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PEOPLE, etc., v. HUBERT and others. (No. 11,253.)

(*Supreme Court of California.* September 23, 1886.)

STATUTE OF LIMITATIONS—SWAMP-LAND ASSESSMENT—CALIFORNIA CODE CIVIL PROC. § 338, SUBD. 1.

An assessment for reclamation purposes is "a liability, created by statute," and under subdivision 1, § 338, Code Civil Proc. Cal., an action to enforce it is barred by the lapse of three years.

Commissioners' decision. Department 2.

A. C. Adams, for the People. *Geo. P. Harding* and *Jno. W. Gorn*, for respondents, Hubert and others.

BELCHER, C. C. In December, 1870, an assessment for reclamation purposes was levied upon the lands situate in reclamation district No. 108, and on the fifth day of May, 1871, it became delinquent. On the ninth day of August, 1884, this action was commenced to enforce payment of the assessment against certain lands in the district owned by defendant. The defendant demurred to the complaint upon the ground that the cause of action was barred by subdivision 1 of sections 338 and 339, and by sections 343 and 345, of the Code of Civil Procedure. The court below sustained the demurrer, and, we think, properly.

Under subdivision 1 of section 338, "an action upon a liability created by statute, other than a penalty or forfeiture," is barred if not commenced within three years after the cause of action accrues. In *Perry* v. *Washburn*, 20 Cal. 318, it was held that taxes are not debts, nor founded upon contract, but charges upon persons or property, to raise money for public purposes. In *People* v. *McCreery*, 34 Cal. 454, it is said that "taxes are charges, imposed by or under the authority of the legislature, upon persons or property subject to its jurisdiction." A swamp-land assessment is a charge imposed upon property by authority of the legislature, and is thus clearly a "liability created by statute." The fact that it is only a lien upon the property assessed, and not a direct charge against the owner, is immaterial. "A lien is a charge imposed upon specific property, by which it is made security for the performance of an act." Section 1180, Code Civil Proc. The act here for the performance of which the land was made security was the payment of the assessment. An action was required to enforce the performance of the act, and it could only be brought within the time prescribed by statute. *San Francisco* v. *Jones*, 20 Fed. Rep. 188; *State* v. *Yellow Jacket S. M. M. Co.*, 14 Nev. 226. The special act of the legislature referred to by the appellant (St. 1871-72, p. 696) has no application to the case. It provides only that warrants and assessments, while they remain unpaid, shall bear interest.

The judgment should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 74

In re BALDWIN, etc. (No. 11,133.)

(*Supreme Court of California.* September 23, 1886.)

1. EXECUTION—EXEMPTIONS—FARMING UTENSILS—CODE CIVIL PROC. CAL. § 690, SUBD. 3.
An expensive threshing outfit, owned by the judgment debtor and two or more other farmers in common, and used by them to a limited extent on their own lands, but principally used in doing work for others for hire, is not exempt under subdivision 3, § 690, Code Civil Proc. Cal., exempting from execution "farming utensils or implements of husbandry."
2. INSOLVENCY—EXEMPTIONS—PRACTICE ON PETITIONS TO SET ASIDE.
Creditors of an insolvent debtor who has filed a petition to have his exemptions set aside may appear and object without filing any paper setting forth their objections, and, if such a paper is filed, it need not be verified, nor served on the debtor.

Commissioners' decision. Department 2.

J. B. Webster and *L. M. Eliott*, for appellant. *F. T. Baldwin, Ansel Smith*, and *J. C. Campbell*, for respondents.

BELCHER, C. C. John Baldwin was a farmer, and was adjudged an insolvent debtor, under the provisions of the insolvent act of 1880. After the order adjudging him an insolvent was entered, he petitioned the court to set aside to him certain personal property as exempt from execution, and, among other things, a Cahoon seed-sower, and a "threshing rig," consisting of a threshing engine, three tanks to hold water for the engine, a thresher, a derrick and forks, a seed-cleaner, a feeding-machine, a feeding-rack, and a cook-house. S. P. Bailey, one of the creditors of the petitioner, filed a paper, objecting to the property being set aside, on the ground that it was not, by law, exempt from execution. The petitioner moved that the paper be stricken out on the ground that it was not verified, and no copy of it was served on him or his attorney. The court denied the motion, and an exception was reserved to the ruling.

The matter was then heard, and, from the evidence introduced, it appeared that Baldwin owned and farmed 200 acres of land in San Joaquin county, and that he rented other lands, and usually cultivated about 320 acres in grain annually. He owned the Cahoon seed-sower, which was worth $10, and another seed-sower, which was set apart to him, worth $90. The two seed-sowers were used for sowing grain broadcast, but were operated in a different manner. He and his son, who was also a farmer, owned jointly the threshing rig. The engine was used to furnish motive power for the thresher, and it required sixteen men and six horses, in addition to the steam-power, to operate it. The threshing rig was used to thresh the grain of its owners, but it was used principally for the purpose of threshing grain for others. It was also shown that the implements above described were all necessary implements to enable a farmer to profitably carry on the business of farming, and to harvest and prepare his crops for market; that it was of great advantage to a farmer to own and control implements for threshing, in whole or in part, for the reason that the grain, while in stack waiting to be threshed for hire by threshing implements of others, was liable to be injured by fire, early rains, shelling out, etc.; that it was not an unusual thing for several farmers to purchase, and use in common, threshers, engines, derricks and forks, feeding-machines, cleaners, headers, mowers, seed-sowers, plows, and other implements, for the reason that the size of their own farms, and the amount of their capital, would not warrant the investment by each individual farmer in the whole of such implements; that only about one farmer in 40 or 50 owned a threshing rig, and only farmers owning tracts of land several thousand acres in extent could afford to have a complete threshing outfit; and that most of the threshing was hired done, and the men, generally, who owned threshing outfits operated them for profit outside the regular business of farming.

The petitioner offered to prove that, by reason of his land being principally river bottom land, his grain largely grew up with sun flowers, and hence he could not raise grain, and make a living, if compelled to hire it threshed at current prices for threshing; therefore he was compelled to own and control an interest in a thresher, so as to be enabled to entirely harvest his own grain. The creditors and assignee objected to this evidence as irrelevant and immaterial, and the objection was sustained, the petitioner reserving an exception.

After hearing the evidence the court refused to set aside as exempt any of the implements above mentioned, but ordered them turned over to the assignee; and the appeal is from that order.

Section 60 of the insolvent act of 1880 makes it the duty of the court having jurisdiction of the proceedings to exempt and set apart, for the use and benefit of the insolvent, such real and personal property as is by law exempt from execution. Subdivision 3 of section 690 of the Code of Civil Procedure exempts from execution "the farming utensils or implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses, or mules for one month."

The principal question presented for decision is, does the Code exempt from execution an expensive threshing outfit, which is owned by two or more farmers in common, and is used by them, to a limited extent, on their own lands, but is used principally in doing work for others for hire?

In *Brewer's Lessee* v. *Blougher*, 14 Pet. 178, it is said on page 198: "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

It should be observed that the subdivision above quoted does not, by any express words, limit the exemption provided for to judgment debtors who are farmers, nor say that, to be exempt, the oxen, horses, or mules must be *work* oxen, horses, or mules; and yet it has been held by this court that the language used must be so construed as to make the exemption applicable only to such judgment debtors as are engaged in the business of farming, and only to such oxen, horses, or mules as are suitable and intended for the ordinary work conducted on a farm. *Brusie* v. *Griffith*, 34 Cal. 302; *Roberts* v. *Adams*, 38 Cal. 383.

In the case last cited, after reviewing the different provisions of the section providing for exemptions in the old practice act, (section 219,) the court said: "From this summary of the act it is entirely plain that its purpose was to secure to the judgment debtor the means to prosecute his vocation, and thus earn a support for himself and family. In securing to a farmer two oxen, horses, or mules, with their harness, a wagon or cart, his farming implements, and his seed grain or vegetables for planting, the legislature intended, by this exemption, to enable him to prosecute his business of farming, in the ordinary sense of that term; and the oxen, horses, or mules which are reserved to him must be such as are suitable and intended for that use."

In our opinion, the legislature meant by the words, "the farming utensils or implements of husbandry of the judgment debtor," such utensils or implements as are needed and used by the farmer in conducting his own farming operations, and it was not intended that all farming machinery which a farmer may own should be exempt, because, while he uses it chiefly by renting it out, or in doing work on others' farms for hire, he still uses it, to a small extent, on his own land. To hold otherwise would enable the farmer who cultivates 40 acres to invest a large amount of money in expensive implements, and to hold them free and clear of his creditors, though they were

used but for a day on his own land, and for all the balance of the year were rented or hired out to others. A reasonable construction should be given to the statute, and not one which would pervert its benevolent design, and enable gross frauds to be perpetrated under color of law.

In support of their claim that the property should have been set aside, counsel for appellant cite *McCue* v. *Tunstead*, 65 Cal. 506; S. C. 4 Pac. Rep. 510. In that case the plaintiff owned and cultivated in grain, etc., a farm of 150 acres. He also owned a stallion, which he used as a work-horse on the farm, and in serving mares which were brought to the farm and agisted thereon. In summing up the case this court said: "On the question of the value and gender of the horses used in husbandry the Code is silent. It is restrictive as to the number and use only. If the plaintiff is engaged in husbandry, he is entitled to the exemption of two horses, if the same be used by him in such husbandry, the value and gender of which are immaterial. The findings of the court, in our opinion, establish two propositions: (1) That plaintiff is a farmer; and (2) that the horse which he claims as exempt was one of two which he used on his farm in the cultivation and tillage thereof." It was accordingly held that the horse was exempt, and the judgment of the court below holding otherwise, was reversed. We do not think that case a controlling authority in this case. The result reached might have been different if it had appeared that the stallion, though sometimes used to do work on the farm, had been principally used to stand for mares in other places.

As to the Cahoon seed-sower. It was worth but $10, and the petitioner had another seed-sower, which was worth $90, and was set aside to him, both being used for the same purposes, though operated in a different manner. The cheaper implement may have been useful to the petitioner, but, as it did not appear that the one set aside was not sufficient for all his purposes, we cannot see any such violation of duty on the part of the court below in refusing to set it aside as should lead to a reversal of the order.

There was no error in refusing to strike out the paper filed by Bailey. It was not necessary that it be verified or served on the petitioner or his attorneys. The creditors had the right to appear, and object to the property being set aside, without filing any paper setting forth their objections.

So we can see no material error in the ruling of the court excluding certain evidence offered by the petitioner. If admitted, it could not have changed or affected the result.

On the whole we think the order appealed from should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

71 Cal. 197

WALLACE and others *v.* AH SAM and others. (No. 11,368.)

(*Supreme Court of California.* September 30, 1886.)

DAMAGES—MEASURE OF—FAILURE TO CONSTRUCT LEVEES—FUTURE CROPS.

In an action for a breach of contract for the construction of levees the probable profits on crops not planted, but to be raised by a tenant of the owner of the land, who went into possession under a lease at thirds, executed subsequent to the contract for the levees, are too remote to form a ground for damages.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Joaquin.

J. H. Budd and *J. C. Campbell*, for respondents, Wallace and others. *William L. Dudley* and *R. Thompson*, for appellants, Ah Sam and others.

SEARLS, C. On the first day of April, 1881, William S. Moss entered into an agreement with John Wallace, Frank T. Baldwin, and H. T. Compton,

Jr., whereby, in consideration of the covenants, and agreements to be kept and performed by the parties of the second part, he bound himself to convey to them the northern half (less 150 acres) of a certain tract of land by him owned in the county of San Joaquin. The tract was swamp and overflowed land, and the consideration upon which the conveyance was to be made required the parties of the second part to reclaim the whole tract from overflow, by means of levees, dams and flood-gates, to be by them constructed at their own cost and charge. The agreement specified the dimensions of the levee, etc., and contained a further provision that, upon the completion of one-third of the length of the levee, Moss would join with the second parties in the execution of a mortgage on the entire tract of land, to secure the payment of such sum or sums of money as it might become necessary to raise to complete the work.

No time was specified within which the work was to be done, but it was provided that, upon a failure to comply with the provisions of the contract, the agreement to convey should become null and void, and the second parties should forfeit all right thereto. On the twenty-fifth day of July, 1881, Wallace, Baldwin, and Compton, who had agreed to build the levee, entered into a written agreement with Ah Sam, Soon Fook, and Lee Fook, defendants herein, whereby the latter undertook to construct the earth-work of the levee at a given price per cubic foot. The work was to be commenced by the first day of August, 1881, and completed by December 1, 1881.

This second contract recites generally the making of the contract with Moss for the sale of the land, the agreement with him to construct the levees, and refers to the record of that contract, etc. There are a number of other provisions in the second contract, one of which is that authorizing the parties of the first part to hire and put on men to work, provided they should be satisfied the parties of the second part were not likely to complete the work within the time limited; but such additional men were not to be employed until the expiration of the first month, and, if employed, were to be so located as not to interfere with the work of the second parties. The contract also recited the provision for a mortgage as specified in the contract with Moss, and provided for a further loan from defendants, to be secured by a second mortgage on the land to be conveyed to Moss, etc.

The two contracts are set out in the pleadings, and we have only recited such of their provisions as are deemed material to the questions hereinafter considered. Defendants did not complete the levees by December 1, 1881; there being at that date about one mile thereof remaining to be constructed. They continued to work upon this unfinished portion until on or about March 19, 1882, when they abandoned the work, and, a flood coming on, the land was overflowed, and could not be cultivated during the year 1882.

The court below, in making up the account between plaintiffs and the contracting defendants, allowed the former $7,500 damages on account of the loss of a crop upon the land for the year 1882.

The evidence upon which this finding is based tended to show the quantity of grain that could have been produced upon the land in 1882 had the levees been completed in 1881 as per contract, and the prices at which the same could have been sold; also, that in February, 1882, plaintiffs had leased the land in question, or 1,210 acres of it, to sundry persons for a term of five years, from November 1, 1881, they, the said plaintiffs, to receive as rent therefor, one-third of the crops raised each year, delivered to them in Stockton. This evidence was all admitted against the objections of defendants, who excepted to the rulings of the court admitting it, and now assign its admission as error.

The contention of appellants is that the probable profits on crops not planted are too remote to be allowed in this, an action to recover damages for a breach of contract for the construction of levees. The argument is

based upon the idea that the leases were not made until February, 1882,—long after the contract for constructing the levees had been entered into, and could not have been contemplated by the parties when the contract was made.

In *Giaccomini* v. *Bulkeley*, 51 Cal. 261, which was an action in tort for destroying a fence, it was held that evidence to prove that the land would support a given number of cows and hogs, and showing the profits that might have been reaped from them, (it not appearing that plaintiff had such animals,) was too remote and speculative. See, also, *Friend* v. *Miller*, 8 Pac. Rep. 40, and cases there cited.

In *Hadley* v. *Baxendale*, 26 Eng. Law & Eq. 398, it was said: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances for such a breach of his contract."

Ordinarily, the measure of damages for the breach of a contract to construct levee, a fence, or any similar work is: (1) If payment has been made, the cost of constructing the work. (2) If payment has not been made, the excess of the cost of the work over the contract price. This we term "general damages," and it involves the loss which naturally flows from, and is presumed from, the contract and its breach. In addition thereto, there may be a recovery of such further loss or detriment occasioned by the breach of the contract, and proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. This last we term "special damages," and it is awarded upon the theory that the parties who contracted with a full knowledge of the facts, circumstances, and objects of the agreement, may well be supposed to have had in contemplation all the proximate and natural results flowing from its breach.

In the present case there is such reference made to the contract of plaintiffs with Moss that we are authorized to conclude that defendants contracted to build the levee with full knowledge that it was to be the consideration or condition upon which the land was to be conveyed to plaintiffs, and that the completion of the levee was a condition precedent to the conveyance.

When, therefore, the defendants violated their contract to complete the levee by December 1, 1881, they must be presumed to have done so with full knowledge that the direct and immediate consequence of such violation was to prevent plaintiffs from procuring a conveyance of the land until the levee was completed. It follows that, under such circumstances, defendants should be held liable for the use and occupation of the land in its then condition, during such reasonable time as was necessary for plaintiffs to complete the violated contract, and thus entitle themselves to a conveyance from Moss, if prevented from occupying and using the land by the non-completion of the levee.

It does not necessarily follow, however, that the method adopted in the court below was a proper one for estimating the value of the user of the land. The leases offered in evidence were executed, not only after the defendants had entered into the contract, but after its breach. The land, except a small portion of it, was not cultivated, or sown to grain of any kind, and, had it been, we are at a loss to see how plaintiffs would have been entitled to the crops raised upon land which they did not own.

It seems to us that the rule adopted in the court below, if applied to con-

tracts of this character, would tend largely to place it in the power of parties entitled to recover damages to regulate the amount of recovery to suit themselves. There would be but little risk in contracting to give one-third of a crop which the parties all knew could not be raised.

If it be said the leases were for five years, and therefore any inference of a want of good faith, because the land was not susceptible of cultivation during the first year, is unfounded, we reply that, while it tends to meet the objection named, it at the same time suggests another, viz., that it may well be that a tenant could afford to give one-third of the crops raised upon lands of this character for a term of five years, yet, owing to the inherent difficulties of cultivating such lands in the first instance, he would be unwilling to give a like quantity or proportion the first year. We have no reason to believe that plaintiffs acted in bad faith in executing the leases specified in the record, and we only refer to the possibility of such conduct for the purpose of showing that the rule under which such a course may be pursued, is inherently vicious.

Had defendants contracted with plaintiffs to crop the land for the year 1882, yielding in return one-third of the crop, and then failed to comply with their agreement, the basis adopted here would have been proper. In such a case it could properly be said they contracted with a view to the damages proven.

Again, had the leases been executed before defendants agreed to construct the levee, and had their agreement been made with full knowledge of such leases and their conditions, it might with propriety be held that their liability should be measured by the conditions in the leases. Here, however, the measure of damages is made to depend upon a subcontract with which the defendants had nothing to do, of which they knew nothing, and with a view to the terms of which they cannot be supposed to have contracted. In other words, the subcontracts of plaintiffs with their several lessees, and the possible profits which they might have derived therefrom, are substituted for the value of the premises during the year 1882.

This we think was, under the circumstances of this case, erroneous. *Olmstead* v. *Burke*, 25 Ill. 86; *Rhodes* v. *Baird*, 16 Ohio St. 581; *Fox* v. *Harding*, 7 Cush. 522; *Devlin* v. *Meyer*, 63 N. Y. 25; *Masterson* v. *Mayor, etc.*, 7 Hill, 61.

The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

72 Cal. 55

PACIFIC TRUST CO. *v.* DORSEY. (No. 11,153.)

(*Supreme Court of California.* September 30, 1886.)

CORPORATIONS—STOCK—ISSUING CERTIFICATE FOR NOTE—CONST. CAL. ART. 12, § 11; ST. 1875-76, PAGE 729, § 1; PEN. CODE, § 560.

A note given by a subscriber to the capital stock of a bank, in payment of a first assessment, the certificate for the stock being issued thereupon, is not void under section 11, art. 12, Const. Cal., providing that "no corporation shall issue stock except for money paid," etc., nor under section 1, St. 1875-76, p. 729, or section 560, Pen. Code.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Joaquin.

D. S. Terry and *Baldwin & Smith*, for respondent, Pacific Trust Co. *Jas. A. Louttit*, for appellant, Caleb Dorsey.

BELCHER, C. C. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. The action was based upon a promissory note, and the contention of appellant is that the contract, in the execution of which the note was given, was against public policy, and prohibited by law; and so the note was void.

The facts, as shown by the record, are as follows: In August, 1883, the Pacific Trust Company, plaintiff herein, was organized as a corporation to do a banking business at the city of Stockton. Its capital stock was fixed at $500,000, divided into 5,000 shares, of the par value of $100 each. The defendant subscribed for 100 shares of the capital stock. After the corporation was fully organized the subscribers for stock were called upon to pay an assessment of 10 per cent. upon the amounts severally subscribed by them. The defendant paid nothing upon his subscription till the third day of December, 1883, when he made the note in question for the amount of his assessment, payable to the plaintiff, or order, one day after date, with interest at the rate of 10 per cent. per annum. The note was delivered to the president of the company, and thereupon a certificate for a hundred shares of stock, properly signed and sealed, was delivered to the defendant, and by him indorsed and delivered back to the president, to be held by the company till his note should be paid. The note was not paid, and on the fourth of September, 1884, this action was commenced to recover the amount due upon it.

Was the note void? In support of their claim that it was, counsel for appellant cite section 11 of article 12 of the constitution, section 1 of "An act concerning corporations and persons engaged in the business of banking," approved April 1, 1876, (St. 1875–76, p. 729,) and section 560 of the Penal Code.

The section of the constitution referred to reads as follows: "No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock or bonded indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law."

The evident purpose of this section was to prevent the fictitious increase of the stock or indebtedness of corporations, and it does not touch the question involved here. The defendant had subscribed for 100 shares of the stock, and was liable to pay for it as the money might be needed and called for. And if it be conceded that the certificate was improperly issued to him before the actual payment of the money, or some part of it, still that fact cannot render void his promise to pay at a subsequent time, and so release him from all liability. But it is by no means clear that the certificate was improperly issued. The provision is that no stock shall be issued "except for money paid, labor done, or property actually received." The word "property" includes property real and personal; and the words "personal property" include "things in action and evidences of debt." Section 14, Civil Code. The defendant's note was actually received by the corporation, and was a thing in action or evidence of debt.

The first section of the "Act concerning corporations and persons engaged in the business of banking" requires every corporation and all persons doing a banking business in this state, in January and July of every year, to publish and file for record a sworn statement "of the amount of capital actually paid into such corporation, or into such banking business: provided, that nothing shall be deemed capital actually paid in except money *bona fide* paid into the treasury of such bank, and under no circumstances shall the promissory note, check, or other obligation of any director or stockholder, or of the proprietors or proprietor of any such bank, be treated, computed, or in any manner considered, any part of such actually paid-in capital."

Under this statute the defendant's note could not be advertised to the world or treated as a part of the paid-up capital of the bank. The evident purpose of the statute was to inform the public twice a year of the actual capital which a bank might have in hand for its business, and to prevent the perpetration of frauds upon the public by a pretended or fictitious capital. But why should the note be held void because the amount of it could not be included in the advertised capital? It was given for a lawful and adequate consideration, and was in fact only a new promise to pay a debt which the defendant had contracted and was then obligated to pay.

Section 560 of the Penal Code is in a chapter that treats of "fraudulent insolvencies by corporations, and other frauds in their management." It provides that "every director of any stock corporation who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended * * * to discount or receive any note or other evidence of debt in payment of any installment actually called in and required to be paid, or with the intent to provide the means of making such payment, * * * is guilty of a misdemeanor."

It is unnecessary to consider when or under what circumstances this section makes the directors of a corporation liable to be prosecuted for a misdemeanor. The only question here presented is, does it make void the note of defendant, which, so far as appears, was made in good faith, and for the purpose of obtaining a little more time to discharge an obligation which he then recognized as legal and binding upon him? We do not think it can have that effect. If it could, then, by the same reasoning, it would follow that if he had gone to the bank with the best note that could be made in the state, and had had the note discounted with the intent to provide the means of making payment of his assessment, and with the money received had paid his assessment, still he could treat the whole transaction as void, and compel the bank to deliver back to him the note. Such a construction of the section would sanction fraud and unfair dealing, and we cannot, therefore, think it correct.

In our opinion the receipt of the note neither violated public policy, good morals, nor positive law, and the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

71 Cal. 192

BROWN v. MANN. (No. 9,043.)

(*Supreme Court of California.* September 30, 1886.)

STATUTE OF LIMITATIONS—ADMINISTRATOR SUING HIMSELF—OPERATION OF STATUTE NOT SUSPENDED.

If a mortgagee is administrator of the estate of the mortgagor, a suit to foreclose the mortgage cannot be maintained for his benefit by one to whom he assigns the mortgage; and if such a suit is begun while he is administrator, and, after he ceases to be administrator, he is substituted as plaintiff therein, the suit will be considered as begun at the time of such substitution, and will be barred by limitation if the statutory period has then elapsed.

Department 1. Appeal from superior court, county of Santa Cruz.

W. D. Storey, for appellant, Brown. *C. B. Younger*, *J. A. Barham*, *F. Adams*, and *A. Craig*, for respondent, Mann.

MYRICK, J. Foreclosure. The note and mortgage were dated May 4, 1870, payable in one year, to-wit, May 4, 1871. The proceedings had after the transfer of the note and mortgage by plaintiff (Charles Brown) to Adolphus Brown, with the suit thereon, must be disregarded, because Charles Brown,

being the administrator of the estate of Abel Mann, could not, under the name of Adolphus Brown, have an action for his own benefit against himself as administrator to foreclose the mortgage. He had ample means in other ways to obtain the benefit of his security. Not until he ceased to be administrator, and was substituted as plaintiff, which was after May 4, 1875, had he, Charles Brown, the plaintiff herein, commenced any proper action to foreclose the mortgage. At that time more than four years had elapsed after the note came due, and the action was barred.

In this view, the balance of the case, and the points and arguments presented on either side, are quite immaterial. Judgment and order affirmed.

We concur: McKINSTRY, J.; ROSS, J.

71 Cal. 195

PEOPLE *v.* CAROLAN. (No. 20,198.)

(*Supreme Court of California.* September 30, 1886.)

1. WITNESS—DISCREDITING—CROSS-EXAMINATION—MISDEMEANOR AND FELONY.
 A witness cannot be asked, upon cross examination, for the purpose of discrediting him, whether he has been arrested and convicted of a misdemeanor, as section 2051, Code Civil Proc., limits such evidence to conviction of felony.
2. SAME—OFFENSE INVOLVING MORAL TURPITUDE.
 A record of conviction of a misdemeanor, if admissible in any case, is so only when the offense involves moral turpitude or infamy.
3. FRAUD—PRESENTING FRAUDULENT CLAIM TO SUPERVISORS—WARRANT REGULARLY ISSUED.
 In a prosecution for presenting a fraudulent claim to the board of supervisors, it is immaterial whether or not the warrant upon which a claim made for traveling expenses was based, was regularly issued.

Department 1. Appeal from superior court, county of Contra Costa.

The Attorney General, for the People. *Eli R. Chase*, *G. W. Bower* and *J. O'B. Wyatt*, for appellant, Carolan.

BY THE COURT. The defendant was indicted under section 72 of the Penal Code for presenting to the board of supervisors for allowance a false and fraudulent claim, and was convicted.

There is no merit in the points made by the defendant, that the claim as presented contained several items, or that the claim contained items not alleged to be false or fraudulent.

One Lowrey was examined as a witness for the prosecution. On cross-examination, for the purpose of affecting his credibility, the defendant's counsel asked him whether he had been arrested and convicted of a misdemeanor, and whether he had been incarcerated in the county jail. The court sustained objections to these questions. We see no error. Section 2051, Code Civil Proc., limits evidence of this character to conviction of a felony.

For the same purpose a record of the conviction of the witness Lowrey of a misdemeanor was offered, and the court rejected the evidence. If, in any case, a record of conviction of a misdemeanor is admissible for the purpose of discrediting, it should be made to appear that the offense involved moral turpitude or infamy, which was not done in this case.

The indictment was sufficient, charging the offense, as it did, in the language of section 72, Pen. Code.

It was immaterial whether or not the warrant was regularly issued, upon which the claim made by the defendant for traveling services was based. We see no error in the record.

Judgment and order affirmed.

71 Cal. 204

Ex parte THOMAS. (No. 20,243.)

(*Supreme Court of California.* October 6, 1886.)

CONSTITUTIONAL LAW—REGULATION OF COMMERCE—LICENSING SALE OF MERCHANDISE.

An ordinance imposing a license tax for vending goods not manufactured or produced in the state is in violation of the federal constitution, being an attempt to regulate commerce between the states.[1]

Department 2. On *habeas corpus*.

A. E. Bolton, for petitioner. *S. P. Hall*, for respondent.

BY THE COURT. This case involves the constitutionality of section 14 of an ordinance passed by the board of supervisors of Alameda county. The section referred to is in these words: "Every traveling merchant, hawker, or peddler, who vends goods, wares, or merchandise of any kind, other than the manufactures or productions of this state, or butchers' meat, must pay a license tax of $10 per month, unless he uses a wagon, or one or more animals, for the purpose of vending such goods, wares, or merchandise, in which case he must pay a license tax of $15 per month." No license is required for vending goods, wares, or merchandise which are the manufacture or product of this state, or butchers' meat.

The applicant for this writ was convicted of a violation of this ordinance in selling sewing-machines manufactured in another state. It is contended that this ordinance is in violation of the federal constitution, in that it is a regulation of commerce, control over which is by the supreme law of the land vested in congress. The identical question here presented was passed on by the supreme court of the United States in *Welton* v. *Missouri*, 91 U. S. 275, and in *Webber* v. *Virginia*, 103 U. S. 344. The statutes considered in the cases cited were of the same character as the ordinance in question herein, and they were held to be unconstitutional. See, also, *Brown* v. *Maryland*, 12 Wheat. 425; *Woodruff* v. *Parham*, 8 Wall. 123; *State Freight Tax*, 15 Wall. 232; *Mobile Co.* v. *Kimball*, 102 U. S. 691. In accordance with the judgments in the cases above cited, we are bound to hold that the ordinance before us is unconstitutional and void.

The prisoner must be discharged from custody. So ordered.

71 Cal. 205

COUNTY OF SAN MATEO *v.* MALONEY and others.

(*Supreme Court of California.* October 9, 1886.)

TAXATION—COLLECTION OUT OF PERSONAL PROPERTY—DECISION OF ASSESSOR, CONCLUSIVE—COMMISSION.

The determination of an assessor, who is directed by Pol. Code Cal. § 3820, to enforce the collection of taxes out of personal property whenever, in his opinion, the lien upon the real property would be insufficient to secure payment of the taxes upon the real and personal property, that it is necessary to resort to the personal property, is binding on the courts; and upon personal property taxes thus collected he is entitled, without further question, to a commission under St. Cal. 1883–84, p. 125, giving him a commission on personal property tax collected by him as authorized by section 3820 of the Political Code. MYRICK and THORNTON, JJ., dissenting.

In bank. Appeal from superior court, county of San Mateo.

[1]NOTE.

As to the illegality of laws imposing higher rate of taxation on the products of other states, see Walling v. State of Michigan, 6 Sup. Ct. Rep. 454, and note, 460.

A tax imposed by one state on the sale of the products of another within its limits, which in purpose or effect discriminates against said products, is void. Ex parte Hanson, 28 Fed. Rep. 127, and note; In re Watson, 15 Fed. Rep. 511, and note; City of Marshalltown v. Blum, (Iowa,) 12 N. W. Rep. 266.

Edward F. Fitzgerald, for respondent, County of San Mateo. *Sawyer & Burnett*, for appellants, Maloney and others.

McKEE, J. This was an action against the defendant Maloney, as assessor of San Mateo county, and the sureties upon his official bond, to recover the sum of $638, which, it is alleged, he collected as taxes for the county, and, instead of paying the same over to the county treasurer, as it was his duty to do, he converted the same to his own use.

It appears by the finding of the court that between the first Mondays of March and July, 1886, the assessor served the executors of the last will of John Parrott, deceased, with a demand in writing to render to him a statement in writing, under oath, as required by law, of the specific real and personal property belonging to the estate of their testator, in their possession, or under their control, at 12 o'clock M. on the first Monday in March, 1886, to be taxed according to law. With the demand the executors neglected and refused to comply, and, upon their refusal, the assessor arbitrarily estimated the value of the personal property of the estate in their possession and under their control on that day at $1,292,879, and the real property at $62,695. Upon the assessment thus made taxes were levied on the personal property, amounting to $20,039.63, which were collected by the assessor from the personal property, "because, in his opinion, said taxes were not a lien upon any real property;" and, after enforcing the collection of the taxes on the personal property in that way, he paid all of them over to the county treasurer, except the sum of $638, which he retained as commissions for collecting said taxes.

The county contends that the assessor had no legal right to enforce the collection of the taxes against the personal property, and that he was not entitled to retain the money in his hands as commissions for collecting said taxes; and that is the question.

Upon the facts found by the court, there is no question that the assessment of the personal property, the levy of the taxes thereon, and their collection by the assessor, were lawfully made. The assessment was made under the provisions of the revenue law, which imposed upon the assessor the duty of arbitrarily estimating the value of the real and personal property of a tax-payer who neglects or refuses, after demand by the assessor, to render a statement in writing under oath of the specific real and personal property owned by him, or in his possession, or under his control, at 12 o'clock noon on the first Monday of March in each year. Sections 3629, 3633, Pol. Code. The levy of the taxes upon the assessment was also made under provisions of the same law; and the law made both the assessment and levy conclusive. The assessment was not subject to be reduced by the board of equalization. The tax levied had the effect of a judgment against the tax-payer, the levy was declared to be a lien upon the personal property itself, and also upon the real property of the tax-payer, with the force and effect of an execution levy upon both the real and personal property, and the judgment could not be satisfied, nor could the lien be removed until payment of the taxes in the manner provided by law. Sections 3716, 3717, 3752, Pol. Code, and 1669, Code Civil Proc. And, in addition to the statutory lien upon all the property, power was conferred upon the assessor to enforce collection of the taxes on the personal property whenever, in his opinion, the lien upon the real property would be insufficient to secure payment of the taxes upon the real and personal property. Section 3820, Pol. Code.

It was under that section of the Code that the taxes were collected. They were therefore lawfully collected. But the court below gave judgment for the plaintiff upon the ground that "said taxes were a lien upon the real property, and the real property was sufficient to secure the payment of said taxes:" and it decided "that said defendant, Maloney, as assessor, was not enti-

tled to any compensation or commissions for the collection of said $20,039.63." But the law authorized the assessor to ascertain and determine whether the real property was sufficient to secure payment of the taxes upon the real and personal property; and if, "in his opinion," it was not, the law cast upon him the imperative duty of enforcing collection of the taxes against the personal property. That duty was regularly performed by the assessor, (sub. 15, § 1963, Code Civil Proc.;) and the judgment or opinion which he formed, and upon which he acted, is not reviewable by the courts, after he has collected and paid over the taxes to the county treasurer. It is well settled that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. *Gaines* v. *Thompson*, 7 Wall. 347. As was said in *Porter* v. *Haight*, 45 Cal. 639: "When the state, by legislative act, confers upon a board of public officers jurisdiction to exercise their judgment and discretion upon matters within their power to perform, the courts cannot review the question whether that discretion was properly exercised." See, also, *People* v. *Hagar*, 52 Cal. 179.

The taxes were therefore lawfully collected under section 3820 of the Political Code. And the law provided: "The assessor shall be entitled to receive and retain for his own use 6 per cent. on personal property tax collected by him, as authorized by section 3820 of the Political Code." St. 1883-84, p. 125. The assessor had therefore the right to retain the money in controversy as his percentage for collecting the tax.

Let the judgment be reversed, and the cause remanded. So ordered.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY,

We dissent: MYRICK, J; THORNTON, J.

71 Cal. 212

Ex parte SCHMIDT. (No. 20,220.

(*Supreme Court of California.* October 27, 1886.)

WITNESSES—DIVULGING PROCEEDINGS BEFORE GRAND JURY—INDORSING NAMES OF WITNESSES ON INDICTMENT.

A grand juror summoned as a witness upon the hearing of a motion to set aside an indictment on the ground that the names of all the witnesses examined before the grand jury have not been inserted or indorsed thereon, cannot refuse to testify as to what witnesses were examined before the grand jury.

In bank. On *habeas corpus*.

John B. Harmon, for petitioner.

BY THE COURT. A person had been indicted for an offense, and that person moved the court, under section 995, Pen. Code, to set aside the indictment on the ground that the names of all the witnesses examined before the grand jury had not been inserted at the foot of the indictment, or indorsed thereon. On the hearing of the motion, and in support thereof, the petitioner, a member of the grand jury, was called and sworn, and was interrogated as to whether any person was examined as a witness before the grand jury whose name was not inserted at the foot of the indictment or indorsed thereon. The petitioner refused to answer the questions, on the ground that he would thereby be disclosing secrets of the grand-jury room; and such refusal was by the court below adjudged a contempt, and the petitioner was committed. Hence this writ.

Section 943, Pen. Code, declares that the names of the witnesses examined before the grand jury, or whose depositions may have been read, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court; and by section 995 the failure to so insert or indorse the names

of all the witnesses is made ground for setting aside the indictment. By section 925, no person, except the district attorney and witnesses under examination, are permitted to be present at the sessions of the grand jury. If, therefore, neither the members of the grand jury nor the district attorney could be called upon to state whether any witnesses were examined other than those whose names have been inserted or indorsed, a barren right to move to dismiss is given without the power to ascertain whether or not the statute has been complied with. Under our statute, the names of witnesses before the grand jury are not secrets to be undivulged, at least for the purpose herein referred to; because the moment an indictment is presented that moment the names should be a part of the record.

The petitioner is remanded, and the writ is discharged.

71 Cal. 234

RIDDELL *v.* HARRELL. (No. 11,363.)

(*Supreme Court of California.* November 3, 1886.)

1. EXECUTION—SALE—SETTING ASIDE—COMPLAINT—"PROBATED"—"DURING HIS LIFE."
On a demurrer to a complaint in a suit by a devisee to set aside an execution sale of his testator's land, an averment that the will was "probated by the superior court" means, in effect, that the will was admitted to probate by the superior court; and an averment that testator was, "during his life-time," the owner of real estates, is a statement that he was the owner continuously during his life-time,—and will sustain the complaint.

2. JUDGMENT—COSTS—VOID FOR WANT OF NOTICE OF MEMORANDUM.
Where plaintiff obtains a judgment "claiming his costs," and the clerk inserts the costs in the judgment, but no memorandum of the items of the costs as required by statute was served upon defendant, the judgment for costs is as void as it would be if the memorandum had not been filed.

3. EXECUTION—SETTING ASIDE SHERIFF'S SALE—RECEIPT OF BALANCE OF PROCEEDS.
In an action by a devisee to cancel a judgment for costs against his testator, and the sheriff's sale thereunder, the presumption that the sheriff, in the execution of his duty, paid or tendered the balance of the proceeds of the sale, above the amount of the judgment and costs, to the deceased testator, raises no presumption that the testator received it, and thereby ratified, the judgment, and will not estop his devisee from seeking relief in equity for cancellation of the judgment.

In bank. Appeal from superior court, Tulare county.

Action by a devisee to cancel a judgment for costs against his testator, and the sale of land, and sheriff's deed thereunder, and for a deed under order of court to plaintiff. Demurrer to complaint sustained. Judgment for defendant. Plaintiff appeals.

I. N. Thorne, for appellant. *Alfred Daggett*, for respondent.

McKINSTRY, J. The court below sustained the defendant's demurrer to the complaint, which is as follows:

"The plaintiff complains and alleges:

"*First.* That Speer Riddell, his brother, lately deceased, was, during his life-time, the owner in fee of certain real estate, situate, lying, and being in the county of Tulare and state of California, particularly described as follows: South half of section 20, township 17 south, range 24 east; north half of south half, and north half of south half of south half, of section 21, township 17 south, range 24 east; all section 29, township 17 south, range 24 east; south half of section 30, township 17 south, range 24 east,—Mount Diablo base and meridian.

"*Second.* And plaintiff further says that the said Speer Riddell departed this life on the twenty-third day of October, 1884, leaving no wife or descendants, and leaving a last will and testament, which has been duly probated by the superior court of the city and county of San Francisco, where said Speer Riddell resided and owned property at the time of his decease; wherein and whereby the said Speer Riddell devised to this plaintiff the whole of his estate, real and personal, subject only to the payment of certain small legacies, neither of them exceeding the sum of $100, and not exceeding in the aggregate the sum of $300; and by reason whereof this plaintiff became, was, and is the owner of and seized of all the real estate whereof the said Speer Riddell was the owner, as aforesaid, at the time of his decease.

"*Third.* And the plaintiff further says that the said Speer Riddell, prior to his decease, was interpleaded with one Jasper Harrell, in a suit commenced by the said Jasper Harrell against the said Speer Riddell and others, his tenants, in the superior court of Tulare county, for the recovery of certain real estate situate in the said county of Tulare other and different from the land and premises hereinbefore described; and that such proceedings were had in such suit that judgment was rendered in favor of said Harrell, and against the said Speer Riddell and others, defendants, for the recovery of the premises sued for, to which judgment, as recorded in the judgment book, there was added, without authority by the clerk of said court, a further judgment, as for costs, of $113.50, but that the copy of the judgment as recorded, attached to the judgment roll, did not contain the said sum added as for costs, but left a blank, a copy of which said judgment as recorded is hereto annexed, and marked 'Schedule A,' and which is made a part of this complaint.

"*Fourth.* And plaintiff further says that that part of the aforesaid judgment as for costs was added by the clerk of said court without authority of law, and in violation of the statute relating to costs, and the entry of judgment therefor; and he further says that said cause was tried in said court before the judge, sitting without a jury, and judgment rendered in favor of the plaintiff and against the defendants for the recovery of the land sued for, and costs; that since said trial and decision no bill of costs, or copy thereof, was served on the attorneys for the defendants, or either of them, or upon said defendants or either of them, nor was there any admission or pretended admission of the service of a bill of costs, or a copy thereof, nor any affidavit or service upon defendants, or either of them, or upon defendants' attorneys, or either of them, or any proof of service of any bill of costs upon them, or either of them, presented to, or filed with, or made before the clerk of said court, whereby the said clerk could have or acquire power or jurisdiction to add to, or include as a part of, said judgment the amount of any bill of costs, or any amount, for any such purpose.

"*Fifth.* And this plaintiff further says that afterwards, to-wit, on the thirteenth day of March, 1884, the said plaintiff, Jasper Harrell, caused an

execution to be issued in said case, out of and under the seal of said court, directed to the sheriff in Tulare county, commanding him to make $113.50 (being the amount alleged as costs in said judgment) out of the property of the defendants; that thereafter said sheriff, under and by virtue of said execution, levied upon and advertised for sale four well-known and separate and distinct parcels or lots of land, and so described in said levy and notice of sale, belonging to the defendant Speer Riddell, and being the same property hereinbefore described; and on the nineteenth day of April, 1884, the said sheriff fraudulently, in violence of his duty, and contrary to law, sold the said four well-known, separate, and distinct parcels or lots of land *en masse* for $400 to Jasper Harrell, plaintiff in said suit, as is shown by said execution and sheriff's return indorsed thereon, now on file in said cause, copy of which is hereto attached, marked 'Schedule B,' and which is made part thereof; and that on the day last named the said sheriff made, executed, and delivered to said Jasper Harrell his certificate of sale, showing that he had sold the said four well-known, separate, and distinct parcels or lots of land *en masse*, to said Harrell, for $400, and each of said parcels or lots of land is herein separately described, as in said levy and notice of sale, and the same was filed for record in the county recorder's office of Tulare county on the thirtieth day of June, 1884, copy of which is hereto attached, marked 'Schedule C,' and which is made part hereof. And plaintiff further says that W. F. Martin, said sheriff of Tulare county, on the twenty-third day of October, 1884, made and executed on the thirteenth day of November, 1884, acknowledged and delivered to said Jasper Harrell, his deed purporting, in consideration of $400, to convey to said Harrell all the right, title, and interest of the said defendants in and to four well-known, separate, and distinct parcels or lots of land, same as hereinbefore described; and on the day last named the same was filed for record in the county recorder's office of Tulare county, to which reference is hereby made, and which is hereby made part hereof.

"*Sixth.* And plaintiff further says that neither the attorneys of said defendants, nor either of them, nor the defendants, nor either of them, nor the plaintiff in this suit, had any knowledge, notice, information, or belief that any amount as for costs had ever been added to or included in the judgment made and entered in said cause, or that any cost-bill had ever been filed by said plaintiff or his attorney with the clerk of said court, or that any execution had been issued in said cause, or that any sheriff's sale under execution of any property of any of the defendants had been made, or that the sheriff of Tulare county had made any certificate of sale of any such property, or had made any sheriff's deed of any such property, to any person whatever, until the seventeenth day of November, this present month and year, when said facts first accidentally became known to this plaintiff.

"*Seventh.* And said plaintiff further alleges that the said four parcels or lots of land are now, and were at the time of said levy and sale, greatly in excess in value of the said supposed judgment for costs; and that each parcel or lot of said land now is, and was at the several times last aforesaid, largely in excess in value of the amount of said costs, and would have sold, at a fair and honest sale, for more than enough to pay said alleged judgment for costs; and that the aggregate value of said four parcels or lots of land was at several times last aforesaid, and is now, the just and full sum of $25,000. Wherefore, plaintiff prays," etc.

We think the complaint is not one to be commended as a model pleading, but are compelled to hold it not fatally defective.

1. It is contended by respondent that the demurrer was properly sustained, because there is no sufficient allegation that plaintiff ever had any interest in or title to the lands described in the complaint. The complaint avers that Speer Riddell died, leaving a last will and testament, wherein and whereby he devised to the plaintiff the whole of his estate, real and personal. But, it

is said, there is no allegation that the will was proved or established by the decree of a court of competent jurisdiction. The complaint avers that the will "has been duly probated by the superior court of the city and county of San Francisco, where the said Speer Riddell resided and owned property at the time of his decease." If the judgment admitting the will to probate is pleaded at all, the Code of Civil Procedure only requires the prefix "duly." Section 456. The real question, then, is whether an averment that the will was "probated by the superior court" is, in effect, an averment that the will was admitted to probate by the judgment of the superior court. As a will can only be admitted to probate by a judgment, an averment that a will was admitted to probate by the superior court, having jurisdiction to make and enter the judgment, is an averment of the judgment. It would be difficult to distinguish between an allegation that the will was probated "by" the superior court and one that is admitted to probate by that court. The verbalizing of the word "probate" ought not to take from the intended meaning.

2. It is urged the complaint contains no averment that Speer Riddell had any interest in the lands described in the complaint at the time of his death. The averment is that Speer Riddell was, "during his life-time," the owner, etc. This is a statement that he was the owner continuously throughout his life-time.

3. The respondent insists the complaint shows that the judgment in *Harrell* v. *Riddell* was a valid judgment, and the execution sale valid.

Sections 510 and 511 of the former practice act provided:

"Sec. 510. The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court a memorandum of the items of the costs to which he is entitled. He may include in the costs * * *. The memorandum shall be accompanied by the affidavit of the party. * * * The memorandum and affidavit shall be delivered to the clerk within twenty-four hours after the rendition of the verdict, or the costs shall be deemed waived.

"Sec. 511. The clerk shall include in the judgment entered up by him the costs, the percentage allowed, and any interest on the verdict from the time it was rendered." St. 1851, pp. 131, 132.

In *Chapin* v. *Broder*, 16 Cal. 418, it was held that the insertion of a sum as costs in a judgment by the clerk was a mere ministerial act, depending entirely on the filing of a memorandum for its authority, and that the judgment, so far as the costs were concerned, was void unless based on a memorandum filed; that a party who failed to comply with the statute by filing his memorandum waived all claim for costs.

Sections 1033 and 1035 of the Code of Civil Procedure read:

"Sec. 1033. The party in whose favor judgment is rendered, and *who claims his costs*, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee,—or, if the entry of the judgment on the verdict or decision be staid, then before such entry is made,—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating * * *. A party dissatisfied with the costs claimed, may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers."

"Sec. 1035. The clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose."

If the insertion of costs in the judgment is merely the ministerial act of the clerk,—an act which can only be performed in the cases in which the statute allows it,—the judgment for costs is void, as well when the memorandum has not been served on the opposite party, as when no memorandum has been filed. The omission from section 1033 of the Code of Civil Procedure of the clause in section 510 of the practice act, which provided that a failure by the prevailing party to file his memorandum of costs within the time limited should be deemed a waiver of his costs, is not a material circumstance. The Code contemplates that such shall be the result, since the only costs which the clerk is authorized to insert are those *claimed*, and "taxed or ascertained," in the manner provided.

4. It is said plaintiff, as successor in interest of Speer Riddell, is estopped from seeking relief in equity, because the latter ratified the sheriff's sale by receiving from the officer the excess of the proceeds of the sale beyond the amount of the judgment and the accruing costs. It does not appear from the complaint that Speer Riddell received, or that there was tendered to him any part of the proceeds of the sale. And even if it should be conceded that there would be any presumption that the sheriff paid or tendered such excess to Speer Riddell, the defendant in execution,—in other words, a presumption that the officer discharged his duty,—this would be met by the averment in the complaint that neither Speer Riddell nor plaintiff had any knowledge, notice, information, or belief that any amount as for costs had been inserted in the judgment, or that any cost-bill had ever been filed, or that any execution had ever been issued, or of any sale thereunder, or of any certificate or deed by the sheriff, until the seventeenth of November, 1875. Moreover, if defendant here could rely on a presumption that the sheriff did his duty, that officer fully discharged his duty by tendering the excess of the proceeds of the sale of any excess there was to Speer Riddell. There is no presumption that Speer Riddell received the money.

5. The mere fact that several separate tracts were sold together by the sheriff would not constitute a cause of action.

6. Respondent relies upon the omission to allege that the amount of costs inserted by the clerk was not justly due as costs. But if the service of the memorandum is a jurisdictional fact, and the claim of the plaintiff to any costs existed as an enforceable claim only after the statute was complied with, no sum was legally due for costs when the clerk inserted a sum in the judgment.

Judgment reversed, and cause remanded, with instructions to the court below to overrule the demurrer, with leave to the defendant to answer.

We concur: SHARPSTEIN, J.; MYRICK, J.; MCKEE, J.; MORRISON, C. J.; THORNTON, J.

71 Cal. 263

PEOPLE v. STOKES. (No. 20,221.)

(*Supreme Court of California.* November 4, 1886.)

1. ADULTERY—PROOF OF MARRIAGE—MARRIAGE CERTIFICATE—STATUTES—CONSTRUCTION.
St. Cal. 1871-72, p. 380, providing for the punishment of adultery, and making a recorded certificate of marriage proof of marriage for the purpose of the act, does not exclude other proof of the marriage.

2. SAME—EVIDENCE—MARRIAGE CERTIFICATE—INDICTMENT—VARIANCE.
Where, in a trial of John W. Stokes for adultery, the record of a marriage certificate introduced in evidence shows a marriage of John Stokes to *Rebecca* Gibson, the testimony of a witness that he was present when defendant was married to *Rachael* Gibson, in the year when, at the place where, and by the person by whom, the record shows the marriage was performed, is admissible as tending to identify the parties named in the certificate.

3. Same—Cohabitation.
Evidence that defendant and Rachael Gibson lived as man and wife for many years, and that she bore him children, if not admissible as proof of marriage in a trial on a charge of adultery, is admissible as tending to identify the parties named in the certificate.

4. Same—Names in Marriage Certificate.
Evidence of the real names of the parties, contradicting the names in a marriage certificate, does not contradict the certificate, the minister not being required to guaranty that the persons named were married in their true names.

5. Husband and Wife—Marriage—Presumption of Continuance of Status.
The *status* of marriage, having been proved, is presumed to continue, and the presumption can only be overcome by evidence of death or divorce.

In bank. Appeal from superior court, Tulare county.

Atwell & Bradley, for appellant. *E. C. Marshall*, Atty. Gen., for the People.

McKinstry, J. The defendant was found guilty of the misdemeanor defined in the first section of "An act to punish adultery," which reads: "Every person who lives in a state of open and notorious cohabitation and adultery is guilty of a misdemeanor, and is punishable," etc. St. 1871–72, p. 380. The third section of the act provides: "A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this act."

At the trial the prosecution called the county recorder of Tulare, the custodian of the records, who read from his records as follows:

"John Stokes to Rebecca Gibson. This certifies that on the twenty-second day of May, in the year of our Lord 1859, John Stokes, of Tulare county, Cal., and Rebecca Gibson, of the same county and state, were by me united in marriage at the school-house, in the Persian district, in the said county, according to the laws of California and the customs of the church to which I belong. E. B. Lockley, Methodist Preacher."

"Filed for record June 18, 1859, at 10 A. M., and recorded same day, at 2 o'clock P. M. E. E. Calhoun, Recorder."

To the record the defendant objected that it was irrelevant, immaterial, and incompetent, because it did not appear that the John Stokes married was the defendant. When the objection was made the district attorney said: "We propose to follow this up with proof that the John Stokes mentioned in this record is the person mentioned in the indictment as John W. Stokes," and thereupon the objection was overruled.

The prosecution subsequently called a witness, who testified that, in the year 1859, he was present in the "Persian school-house," when a marriage was celebrated by a Methodist preacher, named Lockley, between the defendant and *Rachael* Gibson. This, of itself, was evidence of the defendant's marriage. The statute does not exclude all evidence of marriage other than the record of the certificate. If it be suggested that the jury may have disbelieved the witness, and relied on the record of the certificate as proof of the marriage, still the testimony of the witness was admissible as tending to identify the parties named in the certificate. There was also evidence that the defendant and Rachael lived together, avowedly as man and wife, for many years. Under our law, that would be evidence of a marriage in prosecution for bigamy. Pen. Code, 1106. Even if it should be conceded that in this action it would not be evidence of marriage, it was evidence tending to identify the defendant and Rachael Gibson as the persons mentioned in the certificate.

It is said the record of a marriage between *John* Stokes and *Rebecca* Gibson was contradicted by evidence tending to prove that *John W.* Stokes was married to *Rachael* or *Rachael M.* Gibson. Counsel argue that, in a criminal

case, the jury "could not infer" against the defendant, that Rachael M. Gibson was the person referred to in the certificate. But the jury were not left to infer the identity of the persons from the bald fact of identity in their surnames. There was evidence tending to prove that John W. Stokes and Rachael M. Gibson were the very persons married by the Methodist preacher, Mr. Lockley, in the Persian school-district, in the year 1859; and other evidence tending to prove that John W. and Rachael M. were the persons mentioned in the certificate of record by the names, John and Rebecca. The marriage was a valid marriage, even if the parties gave the wrong names to the preacher, or the latter mistook the names. Men and women are conjoined in matrimony, and a defendant charged with bigamy or adultery cannot, in this country, base a defense on the ground that he or his wife was married under an assumed name, not his or her real name. In such case, evidence of the real names does not *contradict* the certificate, since the minister or other person authorized to perform the marriage ceremony is not required to guaranty the fact that the persons married were married in their true names. Certainly the omission of a *middle* name or initial does not invalidate the marriage nor detract from the effect of the recorded certificate.

At common law, in cases of alleged bigamy, proof of an actual marriage, or at least an admission of former marriage, was ordinarily required. The presumption of a marriage, (in favor of morality), arising in civil causes, from open and avowed cohabitation as man and wife, was overcome, in cases where the person was charged with the crime of bigamy, by the counter-presumption of defendant's innocence. If the common-law rule obtain in prosecutions like the present, still evidence that the defendant and Rachael M. lived together for 20 years as man and wife, and that she bore children to him, tended to identify John W. and Rachael M. as the persons mentioned in the certificate by the names of John Stokes and Rebecca Gibson.

It is said that the prosecution, relying on the statutory evidence of the marriage, should have proved that the parties had not been divorced. But the statute does not declare that a recorded certificate of marriage proves marriage only when accompanied by evidence that the parties have not been divorced. It proves that marriage, and also the continuance of the marriage, "there being no decree of divorce." Aside from the inherent difficulty of proving the negative, a decree of divorce could not affect the evidence of the fact that marriage was contracted, since marriage must precede divorce. The *status* of marriage being proved, is presumed to continue until death or divorce. This presumption can be overcome only by proof of the dissolution of the marriage. It was incumbent on the prosecution to prove a subsisting marriage at the time of the offense charged, but the subsisting marriage was proved *prima facie* by proof that the marriage was contracted.

Appellant also claims that there is no proof the defendant's wife was living at the time of his alleged cohabitation with the woman named in the indictment. In the absence of affirmative evidence, the dissolution of the marriage is not to be presumed to have occurred, either by divorce or by the death of one of the parties to it. In the latter case, the presumption of death is created by evidence that a party to the marriage has not been heard from in seven years. Code Civil Proc. 1963. There is no presumption of *law* that life will not continue for any period, however long. But juries are justified in presuming as a *fact* that a person is dead who has not been heard of for seven years. Roscoe, Crim. Ev. 18. Under our Code, the jury is bound to presume that a person not heard from in seven years is dead. But this presumption is disputable, and may, in its turn, like the presumption of continued life, be overcome by other evidence. Code Crim. Proc. 1963. Moreover, there was affirmative evidence that the wife was still living at the time of the trial of this action. The witness Elizabeth Balaam testified: "She is in San Luis Obispo county." It would be to distort the ordinary meaning of language to

hold that the witness said, or intended to say, her sister was buried in San Luis Obispo.

The jury were justified in holding that the defendant was a married man. There was abundant evidence that while married he "lived in a state of open and notorious cohabitation and adultery."

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCKEE, J.; THORNTON, J.; MYRICK, J.

72 Cal. 157

DUFFY *v.* GREENEBAUM. (No. 11,206.)

(*Supreme Court of California.* November 6, 1886.)

APPEAL—APPEAL BONDS—SUFFICIENCY—SUPERSEDEAS BOND.

An undertaking stating that its purpose is to stay execution on appeal, and following Code Civil Proc. Cal. § 942, which provides for undertaking for that purpose, will not be construed to include the $300 undertaking on appeal required by Code Civil Proc. Cal. §§ 940, 941.

Department 2. Appeal from superior court, city and county of San Francisco.

D. L. Smoot and *Chas. Creighton*, for appellant. *O'Brien & Morrison*, for respondent.

BY THE COURT. Motion to dismiss an appeal. There is no $300 undertaking on appeal as required by sections 940 and 941, Code Civil Proc. The undertaking closely follows section 942, Code Civil Proc., which prescribes the requisites of the undertaking to stay execution. We are therefore of opinion that the undertaking must be construed to be given for the purpose stated in the undertaking; that is, to stay execution. We cannot construe it to include the $300 undertaking on appeal. Motion granted.

70 Cal. 163

McCALLION and others *v.* HIBERNIA SAV. & LOAN SOC. (No. 9,232.)

(*Supreme Court of California.* July 19, 1886.)

1. CORPORATIONS—DISFRANCHISEMENT—AUTHORITY TO EXPEL—OFFICERS—VACANCIES—SUCCESSORS.
 Neither opposition to the authority under which officers of an association act in the performance of their functions, nor irregularity in the performance of their functions, will authorize members of the association to secede, for the purpose of expelling its regularly elected officers, declaring their offices vacant, and constituting themselves their successors in office.
2. SAME—PROOF OF ORGANIZATION—MEMBERS—CERTIFICATE—STATUTORY REQUIREMENTS.
 Where a certificate of members of an association is legally defective for want of conformity to the statutory requirements under which it purports to have been made, it cannot be used as proof of a corporation *in esse*.
3. COMPROMISE—LITIGATION—WAIVER—LEGAL RIGHTS.
 Where a compromise has been proposed between parties in litigation, they will not be held by its failure, from any cause whatever, to have waived any of their legal rights.

Department 1. Appeal from superior court, city and county of San Francisco.

Action to recover a fund composed of moneys deposited with defendant, from time to time, by "Division No. 1," Ancient Order of Hibernians. Judgment for plaintiffs, and motion by defendants for a new trial. Motion overruled, and defendants appeal. The facts are sufficiently stated in the opinion.

M. C. Hassett, J. D. Sullivan, and *D. T. Sullivan,* for appellants. *D. L. Smoot,* for respondents.

McKEE, J. This is an appeal from an order denying a motion for a new trial. The order appealed from was made upon a statement of the case. The case shows that plaintiffs and substituted defendants, respectively, claim to be the officers and directors of an association or society in the city and county of San Francisco known as the "Ancient Order of Hibernians, Division No. 1," and entitled to a fund composed of moneys paid into court by the Hibernia Savings & Loan Society, which were deposited with it from time to time by said division No. 1.

Upon the trial of the issues raised by the pleadings between these rival claimants of the fund, the court found as facts: "*First.* That the $3,349.15 paid into court by the Hibernia Savings & Loan Society, and now in the treasury of the city and county of San Francisco, is the property of Division No. 1 of the Ancient Order of Hibernians, of the city and county of San Francisco. *Second.* That the plaintiffs constitute and represent the said division, and the substituted defendants do not. *Third.* That the said division is not a corporation, but a voluntary association of persons for benevolent purposes, and that the substituted defendants, designated as the 'Ancient Order of Hibernians' General Benevolent Society of California,' is not an existing corporation, with title to said money. *Fourth.* That the said division annually selects certain of its members to take charge of the division's property, and styles them trustees; that these trustees at present are John Collins, John Breslin, P. M. Cleary, Michael Sullivan, and Daniel O'Leary."

Upon these facts the court awarded possession and control of the fund to the plaintiffs, in trust for the use and benefit of division No. 1.

The principal grounds assigned by defendants upon their motion for a new trial were that the findings, conclusions of law, and judgment are wholly unsupported by the evidence, and that the findings are not responsive to the issues made by the pleadings. It is upon these grounds that the case has been argued and submitted.

As to the first finding, both parties concede that the fund in controversy belonged to division No. 1 of the Ancient Order of Hibernians, of the city and county of San Francisco.

As to the second finding, the evidence contained in the record clearly shows that the "division" was organized by authority, in January, 1869, as a voluntary Catholic association or society for benevolent purposes; that it has since continued to exist, maintaining fraternal relations between all its members, and with other divisions of the order, until the year 1878; that in that year the division had on its roll-call the names of 500 members, and on deposit in bank several thousands of dollars; that it held annual elections of officers in June of each year; and that in June, 1878, the plaintiffs were regularly elected and qualified as its officers and directors. The election of these officers was never contested, and for several months they exercised their functions without dissension or disorder. But in September, 1878, the county judicature of the order in San Francisco discovered that the president and other officers of the division, in initiating new members into the order, worked under a formula which it considered illegal, because it was not in conformity with the rules and regulations upon the subject promulgated by a national convention of the order held in Boston in May, 1878, and it directed the president to change the mode of initiation, so as to conform to the law of the order as established by the Boston convention. In the same year, however, a national convention of the order which was held in New York denounced the Boston convention as an illegal body, wholly without authority to give law to the order in the United States; and division No. 1, in San Francisco, following New York, refused to obey the "county delegate," and continued to work under the formula of initiation which, it claimed, was prescribed by the "head of the order" in Ireland. This created dissension in the order, and, upon a question as to the proper form of initiation, not only division No. 1, but the order itself, "split" in two.

Admittedly, however, certain of the defendants, in connection with such others of the members of division No. 1 as recognized the authority of the Boston convention, refused to attend the division meetings; and on the eighth of November, 1878, they held a special meeting outside the division room, presided over by the county delegate of the order, at which a resolution was passed declaring that the offices of president and treasurer of the division were vacant, and two of the defendants were selected to fill the vacancies, and others of them were chosen to act as trustees. But such action was without color of authority. Neither opposition to the authority under which officers of an association act in the performance of their functions, nor irregularity in the performance of their functions, will authorize members of the association to secede for the purpose of expelling its regularly elected officers, declaring their offices vacant, and constituting themselves as their successors in office. For any offense committed by a division officer the laws of the order provided a remedy *within*, and not without, the division itself. An outside movement would be wholly ineffectual to disturb him in his office; so that, when the plaintiffs commenced their action in January, 1879, they were legally in possession of the organization, as the legally elected officers and trustees of the division, and the finding of the court that they represented the division, and were entitled to the possession and control of its funds, is fully sustained by the evidence.

As to the third finding, there appears to have been no conflict in the evidence upon which it is founded. The only evidence upon the question is that in July, 1869, when the division numbered 50 or 60 members, 2 of them,—Bernard Conlan and William Dolan,—on the fourteenth of July, 1869, prepared a certificate to the effect "that on the twelfth of July, 1869, a meeting of the members of a society or association, not yet incorporated, known as 'The Ancient Order of Hibernians' General Benevolent Society of California,' * * * was held for the purpose of incorporating themselves according to law; that at the meeting it was resolved that the said society should be incorporated and assume corporate powers under the laws of the state, and ex-

ercise such powers under the said corporate name, having its principal place of business in the city of San Francisco; and that there was then chosen, by ballot, seven persons to act as a board of directors of said corporation for one year." This certificate Conlan and Dolan signed, acknowledged, and caused a copy to be filed in the office of the secretary of state. But as articles of incorporation, the certificate was legally defective for want of conformity to the statutory requirements under which it purported to have been made; and, aside from the defects which rendered it inapt, Conlan and Dolan, and those acting with them in the movement, did not attempt to exercise corporate functions under it, in connection with or as "Division No. 1 of the Ancient Order of Hibernians." Therefore the certificate was not proof of a corporation *in esse*. Wood, Dig. 119, § 2; *Hill* v. *Woodbury*, 14 Cal. 425; *Harris* v. *McGregor*, 29 Cal. 127; *People* v. *Selfridge*, 52 Cal. 331.

Besides, it was not claimed by the defendants that there existed at the commencement of the action a society or association by the name of "The Ancient Order of Hibernians' General Benevolent Society of California," as a chartered corporation, or that they were, under that corporate name, entitled to the funds of the division; and the finding that the division was not a corporation, and that the defendants were not a corporation with title to the division's funds, was fully sustained by the evidence.

But it is insisted that the order appealed from should be reversed, because the court did not find upon an issue of compromise presented by certain supplemental pleadings in the case. There was evidence given, without objection, which proved that a state convention of the order had met at San Jose, after the commencement of the action, and proposed a compromise of the dissensions in the division, and that the plaintiffs and the defendants afterwards held a meeting for the purpose of harmonizing and settling their disputes; but the meeting was discordant and resulted in failure. Whether that was in consequence of the conduct of one or the other of the contesting parties is of no moment. The proposed compromise did not affect the title of the plaintiffs to their offices; and by the failure to compromise, from whatever cause, they did not waive any of their legal rights. So far as the question of their rights was concerned, the issue of a compromise was immaterial, and it was not necessary for the court to make any finding about it. Order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

2 Cal. Unrep. 697

JUDKINS *v.* ELLIOTT. (No. 9,975.)

(*Supreme Court of California.* August 30, 1886.)

WATERS AND WATER-COURSES—RIPARIAN RIGHTS—PRIOR APPROPRIATORS—PUBLIC LANDS. An appropriator of water on United States public lands is entitled to the use of the same, as against one who subsequently acquires title to the land from the government.[1]

In bank. Appeal from superior court, county of Sierra.

Action for damages for diversion of water to the use of which the plaintiff claimed to be entitled, and for an injunction against further use of the water by defendant. It appears that plaintiff had appropriated water upon the public lands of the United States before any private claim to the land had been made. Defendant subsequently acquired title to the land upon which the water rose, and through which it flowed to plaintiff's lands, and diverted the same, to plaintiff's injury.

[1] See Kaylor v. Campbell, (Or.) 11 Pac. Rep. 301; Lehi Irr. Co. v. Moyle, (Utah,) 9 Pac. Rep. 867; Larimer Co. Res. Co. v. People, (Colo.) 9 Pac. Rep. 794; Lux v. Haggin, (Cal.) 4 Pac. Rep. 919, 938; S. C. 10 Pac. Rep. 674.

M. Farley and *R. H. Lindsay*, for appellant. *Van Clief & Wehe*, for respondent.

BY THE COURT. The case shows that the water in controversy, while situate upon public land of the United States, was appropriated by the plaintiff prior to acquisition by defendant of any right or title from the government to the land upon which the water is situate.

Judgment and order affirmed.

70 Cal. 638

Ex parte JAYNES. (No. 20,235.)

(*Supreme Court of California.* September 15, 1886.)

TRIAL—SUBPŒNA DUCES TECUM—IDENTIFICATION OF TELEGRAMS—CONTEMPT.

A witness served with a *subpœna duces tecum*, requiring him to search for and produce all telegraphic messages from a number of persons to many other persons, between certain specified dates, with no further identification of the messages, is not bound to respond.

In bank. *Habeas corpus.*

The petitioner was an employe of the Western Union Telegraph Company. On the trial of a cause involving the ownership of property in another state, some of the parties believing that frauds were being perpetrated concerning such property, in pursuance of telegraphic directions by one claiming the ownership of the property, applied for a *subpœna duces tecum*, to compel petitioner, who had charge of all the messages sent through the Western Union Telegraph Company, to produce all messages sent by the company between certain dates, from such claimant of the property to a number of designated persons in the place where the property was situated, and who were supposed to have control of the property. This petitioner refused to do, unless the particular messages sought were identified. Petitioner was then adjudged guilty of contempt, and committed to jail, whereupon he applied for a writ of *habeas corpus.*

P. G. Galpin, for petitioner.

BY THE COURT. The petitioner was served with *subpœna duces tecum*, requiring him to produce telegraphic messages, but there was nothing to point his attention to any particular message or messages.

He was required to search for and produce all messages from a number of persons, to many other persons, between certain specified dates. The service of the subpœna was an evident search after testimony. The petitioner was not bound to respond, and committed no contempt in failing to examine the papers under his control to ascertain if any such messages had been sent or received.

The petitioner is discharged.

JAYNES *v.* SUPERIOR COURT OF SAN FRANCISCO. (No. 11,584.)

(*Supreme Court of California.* September 15, 1886.)

TRIAL—SUBPŒNA DUCES TECUM—TELEGRAMS—CONTEMPT.

In bank. *Certiorari.*

Doyle, Galpin & Scripture, for petitioners.

BY THE COURT. For the reasons given in the opinion in *Ex parte Jaynes, supra*, (No. 20,235,) the order of the superior court of March 9, 1886, committing Frank Jaynes for contempt, is annulled.

2 Cal. Unrep. 707

PORTEOUS *v.* REED. (No. 9,967.)

(*Supreme Court of California.* September 16, 1886.)

STATUTE OF LIMITATIONS—FINDINGS—REVERSAL.

Failure to find upon the issue of the statute of limitations is ground for reversal of the judgment.

Department 1. Appeal from superior court, county of Calaveras.
Ira H. Reed and *D. M. Seaton*, for appellant. *Reddick & Solinsky*, for respondent.

PER CURIAM. Ejectment. The defendants pleaded the statute of limitations. The findings fail to respond to this issue. The judgment is reversed, and cause remanded.

71 Cal. 269

Ex parte CASEY. (No. 20,159.)

(*Supreme Court of California.* November 16, 1886.)

COURTS—STATE—PROBATE—ORDER TO PAY IN—TITLE INVOLVED—CONTEMPT.

The probate court has no authority to make an order for the payment into a bank, subject to its further orders, of money of the decedent claimed by the party holding it as her money in virtue of the gift of the decedent, or to commit such party for contempt in disobeying such order, as no power to make such order is conferred by Code Civil Proc. Cal. §§ 1459–1461, nor by § 572.

Commissioners' decision. In bank.
Committal by probate court for contempt. Application for writ of *habeas corpus*.
G. W. Langan and *H. C. Newhall*, for petitioner. *M. Cooney, contra.*

FOOTE, C. Mrs. Ellen Casey, the petitioner, is in possession of a sum of money which the executor of a certain Mrs. Zephyr claimed as belonging to the estate of his decedent. After an examination under the statute, (sections 1459–1461, Code Civil Proc.,) Mrs. Casey was cited to show cause why she should not be punished for a contempt of the probate court in not obeying its order commanding her to deposit the money in a bank, subject to that tribunal's order. She appeared, claimed that the money had been given to her by Mrs. Zephyr before the latter's death, and introduced evidence tending to establish her own title to it. The court heard testimony in favor of and controverting her right to the money, and then made its order committing her for contempt in refusing to deposit it in a bank. The petitioner has sued out a writ of *habeas corpus* for the purpose of regaining her liberty.

According to the evidence adduced in this proceeding, the petitioner was either the owner by gift from Mrs. Zephyr of the money in controversy, or she had embezzled it after the latter had intrusted it to her to be deposited in bank. The dispute between Mrs. Casey and the executor necessarily involved the title to that money, and the question for determination is whether or not the probate court had the right, upon such a summary proceeding as that taken here, to order Mrs. Casey to be committed for contempt in failing to obey its order, which involved the transfer of the property which she claimed and asserted title to into the custody of a bank of the court's choosing. If the evidence had shown that Mrs. Casey claimed no title to the money in dispute, but admitted it to be the decedent's property at her death, the question presented would be different. But here the claim is made, and supported by some evidence, at least, although there is a sharp and decided conflict about it, that the money which the executor claims as assets of the decedent's estate was given to Mrs. Casey, and was in her possession as her property, before the decedent's death. It necessarily follows, then, that, in order to commit Mrs. Casey for contempt in not obeying the order of the probate court, that tribunal must have decided that the title to this property was not in her. Can such an issue, vital to the exercise of the court's power, be legally determined in such a proceeding?

The question, it seems to us, is very clearly answered by this court as follows: "The title upon which his adverse claim was founded may be invalid. It may have been obtained by fraudulent and corrupt practices. It is a principle which underlies all institutions and forms of government that no man

can be deprived of his property, except in proceedings according to law, unless it be confiscated for the necessities or good of the public. If his title is claimed to be invalid or fraudulent and void, he is entitled to be heard according to the forms of law. Proceedings to punish him for contempt, for not delivering it up without a trial according to law, to another who claims it, are not the appropriate proceedings for the trial of an issue of title. The issue as to such title should be tried in an appropriate action, in which the verdict of a jury or the findings of the court may be had upon issues properly framed for the purpose of definitely determining the question of title." *Ex parte Hollis*, 59 Cal. 406–413. "Proceedings to punish a party for contempt are not the appropriate proceedings for the trial of the issue of title." *Larrabee* v. *Selby*, 52 Cal. 506–508.

It is true that in the present case the order of the court did not command the petitioner to pay over the money to the executor; but it did command her to deposit what she claimed was her money in a bank subject to the further order of that tribunal. To give the right to the court to make such an order, it must first have determined that she had no title to it; for if otherwise, and her right was not determined or considered, she being in possession of the money, claiming it as her own, then that tribunal had no legal authority to make any such order, and therefore the question of title must necessarily have been passed upon.

Sections 1459 to 1461 of the Code of Civil Procedure—portions of the statute appertaining to probate proceedings—provide, it is true, for the citation and examination of parties alleged to have in their possession property belonging to an estate; but they do not declare that the court may, after such an examination, when the title to the property is in dispute, order such effects to be delivered up to the executor or administrator, or deposited where the court may order; and if such had been the legislative intention it was easy to have asserted it in apt language.

Section 572, Code Civil Proc., refers to property which is, without question, in the hands of a trustee as trust property, or which belongs to or is due to another. It does not refer to that where the party alleged to hold as a trustee claims title to it in his own right.

We fail to find anywhere in our constitution or statutes any language which gives to a superior court, in a summary proceeding of the kind invoked here, the right to adjudicate the title to property.

For these reasons the petitioner should be discharged from custody.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the petitioner is discharged.

THORNTON, J. I concur in the order directed in this case. I can see no power in any court in this state to appoint a receiver without an action brought to which the person to be affected by the order is a party. This appears from section 564, Code Civil Proc. In this case no action has been brought, and, conceding that power to make the order which was made in this case is included in the power to appoint a receiver, the circumstance that no action has been instituted is conclusive to show that the court had no power to make the order. No power to make such order is conferred by sections 1459 to 1461, Code of Civil Procedure, nor by section 572 of same Code. In this last section, by the words "shown by the examination of a party," reference is had to a party to an action. That is plainly evidenced by the preceding words, "when it is admitted by the pleading." The pleading spoken of can only be the pleading in an action, and the examination of a party can have reference only to a party to the action. The meaning of the

section is the same as if it commenced with the words, "In an action, when it is admitted by the pleading," etc.

It may be said here that, granting that the case before us is such as is specified in section 572, the order authorized by that section has not been made. The order made directs the petitioner here to deposit the sum of money about which the controversy has arisen in a bank; the order allowed by section 572 is that the party pay the money into court, or to the party to whom it is admitted by the pleading, or shown by the examination of the party, to belong or be due. The order made in this case, directing the petitioner to deposit the money in a bank, was made without authority.

For the above reasons I think that the applicant for the writ should be discharged, and concur in the order discharging her from custody.

70 Cal. 121

PAGE and others *v.* SUMMERS and others. (No. 9,382.)

(*Supreme Court of California.* July 12, 1886.)

PARTNERSHIP—DISSOLUTION—MINING—PROSPECTING PARTNERSHIP.

Where a prospecting partnership has been dissolved by mutual consent of the partners, there is no implied duty upon any of the partners to go on, and complete defective locations, and, having done so, they are not chargeable as trustees of the others.

Department 1. Appeal from superior court, Mono county.

April 15, 1881, plaintiffs and defendant Young entered into an agreement to form a prospecting company to discover and acquire mining claims in Mono county, California. All were to be equally interested, and share alike, in all mining claims located by the company in name or names of any of its members. April 27, 1881, defendant Young and plaintiff Frost made a discovery of a claim, erected a monument, with notice of claim thereon, and called it "Kentuck." May 5, 1881, they located in the same way the "May Bell." These are the claims in controversy. May 12, 1881, the partnership was mutually dissolved. May 19, 1881, the defendants and plaintiff Frost located these claims and set up proper boundary monuments. Frost afterwards conveyed all his interest to the defendants. Plaintiffs seek to compel defendants to convey to them title of their share of the claims, and account for the proceeds of the mining.

Stewart & Herrin, for appellants, Page and others. *Bennett & Reddy*, for respondents, Summers and others.

MCKINSTRY, J. The court below found "that on the twelfth day of May, 1881, the said J. H. Page withdrew from the said prospecting company, and the said prospecting company *was dissolved, and the said prospecting agreement was terminated between all the parties thereto.*"

It is insisted by counsel for appellants that the parties to the prospecting contract were *partners*, or at least occupied a fiduciary relation towards each other, like that existing between partners; that it was the duty of Frost and Young to complete the defective locations commenced before the dissolution, and that the subsequent locations made by Frost and Young should be treated precisely as if they were the completion of their prior attempted locations; that neither Frost nor Young could get rid of his obligation to complete the original locations by removing the original notices, and posting others, and marking the boundaries of the claims asserted in the notices last posted. Further, that G. M. and J. N. Summers, who took with notice of the prospecting agreement, should be held as trustees.

Where a partnership has contracted engagements which cannot be fulfilled during the time limited for its existence, the partnership continues for the purpose of performing such outstanding engagements, and of taking and settling all accounts, and converting the property, means, and assets of the

partnership existing at the time of its dissolution, and for these purposes the authority of each member of the firm remains the same after as before the dissolution. *Robbins* v. *Fuller*, 24 N. Y. 570; *Murray* v. *Mumford*, 6 Cow. 441; *Western Co.* v. *Walker*, 2 Iowa, 504.

The interest of the parties herein, in the completion of the defective locations, ought not to be estimated by reference to events which happened after the termination of the agreement, even if it appeared that the rights acquired by the subsequent locations were valuable. The agreement was made in Mono county, the mines located were within that county, and, for aught that appears, all the parties to the agreement resided there. There is no finding of the concealment of any fact from the plaintiffs. It must be presumed that, with full knowledge of the existing conditions, all parties to the agreement terminated it, and dissolved the contractual relations arising from it. Page, Fulmore, and Blake may have concluded that the ground was valueless, or that it would be fruitless to complete the locations, or to expend money in developing them. Whatever motive may have influenced them, they saw fit to dissolve the company, and end the agreement and enterprise. It may be conceded that the parties to the prospecting contract might, had they deemed it for their interest to do so, have completed the locations previously commenced within a reasonable time, and that they would have been protected, during such reasonable time, from the interference of third persons. But it was for them to determine whether it was advisable to complete the locations or abandon them.

None of them had contracted an obligation with the government, or with any third person, to be performed after May 12, 1881. No duty remained with any of them to acquire property not contracted for prior to the dissolution. They had acquired no inchoate interest in property which they were under obligation to complete, notwithstanding the dissolution. The plaintiffs (other than Frost) could not have been compelled to take a conveyance of aliquot portions of the ground subsequently located, nor were they liable to the actual locators for part of the cost of making the subsequent locations, nor subject to pay any part of the expense for work done under such locations. It may be added, the court below found that Frost and Young removed and destroyed the original notices. It does not appear but this was done *after* the dissolution of the agreement, nor does it appear but it was done with the knowledge and consent of the other plaintiffs.

There are reasons, not necessary to mention, why (independent of the termination of the prospecting contract) none of the plaintiffs could demand a decree for a conveyance of any portion of the "Georgie Howell," located by Frost; why Frost is not entitled to any relief; why neither Frost nor Blake could enforce the agreement as against any of the mines located. Reasons, also, why, in any event, the defendants G. M. & J. N. Summers would hold two-thirds of the "May Bell" and one-half of the "Kentuck" free from any trust.

Judgment and order affirmed.

We concur: MYRICK, J.; ROSS, J.

70 Cal. 153

STATE *v.* SMITH, Jr., and others. (No. 11,199.)

(*Supreme Court of California.* July 14, 1886.)

1. ALIENS AND NATURALIZATION—SUCCESSION BY NON-RESIDENT FOREIGNERS—ARTICLE 1, § 17, CONST. CAL.

Article 1, § 17, Const. Cal., prohibiting the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens, with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property, does not deprive it of the right to confer the same privileges on non-resident foreigners.

2. SAME—CODE CIVIL PROC. CAL. § 671—LAW HAVING EXTRATERRITORIAL OPERATION. Code Civil Proc. Cal. § 671, providing for succession by non-resident foreigners, confers a right to be enjoyed within the state, and is not beyond the legislative power as a law having an extraterritorial operation.

3. SAME—TAKING BY SUCCESSION—"APPEARANCE AND CLAIM"—CIVIL CODE CAL. § 672. Under section 672, Civil Code Cal., requiring a non-resident alien, in order to take by succession, to "appear and claim the property," etc., appearance in person or by attorney, and claim by taking possession, or conveying or contracting with respect to the property, or any acts in the state indicating that the alien asserts a right to it, are sufficient.

4. SAME—ESCHEAT—ACTION PREMATURE—OFFICE FOUND—CIVIL CODE CAL. § 672. Under Civil Code Cal. § 672, providing that the non-resident alien must appear and claim the property "within five years from the time of succession," or be barred, a proceeding brought by the attorney general to secure to the school fund, under Const. Cal., art. 9, § 4, the estate of an intestate who left no resident heirs as an escheat, is premature if instituted within five years after the death of the intestate.

Department 1. Appeal from superior court, Sacramento county.

John Smith, a native of England, a resident of California, and a naturalized citizen of the United States, died intestate in Sacramento, California, November 3, 1883, leaving an estate of real and personal property. He left no heirs resident in the United States, but did leave one nephew and three nieces in England, his only next of kin. The nephew, the defendant, John Smith, Jr., came to California, obtained letters of administration after having declared his intention to become a citizen of the United States, and, for himself and the other next of kin, "appeared and claimed the estate." Under this claim the estate was distributed equally to the next of kin, from whom the other defendants derive their title. In January, 1885, this action was brought by the state to declare said estate escheated to the state. The superior court rendered judgment for defendant, and the plaintiff appeals.

E. C. Marshall, Atty. Gen., and *S. P. Scaniker*, for plaintiff.

Section 17, art. 1, of the constitution is a limitation, and it has been held that the *bona fide* resident foreigner succeeds, to the exclusion of all others. *Siemssen* v. *Bofer*, 6 Cal. 250; *Farrell* v. *Enright*, 12 Cal. 450; *People* v. *Rogers*, 13 Cal. 160; *Norris* v. *Hoyt*, 18 Cal. 217. John Smith having died leaving no heirs in the state at the time of his death, his estate, at the instant (*eo instante*) of his death, vested in the state. 4 Kent, Comm. 424; *Fairfax* v. *Hunter*, 7 Cranch, 603; *Jackson* v. *Adams*, 7 Wend. 367; *Wilbur* v. *Tobey*, 16 Pick. 177; *Com.* v. *Hite*, 6 Leigh, 588; *Taylor* v. *Benham*, 5 How. 233; *Montgomery* v. *Hunt*, 5 Cal. 373; *Puckett* v. *State*, 1 Sneed, 355; *Bradstreet* v. *Supervisors*, 13 Wend. 546; *Farrell* v. *Enright*, 12 Cal. 450; *Ettenheimer* v. *Heffernan*, 66 Barb. 374. Subsequent declaration of intention to become a citizen of the United States cannot have a retroactive effect so as to enable John Smith, Jr., to succeed as heir to the estate. *Heeney* v. *Trustees of Brooklyn Benev. Soc.*, 33 Barb. 360. Natives of foreign lands cannot take lands by descent in the state, because they have no inheritable blood in them. The nephew and nieces had never been in the state previous to John Smith, Sr.'s, death, and they had no inheritable blood in them at the time of their uncle's death. *Wacker* v. *Wacker*, 26 Mo. 426. The fee could not be in abeyance; it must vest in some one, and it did vest in the state of California. *People* v. *Conklin*, 2 Hill, 67. The constitution and laws of this state have no force or effect beyond its limits. They cannot fix the *status* of persons who are natives and residents of foreign lands. They cannot make them heirs. Story, Confl. Laws, §§ 7, 20–23. There is no law in this state, nor in any other to our knowledge, by which a foreigner can succeed to and take the estate of a deceased *citizen*. *Spratt* v. *Spratt*, 1 Pet. 343; *Larreau* v. *Davignon*, 5 Abb. (N. S.) 367.

Grove L. Johnson and *Armstrong & Hinkson*, for defendants.

The points involved in the case have already been settled adversely to the plaintiff's contention. *State* v. *Lyon*, 7 Pac. Rep. 763; *In re Estate of Bil-*

lings, 4 Pac. Rep. 639; *People* v. *Rogers*, 13 Cal. 159; *State* v. *Carrasco*, 7 Pac. Rep. 766.

McKINSTRY, J. The constitution (article 1, § 17) prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property. There is no provision of the constitution which prohibits the legislature from conferring the same rights upon those born in foreign countries who have never been residents of the state.

Section 671 of the Civil Code provides: "Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state." It is suggested that, inasmuch as laws can have no extraterritorial operation, the legislature has no power to provide for succession by foreigners who have never been residents. But this section of the Code provides a rule with respect to property within the state. It confers a right to be enjoyed within the jurisdiction.

Section 672 of the Civil Code reads: "If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property, in such case, is disposed of as provided in title 8, pt. 3, Code Civil Proc." The words "non-resident alien" are severely criticised by counsel for appellant. We find no difficulty in interpreting them as indicating those who are neither citizens of the United States nor residents of the state.

All aliens take *by succession*. Civil Code, 671. The failure of a non-resident alien to "appear and claim" within five years after descent cast, operates a bar of his right to assert any title in the property as against the state; and this, not on the idea that the property has escheated to the state as of the date of the death of the ancestor, but because by the law the "non-resident" takes subject to the loss of his right by a failure to make claim within the five years. The clause of section 672 is a limitation, applicable, however, not alone to the commencement of an action in the courts, but to any appearance within the state, and the assertion of a claim, whether by such action or otherwise. The claim may be *in pais*, as by taking possession of the property, or conveying, or contracting with respect to it. If he fails to appear and claim it, the property is escheat at the expiration of the five years. In "such case" the property is disposed of as provided in title 8, pt. 3, Code Civil Proc. It would seem to follow that a "non-resident alien" would have no defense to an inquest to "vest the title in the state" in the nature of office found, except a defense based on his "appearance and claim" within the five years, and it necessarily follows that a proceeding brought by the attorney general under title 8, pt. 3, is premature if commenced within five years after the death of the ancestor.

Section 1272 of the Code of Civil Procedure, so far as it applies to a non-resident alien, not a party or privy to the proceedings prescribed in title 8, only authorizes him to show that which he might have shown had he been made a party, to-wit, that he did appear and claim the property "within five years from the time of the succession." The statute gives to the non-resident alien full five years to "appear and claim" the property, and gives him no more. There is no limitation of time (certainly none less than 10 years after the "succession") within which the action provided for in the Code of Civil Procedure must be commenced by the attorney general. The five years given the non-resident alien can have no reference to the proceeding commenced by the attorney general. No statutory machinery is provided in accordance with which the alien must appear and give notice of his claim. The provision of section 672 of the Civil Code, requiring the alien to "appear and claim the property," relates to an appearance and claim, to be proved by acts within the state indicating that the alien asserts a right to it, or the provision means nothing.

Section 4 of article 9 of the constitution provides that "the proceeds" of the estates of deceased persons who may have died without leaving any "heir" shall constitute a part of the school fund. It does not limit the power of the legislature to declare that aliens may be heirs. Moreover, it speaks of the *proceeds* of the lands, evidently contemplating some procedure in the nature of office found, by which the right of the state shall be ascertained and determined, and legislation providing for the sale of the land. Judgment affirmed.

We concur: MYRICK, J; ROSS, J.

70 Cal. 6

O'KANE *v.* HYDE. (No. 8,361.)

(*Supreme Court of California.* May 28, 1886.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—PROPERTY—PARTNERSHIP CREDITORS—INDIVIDUAL CREDITORS.

An assignment by a firm of their individual as well as partnership property, directing the property first to be applied to the payment of partnership debts, is *void*, as giving a preference to the partnership creditors over the individual creditors as to the individual property.[1]

In bank. Appeal from superior court, city and county of San Francisco.

This was an action brought by John O'Kane, as assignee of Daly & Hawkins, to recover of the defendant the sum of $4,725, and interest, on two promissory notes. The defendant was indebted to that firm on these notes in the sum of $3,445, as admitted by him, or in the first-mentioned sum, as claimed by the plaintiff. The firm were indebted at the same time to the Hibernia Savings & Loan Society in the sum of $6,000, and the latter of them also owed an individual debt to the said corporation of about $5,000. Some time afterwards, and on the twenty-second of March, 1879, the said firm made an assignment for the benefit of their creditors, by which they conveyed all their partnership and individual property to the plaintiff, to be applied to the payment of partnership debts prior to the payment of their individual debts; and on the seventh of October, 1880, the superior court of the city and county of San Francisco directed the plaintiff to bring this suit against the defendant. It further appears that on the twenty-seventh of March, 1879, at the suit of the Hibernia Savings & Loan Society, the debt due by the defendant, Hyde, to Daly & Hawkins was garnished, and in the following month they recovered a judgment against the firm, and an execution was issued thereon. The defendant in these proceedings admitted the debt for the amount as before stated, and paid to the sheriff a large part of it, leaving a balance still subject to the execution. A demurrer to the complaint having been overruled, the defendant answered, denying generally the allegations of the complaint, and alleging that he had paid to the firm of Daly & Hawkins all that was due on his notes to them, except the $3,445 which he had paid, or a large part of it, to the Hibernia Savings & Loan Society, and claiming that the assignment was void as against them, as an execution creditor of the firm. The plaintiff contended, among other things, that the question of the validity of the assignment was *res adjudicata* as to those creditors who were parties to a former suit brought by him against Daly, and that the Hibernia Savings Bank was one. But it was admitted that the defendant was not a party to that suit. There was a judgment for the defendant in accordance with the findings of the court, and plaintiff appealed.

Edward P. Cole, for appellant. *Tobin & Tobin*, for respondent.

MYRICK, J. The court below construed the assignment by Daly & Hawkins to O'Kane as an assignment of their individual as well as of their part-

[1] See Wooldridge v. Irving, 23 Fed. Rep. 673.

nership property, and, as it directed all of the property assigned to be applied to the payment of partnership debts, held the assignment void as thus giving a preference to the partnership creditors over the individual creditors as to the individual property. We are of opinion this construction is correct, and that the assignment was void as to creditors. The defendant, Hyde, was a debtor of the assignors. The Hibernia Savings & Loan Society was their creditor. As such creditor it recovered of Hyde, by garnishment proceedings, the amount of its debt due from the assignors. Hyde, by reason of his relation to the society under the garnishment proceedings, and his payment to it under such proceedings, could make inquiry into the legality of the assignment. We are of opinion that the former action (*O'Kane* v. *Daly & Hawkins*) was not, as to the defendant herein, or as to the Hibernia Savings & Loan Society, an adjudication as to the validity of the assignment.

Judgment and order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

(70 Cal. 320)

HOADLEY v. CITY AND COUNTY OF SAN FRANCISCO.[1] (No. 8,762.)

(*Supreme Court of California.* July 20, 1886.)

1. MUNICIPAL CORPORATIONS—SAN FRANCISCO—PUEBLO LANDS—PUBLIC SQUARES—CALIFORNIA ACT OF MARCH 11, 1858.
 The California act of March 11, 1858, ratifying and confirming the ordinances 822 and 845 of the common council of the city of San Francisco, providing for laying out public squares on pueblo lands within its limits, and the order made by the municipal authorities adopting them, operated as a selection and dedication to the public use of such squares, and no other further acceptance by the public than was afforded by the act was needed in order to make the dedication complete; following *Hoadley* v. *San Francisco*, 50 Cal. 265.[2]

2. SAME—PUBLIC SQUARES—PUEBLO LANDS—ACT OF CONGRESS, JULY 1, 1864.
 The legal title to the public squares on the pueblo lands within the limits of the city of San Francisco vested in the city by the operation of the act of congress, July 1, 1864; following *Hoadley* v. *San Francisco*, 50 Cal. 265.

3. SAME—STATUTE OF LIMITATIONS—ADVERSE POSSESSION—TITLE—OCCUPANCY—DEDICATION—LANDS—PUBLIC USE.
 In an action to quiet title to lands in a city which had been dedicated to public use, the occupancy of such lands by a private person cannot confer on him any rights against the city, no matter how long continued; following *Hoadley* v. *San Francisco*, 50 Cal. 265.[3]

4. SAME—SAN FRANCISCO—PUEBLO LANDS—COMPENSATION.
 The city of San Francisco, as successor of the pueblo of that name, had the right to take pueblo lands, in the possession of others, for public squares, without making compensation therefor; following *Sawyer* v. *San Francisco*, 50 Cal. 370.

5. SAME—ORDINANCES 822, 845—TITLE TO LAND—CITY OF SAN FRANCISCO—ACT OF MARCH 11, 1858.
 Wherever a person acquired any rights, under the California act of 1858, to any of the lands lying within the limits of the city of San Francisco, such rights were

[1] Affirmed. See 8 Sup. Ct. Rep. 659, *sub nom.* Clark v. City & Co. of S. F.

[2] As to the necessity of an acceptance by the public to perfect a dedication to public use, see Quinn v. Anderson, (Cal.) 11 Pac. Rep. 746, and note; Brooks v. City of Topeka, (Kan.) 8 Pac. Rep. 392; Rozell v. Andrews, (N. Y.) 8 N. E. Rep. 513, and note.

As to what will constitute or prove an acceptance by the public, see Morse v. Zeize, (Minn.) 24 N. W. Rep. 287; Laughlin v. City of Washington, (Iowa,) 19 N. W. Rep. 819; Brakken v. Minneapolis & St. L. R. Co., (Minn.) 11 N. W. Rep. 124; Maywood Co. v. Village of Maywood, (Ill.) 6 N. E. Rep. 866; People v. Lohfilem, (N. Y.) 5 N. E. Rep. 784.

See, also, Reilly v. City of Racine, (Wis.) 8 N. W. Rep. 417.

[3] See State v. Horn, (Kan.) *post*, 148, and note.

subject to the provisions of the ordinances 822, 845, providing for laying out the public squares, and the order of the municipal authorities adopting and approving them, which had been ratified by the act.

In bank. Appeal from the late district court, Twelfth judicial district, San Francisco.

Action against the city and county of San Francisco to quiet title to certain lands lying west of Larkin street, and within the city limits as defined by the charter of 1851. Judgment below for defendant. A motion for new trial was refused, and plaintiff appealed from the judgment, and from the order refusing a new trial.

S. W. & E. B. Holladay, *John Currey*, and *W. C. Belcher*, for appellant. *John L. Love*, for respondent.

THORNTON, J. This action was instituted to quiet title of plaintiff to two parcels of land situate in the city and county of San Francisco, and within that portion of said city and county to which the ordinances 822 and 845 of the common council of said city and county, and an order passed by the justices of the peace of the defendant corporation on the sixteenth of October, 1856, ratified by the act of the legislature of this state, approved March 11, 1858, apply. One of the parcels of land in controversy forms a part of Alta *plaza*, and the other a part of Hamilton square.

This cause was here before on appeal, (see 50 Cal. 265,) and on that appeal this court held that the plaintiff acquired no title to the lots or squares in question either by the Van Ness ordinance, or by adverse possession. The questions are presented now under the same state of facts, and the above rulings of the court must be regarded as the law of the case in all its stages. In this condition of things, we see no reason why the points above mentioned should be further considered. See *Sawyer* v. *San Francisco*, 50 Cal. 370; *People* v. *Holladay*, 5 Pac. Rep. 798; *City of Visalia* v. *Jacob*, 65 Cal. 434; S. C. 4 Pac. Rep. 433.

The point made on behalf of plaintiff, as to the fact that the squares in question embrace more than one-twentieth of the land in possession of the plaintiff, and that the excess above such one-twentieth was taken without compensation, as provided in section 6 of ordinance 822, we regard as settled by this court in *Sawyer* v. *San Francisco*, *supra*, adversely to the contention of the plaintiff.

The reasons on which the rule just above mentioned as to the taking of more than one-twentieth, as settled in *Sawyer* v. *San Francisco*, is rested, apply to the point made here that more than one block was taken to make up the squares in controversy. The survey and map of these squares, so including four blocks each, were approved, ratified, and confirmed by the act of the eleventh of March, 1858, (St. 1858, p. 53,) and from such approval the survey and map above mentioned acquired validity. Whatever rights the plaintiff acquired under the Van Ness ordinance he took subject to the act of 1858, which approved the survey and map above mentioned. This is true under any proper application of the doctrine of relation invoked on behalf of plaintiff. The act of approval ratified the ordinance 822, allowing title to be made under it by a possession designated in it, and ratified also ordinance 845, and the order of the justices approving the survey and map above mentioned; and, when the act of 1858 was passed, the doctrine of relation could vest in the plaintiff no greater rights than he took under the act of 1858. Any rights which plaintiff derived under the act of 1858 would be subject to all its provisions. At the same time that ordinance 822 was ratified the order approving the map and survey above mentioned was also ratified, and whatever rights plaintiff took under the act were subject to the provisions of the ordinance and order so ratified. We find in the case no trace

of a contract between the plaintiff and any one which ever vested in plaintiff any rights different from those accorded to him herein.

The above embraces all the points in the case which are necessary to be considered. We find no error in the record, and the judgment and order must be affirmed. Ordered accordingly.

We concur: McKEE, J.; McKINSTRY, J.; SHARPSTEIN, J.; MYRICK, J.

70 Cal. 128

RED JACKET TRIBE, No. 28, etc., *v.* GIBSON and others. (No. 11,302.)

(*Supreme Court of California.* July 12, 1886.)

1. BENEVOLENT SOCIETIES—ACTION AGAINST TRUSTEES—ACTS OF CO-TRUSTEE.
 Evidence that a trustee of a benevolent society acted without the concurrence of a co-trustee, or that the latter was induced to concur in his act by reason of misrepresentations which he had made with respect to the concurrence of a third trustee, is admissible.
2. SAME—PURCHASE—BENEFICIARY.
 In an action against trustees to have declared void a purchase made by them, evidence that one of them understood the propriety of the purchase was first to be submitted to the beneficiary is admissible.
3. SAME—QUESTION FOR JURY—PURCHASE—ASSOCIATION—OFFICER—TRUSTEES.
 Where a suit is brought by an association to have declared void a purchase made for it, by its trustees, from one of its officers, the question whether the acts of the officer were fair or unfair are to be determined by the jury, and not by the trustees who may be called as witnesses.
4. SAME—MORTGAGE—ENFORCEMENT OF—SALE.
 Where a mortgage, made by the officer of an association, has been paid off and canceled with funds derived from a fraudulent sale of property to the association, *held*, in a suit brought by the association against such officer to have the sale declared void, to which the mortgagee was a party, that the mortgage may be revived and enforced for its benefit against all the property therein described, to the extent of the amount applied by such officer to its satisfaction, obtained from such fraudulent sale.
5. SAME—"RED JACKET TRIBE," CALIFORNIA—TRUSTEES—INVESTMENT—FUNDS IN BANK.
 An order of the "Red Jacket Tribe," California, instructing its trustees "to try and invest the money in the bank, not exceeding $2,000," does not purport to authorize an investment of money of the tribe otherwise than in stock, bonds, mortgages, or other securities approved by two-thirds of the members thereof present at a regular council.
6. EQUITY—RIGHTS OF VENDOR—CANCELLATION—SALE.
 Where a deed for the sale of property is annulled, the vendor is entitled to a return of the money, or its equivalent paid for it.[1]
7. SAME—COMPLAINT—RECONVEYANCE—PROPERTY.
 A complaint not praying for a reconveyance of property, no reconveyance will be ordered.

Department 1. Appeal from superior court, county of Sacramento.

The plaintiff is a lodge or tribe of Red Men. The defendants Gibson, Bennett, and Dustman were members of it. Gibson was treasurer, and Bennett, Dustman, and Burt Worthington were the trustees of the tribe. The funds of the plaintiff were kept on deposit in the bank, subject to the order of the trustees. One of the by-laws of the tribe provided that the trustees should "keep the funds invested, for the best interests of this tribe, in such stocks, bonds, mortgages, or other securities as shall be approved by two-thirds of the members thereof present at a regular council." On the thirty-first of October, 1884, the trustees were instructed to try and invest the money in the bank, not to exceed $2,000; and defendants contend that they had full power to act regarding the investment of it.

Afterwards the defendant Gibson saw some of the trustees, and informed

[1]See Worthington v. Campbell, (Ky.) 1 S. W. Rep. 714, and note.

them that he had a lot and a half he would sell for $1,800. A conference having been held to consider the propriety of the purchase as an investment, it was agreed, on the twelfth of November following, the two trustees Bennett and Dustman conducting the negotiations, that the tribe should purchase the property at the above-mentioned price, which comprised the east half of lot 2, and the whole of lot 3, in a certain block in Sacramento. The money was thereupon paid, and a deed for the same delivered to the trustee Bennett, and by him duly recorded. At this time there was a mortgage on the property of $1,200, and interest, in favor of the Occidental Building & Loan Association, and which was a lien, also, on the west half of the said lot 2, which had not been conveyed except by this mortgage. This lien was paid off out of the $1,800, and the mortgage was surrendered up by the loan association, and canceled.

On the twenty-second of November of the same year, Edith L. Gibson, the wife of the defendant J. A. Gibson, filed a declaration of homestead upon the west half of said lot 2, claiming it as a homestead for the benefit of herself and husband. The plaintiff asks that the conveyance by Gibson to them be declared null and void; that the satisfaction of the mortgage be set aside; and that the association be required to transfer the mortgage to them; and that they be permitted to hold and enforce it against all the property therein described, notwithstanding the satisfaction thereof by Gibson, and the declaration of homestead by the wife. There was a verdict and judgment for the plaintiffs according to the prayer of the complaint, and also a personal judgment against Gibson for $600, and costs. A motion for a new trial having been made and denied, the defendants appealed from the judgment, and from the order denying a new trial.

Young & Dunn, for appellants. *Freeman, Johnson & Bates*, for respondent.

McKinstry, J. There was sufficient evidence to justify the findings of the court below.

Evidence that the defendant Bennett acted without the concurrence of his co-trustee Dustman, or that the latter was induced to concur by reason of misrepresentations made by the former with respect to Worthington's concurrence, was admissible.

Evidence that Dustman understood the propriety of the purchase was to be submitted to the "tribe" was admissible.

The objection to the question asked on cross-examination of the witness Dustman, "Now, then, do you know of any unfair act that he [Gibson] did to induce the sale?"—was properly sustained, because calling for the inference of the witness. The witness had already stated, on his cross-examination, what Gibson had said and done to induce the purchase. He had also been asked: "Did Gibson do anything that you know of to induce you to purchase that lot and a half other than what you have testified to?" To this question the witness had answered, "Not that I know of." Whether the acts of Gibson were "unfair" was to be determined by the jury.

The court was authorized to revive the lien of the mortgage of the Occidental Loan Association in favor of the plaintiff if the satisfaction of the mortgage was part of the fraud practiced on the plaintiff.

The court below properly admitted evidence that the trustees never assembled, and, as a board, considered the transaction,—the purchase from Gibson.

The prompt disavowal of the act of one of the trustees was a fact which the plaintiff was entitled to prove. Gibson was a member of the tribe, and acquainted with the by-laws, which did not authorize the trustees to invest in lands. The order instructing the trustees "to try and invest the money in the bank, not exceeding $2,000," does not purport to authorize an investment of money of the tribe otherwise than "in stocks, bonds, mortgages, or other securities, approved by two-thirds of the members thereof present at a

regular council." Moreover, the by-laws of plaintiff could not be amended by a simple motion or resolution.

The decree of the court below annulled the deed from Gibson to the plaintiff, and did not provide for a reconveyance from the latter to the former. This on the theory that the transaction was fraudulent, and, in equity, the deed conveyed no title. The deed being annulled, the plaintiff was entitled to a return of the money or its equivalent.

The minutes of the proceedings of the tribe, showing a disavowal of the transaction, were admissible, notwithstanding the objection that "there was no allegation in the complaint of a tender of reconveyance." The complaint did not pray for a reconveyance, and none was ordered.

Judgment and order affirmed.

We concur: MYRICK, J.; ROSS, J.

71 Cal. 268

SANTA CLARA MILL & LUMBER CO. *v.* BOARD OF SUP'RS OF SANTA CRUZ CO. (No. 9,698.)

(*Supreme Court of California.* November 15, 1886.)

COSTS—MOTION TO TAX—JUDGMENT.

Until a motion to tax costs has been disposed of, the clerk has no authority to enter a judgment for costs.

Department 1. Appeal from superior court, county of Santa Cruz.

Mandamus. The Santa Clara Mill & Lumber Company sued the county of Santa Cruz, April 30, 1879, for $15,000 damages, caused by the location of a proposed public road across the premises of the company, according to the order of the board of supervisors of that county. On January 19, 1880, the action was dismissed on motion of the defendant, the order laying out the road having been rescinded, and judgment was ordered in favor of the company for its costs of suit. The company filed a memorandum on January 29th, verified by its manager, claiming, as its costs, "clerk's fees, $6.23; attorney's fees, $200; total, $206.23." On the same day the county filed a motion to tax costs, stating that the item objected to was the "attorney's fees, $200." The clerk on January 30, 1880, entered judgment according to the plaintiff's claim, allowing $206.23, costs. The motion to tax was never disposed of. The company, on refusal of the county to pay the costs as taxed, sued out a *mandamus* to compel the commissioners to pay.

Charles B. Younger, for appellant, Santa Clara Mill & Lumber Co. *James A. Hall*, for respondent, Board of Sup'rs of Santa Cruz Co.

BY THE COURT. The clerk had no authority to enter the judgment for costs while a motion to retax was pending. *Riddell* v. *Harrell*, *ante*, 67, (No. 11,363, filed November 4, 1886.)

Judgment affirmed.

PEOPLE v. RAY. (No. 11,065.)

(*Supreme Court of California.* September 17, 1886.)

WRIT AND PROCESS—SERVICE OF SUMMONS BY PUBLICATION—AFFIDAVIT—ACTIONS CONCERNING STATE LANDS.

In an action to annul a certificate of purchase of state lands for non-payment of principal or interest, the service of summons by publication must be made in the manner provided by the Code of Civil Procedure for service by publication. Such a service, therefore, without any affidavit for publication of the summons, or order therefor, is insufficient.

In bank. Appeal from superior court, county of Santa Cruz.

Action to foreclose defendant's interest in certain state lands by virtue of a certificate of purchase, and to annul such certificate on the ground that defendant was delinquent in the payment of part of the principal and interest. No personal service of summons was made on the defendant, but an alleged summons by publication was made, by publication in the county newspaper for the statutory time, and affidavit of service by such publication. There was, however, no affidavit for service by publication, nor any order of court therefor. Judgment by default against defendant, who moved to open the default on the ground that there had been no service of summons. The court, upon hearing of the motion, set aside the default. Plaintiff appeals.

W. F. Jeter, for plaintiff and appellant. *J. M. Wood*, for defendant and respondent.

BY THE COURT. On the authority of *People* v. *Applegarth*, 64 Cal. 229, and *People* v. *Mullan*, 65 Cal. 396, S. C. 4 Pac. Rep. 348, order affirmed.

(2 Cal. Unrep. 717)

MCAVOY v. BOTHWELL. (No. 11,744.)

(*Supreme Court of California.* September 27, 1886.)

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

Appeal will be dismissed, in pursuance of rules 3 and 4 of the California supreme court, for failure to file transcript, on clerk's certificate of that fact.

In bank. Appeal from superior court, county of Alameda.

Judgment in the lower court having been rendered for plaintiff, defendant gave notice of appeal. On the expiration of the statutory time for filing the transcript, plaintiff moved to dismiss for failure to file the transcript within the proper time, under rules 3 and 4 of the supreme court, and presented the certificate of the lower court stating the fact that such transcript had not been filed as required by such rules.

W. Whitmore, for appellant, Bothwell. *B. McFadden*, for respondent, McAvoy.

BY THE COURT. Application, on clerk's certificate, to dismiss an appeal for failure to file the transcript in time. The application is granted.

(71 Cal. 273)

LEVINS v. ROVEGNO and others.[1] (No. 9,055.)

(*Supreme Court of California.* November 22, 1886.)

1. TRIAL BY COURT—FINDING—CONCLUSION OF LAW, WHAT IS.

Whether a finding is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning, or by the application of the artificial rules of law, and where plaintiff's mother owned property which, by proper steps, became the homestead of plaintiff's mother and father, and thereafter the mother died, and the father married again, and conveyed the homestead, his wife joining in the conveyance under the name of the first wife, a finding of the court that this conveyance passed the title, as against the plaintiff, is a conclusion of law.

2. HOMESTEAD—RIGHTS OF WIFE AND CHILDREN—DESCENT—ST. CAL. 1860, PAGE 311.

In this case, under the amended homestead act of 1860, (Cal. St. 1860, p. 311,) the plaintiff, being an only child, became the owner, by descent, of one-half of the

[1] See *post*. 343.

homestead property, upon the death of her mother; section 4 of that act modifying the joint tenancy of the husband and wife created by section 1, so that, upon the death of either, one-half of the estate descends to the survivor, and one-half to the children of the deceased.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

S. F. Rhodes & Barstow, for appellant. *Flournoy & Whoon* and *Jos. Rothschild*, for respondents.

SEARLS, C. Action of ejectment to recover possession of the undivided one-half of a portion of 50-vara lot No. 469, in the city and county of San Francisco. The cause was tried by the court, written findings filed, and judgment entered for defendants, from which judgment, and from an order denying a motion for a new trial, plaintiff appeals.

George W. Manchester and Mary Ann Manchester were husband and wife. On the first day of August, 1857, the land in question was conveyed to Mary Ann Manchester, by deed of grant, bargain, and sale, and thereupon Manchester and wife entered into possession, and occupied the same as a homestead, and continued to reside in a dwelling-house thereon, and to occupy the premises, except as hereinafter stated, until the third day of April, 1862, when the said Mary Ann departed this life. On the twenty-seventh day of April, 1861, George W. Manchester filed in the recorder's office of the city and county of San Francisco his declaration of homestead, executed and acknowledged in due form, as required by the provisions of the act of April 28, 1860, describing the premises in controversy, and whereby the homestead continued to exist as such under said act. The value thereof never exceeded $5,000. After the death of the said Mary Ann Manchester, George W. Manchester married a second wife, and on the third day of April, 1868, joined with her in an abandonment and conveyance of the homestead property, in due form, to Isaac M. Ward, under whom the defendants claim the property in question by sundry mesne conveyances, all of which were duly recorded. The second wife executed the deed and declaration of abandonment in the name of Mary Ann Manchester, the first wife, which was not her true name. Plaintiff is the only child of George W. and Mary Ann Manchester, or either of them, who survived the said Mary Ann Manchester, and was under the age of 22 years when this action was brought. A small portion of the lot was sold by Manchester and his first wife, which, however, cannot affect the case.

The court found, as a *conclusion of law*, "that the defendants are the owners in fee-simple, and entitled to the possession of the same, and that plaintiff is not entitled to any part of the same, or to any damage for the withholding thereof."

We are asked to determine whether the foregoing is an ultimate fact, to be found by the court as such, or a conclusion of law to be drawn from the facts as found. The line of demarcation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases. It is quite easy to say that the ultimate facts are but the logical conclusions deduced from certain primary facts evidentiary in their character, and that conclusions of law are those presumptions or legal deductions which, the facts being given, are drawn without further evidence. This does not, however, quite meet the difficulty. We deduce the ultimate fact from certain probative facts by a process of natural reasoning. We draw the inference or conclusion of law, by a process of artificial reasoning; but this last process is often in such exact accord with natural reason that the distinction is scarcely appreciable.

If ultimate facts were found only from direct evidence to the very fact, the distinction between them and conclusions of law would be easily drawn; but, as they are to a great extent presumed from the existence of other facts, they are conclusions reached by argument, by reason,—are results deduced from

an inferential process, in which the evidentiary facts become the premises, and the ultimate fact the conclusion; and this process, by which ultimate facts or presumptions of fact are reached, differs from presumptions of law only in this: that the latter "are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong;" the former, being "merely natural presumptions, are derived wholly and directly from the circumstances of the particular case, by the common experience of mankind, without the aid or control of any rules of law whatever." 1 Greenl. Ev. §§ 44–46. "A presumption of fact is the natural connection of one fact with others by a combined process of proof and argument; a presumption of law is a similar connection, artificially made by annexing a rule of law or legal incident to a particular fact proved." Burrill, Circ. Ev. 52.

The result reached by a presumption of law may be a *fact* equally with that attained by a deduction of the same *fact* from the existence of other and evidentiary facts. It is the *process* by which the result is attained which is or may be different, and the tribunal through which such result is reached that differs, rather than the result itself. An act, deed, circumstance, or event is none the less a *fact* because reached as a conclusion of law. Sanity or insanity, guilt, innocence, fraud, and negligence are all facts; and whether their existence or non-existence is reached by a process of natural reasoning, or by artificial process known as "conclusion of law," does not in the least alter their *status* as facts.

Suppose A. sues B. for services performed. The latter pleads payment. Here payment becomes the ultimate fact to be established. B. proves that he employed a large number of men, and was accustomed to make weekly payments; that A. was observed among others at the time and place where payment was made; that a considerable period has elapsed since A. left the employ of B., during which time the former made no claim: these are circumstances from which, as evidentiary facts, a jury may presume the ultimate fact of payment; but the presumption is one of *fact*, and not of law. Again, suppose the same case, but that the time prescribed by the statute of limitations in bar of the action has run. The law steps in, and presumes payment. The result reached may be the same, but it is reached by a different process. Again, the same fact may be found to exist as a deduction from other facts, which, for that purpose, are treated as evidentiary; or the law will take such evidentiary facts, not as evidence in the sense in which we use that term when applied to the investigation of facts, but as a basis from which to presume the existence of the ultimate fact or conclusion. We have no doubt but that the terms "title" and "owner," considered in the abstract, are facts, and may be found as such.

The question which we are to determine—who has the title? who is the owner?—is quite a different one, and will usually depend, not upon the natural deductions from the facts in proof, but upon the application of those legal principles found to apply justly to all like cases; and, when necessary, and thus applied, to work out a result, the conclusion is one of law, or a mixed question of law and fact. To illustrate: A. and B., parties to an action tried by a jury, each hold a conveyance, in all respects regular and sufficient in form to convey the legal title, executed and delivered at different periods by the holder of the paramount title. These facts established, and manifestly, as we think, it would be the duty of the court to find as a conclusion of law, that the title vested in the one who first received a conveyance. Such duty arises, not because title is or is not a fact, but because it cannot be determined by the application of the process of reasoning adopted for the establishment of facts, pure and simple, and must be determined by the application of the process of artificial reasoning adopted by the law; and, when thus determined, we designate the result a "conclusion of law."

If we have made our meaning clear, we have conveyed the impression that

in legal proceedings it is, in many cases, the means by which the result is to be reached which must determine whether a given conclusion is one of fact or of law. If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law, in order to reach a final determination, the result is a conclusion of law.

A court of original jurisdiction, in determining issues of fact without the interposition of a jury, must, of course, apply the law, so far as it relates to the admissibility and weight to be given to evidence; but beyond that it simply finds the facts as a jury would do in the case of a special verdict. This accomplished, and the facts as found are subject to such intendments or conclusions of law as would apply to a special verdict. Applying this rule to the case at bar, and we are of opinion the court below properly treated the ownership and right to possession of the demanded premises as a conclusion of law, to be deduced from the facts as found.

The main question in the case is this: Did the plaintiff upon the death of her mother, Mary Ann Manchester, on the third day of April, 1862, succeed to the ownership of the undivided one-half of the demanded premises, or did the title thereto vest in George W. Manchester, her father, as survivor of said Mary Ann Manchester, deceased? The court below found, as we think properly, that the premises were community property of George W. and Mary Ann Manchester; or, rather, found facts from which this conclusion must be drawn.

Under the homestead act of 1851, no declaration, acknowledgment, or record was necessary to constitute a homestead. It consisted of a quantity of land, together with the dwelling-house thereon, and its appurtenances, not exceeding in value the sum of $5,000, to be selected by the owner thereof. St. 1851, p. 296. Occupancy of the premises by the family was treated as presumptive evidence of dedication to homestead purposes, and was notice to all the world. *Taylor* v. *Hargous*, 4 Cal. 268. It was necessary that such residence or occupancy as a family residence should be with the good-faith intention to dedicate the premises to the purposes of a homestead, in order to impress upon them that character. *Holden* v. *Pinney*, 6 Cal. 234; *Moss* v. *Warner*, 10 Cal. 296. The homestead thus dedicated under the act of 1851 was exempt from forced sale, and could only be conveyed in the manner prescribed by the statute. The statute did not in terms define the character of the estate which the husband and wife enjoyed in the homestead property during the existence of the marital relation. It did provide that upon the death of the head of the family the homestead, and other property exempt from forced sale, should be set apart by the probate court "for the benefit of the surviving wife and his own legitimate children, and, in case of no surviving wife or his own legitimate children, for the next heirs at law."

As might be expected, the supreme court was repeatedly called upon to define the estate held by the husband and wife in the homestead.

In *Taylor* v. *Hargous*, 4 Cal. 273, it was said: "As soon as a place acquires the nature of a homestead, the nature of the estate becomes changed without reference to the manner in which the title to the property originated, whether it was the separate estate of either husband or wife, or the common property of both. It is turned into a sort of joint tenancy, with the right of survivorship, at least as between husband and wife."

In *Cook* v. *McChristian*, 4 Cal. 24, the same general doctrine was enunciated.

In *Reynolds* v. *Pixley*, 6 Cal. 167, the court expressed its regret that no provision had been made in the act of 1851, for recording the homestead, and alluded to the laws as "a fruitful source of fraud and perjury."

In *Poole* v. *Gerrard*, 6 Cal. 73, and in *Revalk* v. *Kraemer*, 8 Cal. 66, the

doctrine that the homestead is a joint estate of husband and wife, with right of survivorship, is recognized as well as in all other cases in which the question arose prior to *Gee* v. *Moore*, 14 Cal. 472. In this last-mentioned case the court (FIELD, C. J., delivering the opinion, concurred in by BALDWIN, J., and COPE, J.) reviews the former cases, compares them with the constitution and statute, and in referring to the law as announced in *Taylor* v. *Hargous*, *Poole* v. *Gerrard*, and *Revalk* v. *Kraemer*, says: "This doctrine has never met the approbation of the profession, and it is not warranted by any language of the constitution or the statute. There is nothing in the nature of the homestead right or privilege which justifies its designation as such an estate. The right or privilege has no single feature resembling a joint tenancy. The estate rests where it existed before the premises were appropriated as a homestead. The appropriation of them confers a right upon the wife to insist that their character as a homestead shall continue until she consents to the alienation, or another homestead is provided, or they are otherwise abandoned. The wife, if surviving her husband, takes the homestead not by virtue of any right of survivorship arising from the alleged joint tenancy, but as property set apart by law from her husband's estate for her benefit, and that of his children, if there be any. In the same way other property exempt from forced sale is set apart to her." This decision was rendered in October, 1859.

At the next session of the legislature the homestead act of April 21, 1851, was amended (St. 1860, p. 311) so as to require homesteads to be selected by the husband or wife, or both of them, or other head of a family, by a declaration in writing, executed, acknowledged, and recorded as in the statute provided. Persons holding homesteads under former acts were allowed one year within which to file for record their declaration, and, if not so filed, the homestead was deemed to have been abandoned. The declaration in the case at bar was executed and filed within the year.

By section 1 of this amendatory act it was provided that "from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants; and all homesteads heretofore appropriated and acquired by husband and wife under the act to which this act is amendatory shall be deemed to be held by such husband and wife in joint tenancy." Section 4 of the amendatory act provided that "the homestead, and other property exempt from forced sale shall, upon the death of either husband or wife, be set apart by the probate court for the benefit of the surviving husband or wife, and his or her legitimate children."

As before stated, Mary Ann Manchester died in 1862, before the act of that year on the same subject took effect, and the rights of the parties are to be determined as fixed by the act of 1860. Under section 1 of the act of 1860, standing by itself, the husband and wife became and were joint tenants in the homesteads, with right of survivorship, and all other incidents which the term implies. Doubtless in some instances the relation was wanting in some of the unities which at common law were requisite to such an estate. We know of no reason, however, why the legislature, in its wisdom, may not create such an estate, without having at hand all the material requisite under the common law. We suppose that branch of the government might enact that a linear foot should consist of 13 inches, and that the act would not be void because ordinarily 12 inches have indicated such a measure. The real question is not what section 1, standing alone, imports, but is it modified, and its effect as a statute of descent controlled, by section 4 of the same act? Did section 4 regulate and establish the line of descent or succession of the title to the homestead otherwise than as it would have passed under section 1 standing alone?

Rich v. *Tubbs*, 41 Cal. 36, was a case in which Tubbs and wife acquired a homestead under the act of 1860. Tubbs died, and the probate court set aside

the homestead property for the use of the family of the deceased, consisting of the widow and two children. The widow married Rich, and brought an action against the children to quiet title, which was decided in her favor in the court below. On appeal, the judgment was affirmed, upon the ground that the record failed to show that the husband died prior to the passage of the act of 1862, under which last-mentioned act the surviving husband or wife became entitled to the homestead. The court held: (1) That the act of the probate court in setting apart the homestead for the use of the family of the deceased husband, under the act of 1860, did not change nor transmit title; that the effect of such order is merely to relieve the property from administration; that it does not constitute assets of the estate to be administered; and that it leaves the title where it found it, to be determined by claimants thereto in another forum. (2) That although section 1 of the act of 1860 denominates the husband and wife "joint tenants," yet that section is so modified by section 4 that they are not such in the full definition of the common-law term, and that under the latter section the children take some interest by inheritance from their deceased father or mother. The precise interest thus taken, it was said, was not in that case necessary to be determined.

In *Estate of Headen*, 52 Cal. 294, the court, in referring to *Rich* v. *Tubbs*, said: "The fourth section of the homestead act of 1860, which was involved in that case, is clearly a statute of descent and distribution, as applicable to property which had been appropriated as a homestead."

In *Herrold* v. *Reen*, 58 Cal. 443, the doctrine of *Rich* v. *Tubbs* is referred to and approved.

There can be no question but that the first section of the act of 1860, standing alone, creates a joint tenancy in the homestead between husband and wife, with all the incidents and consequences which the term implies, including its principal incident of the *jus accrescendi*. But in the light of the construction which has been given to section 4 of the same act by this court, we are constrained to hold that such section modifies the joint tenancy, so that upon the dissolution of the marital relation by death, prior to the amendment of the act in 1862, one-half of the homestead descends to the survivor, and the other half to the legitimate child or children of the deceased. This result follows from the theory that section 4 of that act was in effect a statute of descent, regulating the succession, and that no act on the part of the probate court was necessary to or could change the title, as was said in *Rich* v. *Tubbs*, *supra*, and in *Estate of Headen*, *supra*.

It follows from this construction that upon the death of Mary Ann Manchester on the third day of April, 1862, the undivided one-half of the homestead property descended to and vested in her only child, the plaintiff herein; and that, as the statute is one of descent, regulating the succession, no action on the part of the probate court was necessary to vest the title in the latter.

It results from these views that the conclusion of law by the court below was erroneous, for which error the judgment and order appealed from should be reversed, and the court directed to enter judgment upon the findings in favor of plaintiff for the undivided one-half of the premises described in the complaint.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, with directions to the court below to enter judgment in favor of plaintiff for the undivided one-half of the premises described in the complaint.

71 Cal. 295

HEINLEN *v.* BEANS and others. (No. 9,121.)

(*Supreme Court of California.* November 23, 1886.)

APPEAL—BOND—CODE CIVIL PROC. § 945—CONSTRUCTION OF—SPECIFIC PERFORMANCE.

Where, upon an appeal from a judgment for specific performance, the defendants, in order to retain possession of the land during the pendency of the appeal, enter into an undertaking under section 945, Code Civil Proc., conditioned, in case the judgment is affirmed, or the appeal dismissed, that they will pay the value of the use and occupation of the property from the time of the appeal to the delivery of the possession thereof, *held*, in an action on the undertaking, that the extent and meaning of the undertaking is that they will pay the judgment appealed from, if affirmed, as rendered by the court below.

In bank. Appeal from superior court, Santa Clara county.

Action on an undertaking under section 945, Code Civil Proc., to recover the value of the use and occupation of land during the pendency of an appeal from a judgment in a suit for specific performance. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion.

Houghton & Reynolds, for appellants. *J. C. Black* and *G. A. Heinlen*, for respondent.

THORNTON, J. In an action for specific performance, brought by John Heinlen against Calvin Martin and Wayne B. Rogers, judgment was rendered on the twenty-eighth of January, 1873, that plaintiff recover of the said defendants the sum of $10,000, the value of the use and occupation of the land in controversy from the twenty-seventh of November, 1868, to the date of the rendition of the judgment; that defendants execute a deed of conveyance of the land above mentioned, and deliver possession thereof to plaintiff, with costs of suit. Defendants, in the same case, made a motion for a new trial, which was denied on the eleventh of December, 1873, and they appealed from the judgment and the order denying their motion for a new trial. On these appeals the defendants, on the date last mentioned, filed the $300 undertaking required by sections 940, 941, Code Civil Proc., an undertaking of stay as to the $10,000 above mentioned, under section 942, Code Civil Proc.; and, as they desired to retain possession of the land involved in the suit, they executed and filed a further undertaking for that purpose, under section 945, Code Civil Proc. These undertakings were executed by T. Ellard Beans and E. Auzerais, the defendants herein.

This action is brought on the undertaking last above mentioned, to recover the value of the use and occupation of the land above mentioned during the period of the pendency of the appeal, and until the delivery of possession of said land to the plaintiff. The extent of the engagement of defendants under the provisions of the undertaking above mentioned may be perceived from the following portion of it, viz..

"And whereas, the appellants are desirous of staying that part of said judgment directing said defendants and appellants to execute a deed to said plaintiff and respondent of the premises described therein, and the judge of this court having fixed the amount of the undertaking for that purpose at $5,000: Now, therefore, in consideration of the premises, and the said stay of the execution of the judgment, we do further, jointly and severally, undertake and promise, and do acknowledge ourselves bound in the further sum of $5,000, that during the possession of such property by the appellants they will not commit, or suffer to be committed, any waste thereon; and that if judgment be affirmed, or the appeal be dismissed, they will pay the value of the use and occupation of the property from the time of the appeal to the delivery of the possession thereof, pursuant to the judgment, not exceeding said sum of $5,000. T. ELLARD BEANS. [Seal.]

"E. AUZERAIS." [Seal.]

The above-named appeals came on for hearing in this court, and were determined by it in January, 1879. This court reversed the judgment, remanded the cause, and directed the court below to modify the judgment in accordance with the opinion. See report of the cause entitled *Heinlen* v. *Martin*, 53 Cal. 321–346. The *remittitur* was transmitted to the court below with the judgment of this court, and its opinion containing the directions given to the court below.

The court below had adjudged that the plaintiff was entitled to a conveyance and possession of the whole land in suit, and to rents and profits of the entire tract during the period above mentioned. This court held plaintiff entitled only to a conveyance and possession of five-sixths of the tract of land, and to the same proportion of the rents and profits, commencing, not from the twenty-seventh of November, 1868, as in the judgment appealed from, but from the tenth day of May, 1870, the date of the commencement of the action. The *remittitur* was filed in the court *a quo* on the third day of April, 1879. The court, proceeding to follow the directions of this court, on the third day of April, 1879, modified its judgment as required, as of the twenty-eighth of January, 1873, the date of the judgment previously rendered by it. It gave judgment in favor of plaintiff for the rents and profits accruing previous to the twenty-eighth of January, 1873, in the sum of $5,260, which judgment was affirmed, (see *Heinlen* v. *Martin*, 59 Cal. 181,) and held to accord with the former judgment of this court. The amount last mentioned was paid by Martin & Rogers, the defendants in the action.

The contention of defendants is that there is no breach of the undertaking committed by them until the affirmance of the judgment, or the dismissal of the appeal. The plaintiff concurs in this view, and such are the express words of the undertaking. By its express words, the defendants only agree to pay when the judgment is affirmed or the appeal dismissed. But the plaintiff puts forward the contention that the judgment in *Heinlen* v. *Martin* was affirmed. The court below was of the same opinion, and so held. Now, if this judgment was affirmed at all, it was only affirmed in part, and the undertaking does not impose on the parties the obligation to pay on any such contingency, but only in case the judgment appealed from is affirmed. We construe this to mean affirmed as rendered by the court below. It does not mean affirmed in part. The conclusion that affirmed in part is not here meant is strengthened by the language used in section 942, Code Civil Proc., where the requisites of the undertaking to stay execution in case of an appeal from a judgment or order directing the payment of money is prescribed. In that section the obligation of the sureties is expressed as follows: "That they are bound, in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, *or the part of the amount as to which the judgment or order is affirmed, if affirmed only in part.*" There is no such language in section 945, under which the undertaking sued on herein is given, and the language of which section it follows. This omission in section 945 is significant, and manifests the intention of the legislature that the sureties were not to be bound in case of a partial affirmance, but only in case the judgment was affirmed as rendered and entered in the court below.

The conclusion here reached is sustained by the judgment of this court in *Chase* v. *Ries*, 10 Cal. 518, which was an action on an appeal-bond executed by defendants, conditioned to pay the judgment appealed from, if the same should be affirmed by the appellate court. It appeared from the record in that case that the judgment appealed from was reversed, with directions to the court below to enter a different judgment; consequently no liability attached to the defendants under the conditions of the bond.

The meaning attributed to section 945 in this case is, in our judgment, in

accord with the intent of the legislature as manifested by the language employed in it; and, when we are satisfied that the meaning and intent of the law-making power have been arrived at, it is useless to speculate as to the views with which it was enacted. We must presume that the members of the legislature who enacted the law deliberated fully on the subject-matter of the enactment, and that, after full consideration, their deliberate views were embodied, and their intention manifested, in the statute as enacted, in which they laid down, as the best rule, that sureties were not to be bound if the judgment was, in effect, affirmed in part. The construction put on section 945, and the undertaking executed under it, accords with the rule laid down in section 2836, Civil Code, and with what is said in *People* v. *Breyfogle*, 17 Cal. 509.

For the reasons above given the judgment and order are reversed, and cause remanded, and the court below is directed to enter judgment for defendants.

We concur: MORRISON, C. J.; MCKINSTRY, J.; MYRICK, J.; SHARPSTEIN, J.; MCKEE, J.

2 Cal. Unrep. 719

HEINLEN *v.* BEANS and others. (No. 8,969.)

(*Supreme Court of California.* November 23, 1886.)

INTEREST—JUDGMENT—APPEAL—CODE CIVIL PROC. § 945.

Where, in an action on an undertaking on appeal, given to secure rents and profits of certain real estate pending an appeal to the supreme court of California, under Code Civil Proc. § 945, if the judgment is affirmed, but not as rendered by the court below, the plaintiff is not entitled to recover anything of defendants, and therefore a ruling of the lower court adverse to his claim of interest, in this action on the judgment appealed from, is not erroneous.

In bank. Appeal from superior court, Santa Clara county.

Action on an undertaking under section 945, Code Civil Proc., to recover interest on a judgment. Judgment for defendants. Plaintiff appealed. The facts are stated in the case with the same title, (No. 9,121,) *ante*, 167.

G. A. Heinlen and *J. C. Black*, for appellant. *Houghton & Reynolds*, for respondents.

BY THE COURT. This is an appeal by plaintiff from the judgment and certain orders in the case with the same title, (No. 9,121,) *ante*, 167. The court below rendered judgment herein in favor of plaintiff for the sum of $5,000. The plaintiff claimed that he was entitled to legal interest on this sum from the fifth of April, 1879, the day on which possession of the land involved in the suit of *Heinlen* v. *Martin and Rogers* was delivered to him. The court held against him on this contention, and this appeal was prosecuted, to have it determined whether he was so entitled or not.

Inasmuch as we have held in case 9,121 that the plaintiff was not entitled to recover anything of defendants, he was not hurt by the ruling of the lower court adverse to his claim of interest, and there was no error in the court's so ruling. The same contention is presented on the orders appealed from, and the same conclusion follows.

As regards the above-mentioned appeals of plaintiff, the judgment and orders are without error, and are affirmed; but, on the return of this cause to the court below, that court will enter judgment as directed in case 9,121.

71 Cal. 285

In re Estate of PHILLIPS, etc. (No. 9,642.)

(*Supreme Court of California.* November 23, 1886.)

1. ASSIGNMENT—INTEREST IN ESTATE—COLLATERAL SECURITY.

An assignment by a legatee of his interest in the estate of the testator, as security for a debt, entitles the assignee to receive, in the distribution of the estate, so much of the legacy as is necessary to pay the amount due upon the debt at the time of distribution.

2. Executors and Administrators—Distribution—Lis Pendens.
Distribution of a person's interest in an estate to his assignee's assignee should not be refused on account of the pendency of a suit to set aside the assignment, brought a few days before the date fixed for distribution, against the original assignee, in which suit no service had been had or appearance entered at said date.

Commissioners' decision.

Department 2. Appeal from decision of superior court, Sonoma county, upon petition for distribution.

Chas. F. Hanlon, for appellant. *J. T. Campbell* and *A. W. Thompson*, for respondents.

Foote, C. Margaret Phillips died on the twelfth day of December, 1882, leaving a will, which was probated, and an administrator with the will annexed appointed. The estate was composed of $17,963 in money, of which the sum of $6,000 was bequeathed to one William R. Johnson, who on the first day of December, 1883, borrowed of one Joyce $425, executing and delivering therefor his promissory note for such amount, and securing its payment by a written instrument reading as follows:

"Know all men by these presents, that I, William R. Johnson, of the city of Petaluma, county of Sonoma, state of California, the party of the first part, for and in consideration of the sum of $425, gold coin of the United States, in hand paid by Martin Joyce, of the same place, party of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, and conveyed, and by these presents do bargain, sell, convey, assign, and transfer, unto said party of the second part, all and singular, my rights, titles, and interests, of any and all kinds of, in, and to the estate of Margaret Phillips, deceased, and each and every part and parcel thereof, and the property of any and all kinds belonging to said estate. And I do hereby nominate and appoint said party of the second part my attorney in fact, and irrevocably (except as herein provided, on payment of the promissory note hereinafter mentioned) for me, and in my name, place, and stead, to receive, receipt for, take, and have all my share, part, and interest in said estate, and the property thereof. The foregoing transfer, conveyance, and assignment is made for and as security to secure payment of a certain promissory note for $425, bearing even date herewith, of which the following is a copy:

"'$425.00. Petaluma, December 1, 1883.

"'On demand, for value received, I promise to pay to Martin Joyce, or order, the sum of four hundred and twenty-five dollars, with interest from date till paid, at the rate of 1 per cent. per month, payable in United States gold coin. Wm. R. Johnson.'

"—And upon full payment thereof, principal and interest, this assignment to become void; the said party of the second part, under the foregoing assignment and power, to collect and receive the principal and interest due upon said note.

"In witness whereof the party of the first part has hereunto set his hand and seal this the first day of December, A. D. 1883.

"Wm. R. Johnson." [Seal.]

On the eighth day of December, 1883, as the record discloses, this note and security were assigned for value to one Hill, the respondent here; who thereupon duly notified the administrator of the assignment and transfer, and filed the same among the papers in the court having jurisdiction on the probate of the will. On the seventeenth day of December, 1883, Johnson made another assignment of his interest in the estate to his sister, who is the appellant here. The assignment is in due form. On the eighteenth day of December, 1883, she notified the administrator of the assignment made to her, and filed it.

On the first day of February, 1884, she filed her petition for distribution, claiming all that had been bequeathed to her brother, William R. Johnson, admitting notice of the Joyce assignment and note, and averring that a suit had been instituted in another court to set it aside, but not stating by whom instituted. She prayed that the matter of the Joyce assignment be settled in the court having jurisdiction of the estate of the decedent, and made no claim to have such proceedings stayed to await the determination of the suit to set aside the note and assignment. Before the filing of her petition the administrator had filed his final account and petition for distribution. The assignee, Hill, duly filed his petition to have the amount of the note and interest distributed to him out of Johnson's share of the estate. Upon the three petitions the matter of distribution was heard before the superior court of Sonoma county. The trial resulted in the distribution to Hill, from Johnson's share of the amount due upon the note and interest, and the balance to his sister, the appellant here. The due execution of the note to Joyce, and that it was for value, and that the assignment to him was for value, and duly made, executed, and delivered, served on the administrator, and filed in court, was admitted by counsel for the appellant. This trial was had on the fourth day of February, 1884, and by the record it appears that the action to cancel the note was commenced by the appellant on the thirtieth day of January, 1884, five days before the trial, and against Joyce, not Hill, the then assignee, and that no service of the summons or complaint therein had been had, and no plea or appearance made or had, by the defendant Joyce therein.

It does not appear from the record precisely what the grounds of the suit for cancellation of the note were. According to the admissions of the appellant's attorney, the note was made for value, and no fraud appears to have tainted it. The appellant contends, however, that the assignment conveyed no interest in the estate to Joyce or his assignee, Hill, but was a mortgage, with a defeasance to secure a debt, without authority to pay it; that neither of such parties were the grantees of W. R. Johnson, and therefore not entitled to have any distribution made to them directly; and that the plea of *lis pendens* was sustained by the evidence, and should have been held good.

As we view the matter, the assignment and note, taken together, transferred to any *bona fide* assignee thereof the legal title to so much of the money bequeathed to Johnson as should be due on the note when the distribution was made, and that, therefore, so far as that matter is concerned, Hill was entitled to that which the court awarded him. A similar assignment and decree for the distribution of money, as distinguished from real property, was upheld in *Estate of Hite*, Myr. Prob. 232, and, as we think, properly.

There certainly was no other suit pending to which Hill was a party, nor does the record sufficiently disclose that any other was pending which could affect the rights of the parties to the proceedings in the matter of the distribution; for the petition which assumes to allege the pending suit as a bar to the respondent's right does not state who the parties to that action were, or the grounds upon which it was based. The evidence does not show that Hill was a party to that suit, but, to the contrary, that it was brought against Joyce, and there is no pretense made therein but what the note was made for a valuable consideration, and without fraud. To us it is clear that Hill was entitled to that which the court awarded him, and we perceive no ground, either legal or equitable, upon which to reverse the decree of that tribunal.

It, and the order denying a new trial, should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 290

GILBERT *v.* SLEEPER. (No. 9,473.)

(*Supreme Court of California.* November 23, 1886.)

1. VENDOR AND VENDEE—ORAL AGREEMENT FOR EXCHANGE OF LANDS—OBLIGATIONS OF GRANTEE OF ONE PARTY—TRUSTS.

In 1875, A. and B. orally agreed upon an exchange of lands. Possession was taken by each under the contract, and it was agreed that deeds should be given when B., who had only a swamp-land certificate for his land, should obtain a patent. In 1881, A. conveyed all his property, including the land so sold, to his wife, who agreed to carry out the contract made with B. About the time of this conveyance B. paid the balance due upon the price of the swamp land, but did not then take out a patent. In January, 1883, A.'s wife brought an action against B. to recover the land in the latter's possession under the contract. She had meanwhile filed a homestead upon it. B. had made improvements thereon without objection being made by A. or his wife. The wife since A.'s death had been in possession of the swamp land. *Held*, that plaintiff held the title impressed with a trust in favor of B.; and that the latter having obtained a patent soon after the beginning of the action, and tendered a deed to plaintiff, he was entitled, under a cross-complaint praying for such relief, to a performance of the contract by her.[1]

2. STATUTE OF LIMITATIONS—TRUSTS—VENDEE IN POSSESSION.

The statute of limitations will not run against a vendee in possession of lands agreed to be sold, as he is to be regarded as a *cestui que trust*.[2]

Commissioners' decision.

Department 2. Appeal from superior court, Lake county.

Action to recover possession of lands. Defendant filed a cross-complaint, and had judgment below. Plaintiff appealed.

R. W. Crump, for appellant. *E. W. Britt*, for respondent.

BELCHER, C. C. This is an action to recover possession of 17.67 acres of land. The defendant answered, and, by way of cross-complaint, set up an equitable defense. The plaintiff demurred, and then answered to the cross-complaint. After trial judgment was entered in favor of the defendant, from which, and from an order denying a new trial, plaintiff appealed.

The demurrer to the cross-complaint was properly overruled. If the facts were as alleged, the plaintiff held the legal title to the land in controversy in trust for the defendant, and he was entitled to the relief demanded.

It appears from the record that in September, 1875, one Jacob Gilbert, the husband of plaintiff, was the owner of 160 acres of land in Lake county, and the defendant had a certificate of purchase from the state of a tract of swamp and overflowed land lying adjacent thereto. In that month the parties entered into a verbal contract to exchange parcels of their lands, Gilbert taking the parcel described in the cross-complaint, and the defendant the parcel described in the complaint. Under the contract each party was to take and thenceforth hold possession of the parcel given him, and they were to execute deeds, each to the other, whenever the defendant should obtain a patent for his land from the state. Gilbert took possession of the parcel given him, and remained in possession of it till he died, in April, 1882, and since his death the plaintiff has continued in possession without offering to surrender it to the defendant. When the contract was made defendant was in possession of the parcel given him, and has ever since continued in such possession, and, without objection from Gilbert or plaintiff, has placed permanent improvements on the land of the value of $400. On the third day of December, 1881, Gilbert, being then in very bad health, under advice given him by defendant, and to save

[1] That the vendor of lands under a contract of sale holds the legal title as trustee for the vendee, see Burkhart v. Howard, (Or.) 12 Pac. Rep. 79, and note.

[2] The statute of limitations does not begin to run against a *cestui que trust* until actual ouster or disavowal of the trust. See Henderson v. Maclay, (Pa.) 6 Atl. Rep. 52, and note.

the expense and trouble of a settlement of his estate in the probate court, for the expressed consideration of five dollars, conveyed all of his property, including the 160 acres of land before mentioned, to the plaintiff. Before making the deed he exacted from plaintiff, and she agreed, that, when defendant should obtain a patent for his swamp land from the state, she would execute to him a deed for the land in controversy, in accordance with the terms of the contract for exchange. On the sixth day of December, 1881, plaintiff filed a homestead upon all the land conveyed to her by her husband, and on the thirtieth day of January, 1883, she commenced this action. The defendant paid the balance of the purchase money due on his swamp land in December, 1881, and on the twentieth of February, 1883, received a patent therefor. Thereafter, on the tenth of March following, he tendered to plaintiff a good and sufficient deed of the parcel which her husband took in exchange, and which is described in the cross-complaint, and she refused to accept it.

The court below found the facts to be substantially as above stated; and, as a conclusion of law, decided "that plaintiff took the deed of December 3, 1881, which included the land here by her demanded, charged with the duty of conveying to the defendant such demanded premises in accordance with the previous promise of her husband, and upon receiving a deed from defendant for the 17.67 acres of land described in his cross-complaint."

The Civil Code provides as follows: "Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only." Section 1804. "The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of the buyer as to that which he takes." Section 1806.

Under these sections, a contract for the exchange of lands is a contract of sale, which, as in other cases of contracts for the sale of lands, may be enforced in a court of equity by a decree for specific performance. *Bigelow* v. *Armes*, 108 U. S. 10; S. C. 1 Sup. Ct. Rep. 83. When, therefore, Gilbert and defendant agreed to exchange their lands, and, under the contract, took possession of the parcels exchanged, each became the vendee and equitable owner of the parcel received by him. The legal title was retained by the seller, but it was held by him in trust for the buyer, to be thereafter conveyed at the stipulated time and on the stipulated conditions. If Gilbert had lived, and, retaining the legal title in himself, had commenced this action, there can be no question that a defense to the action like that interposed here would have been entirely good.

Has the plaintiff any greater rights than her husband would have had in the case supposed? We fail to see that she has. "It is a universal rule that, if a man purchases property of a trustee with notice of the trust, he shall be charged with the same trust, in respect to the property, as the trustee from whom he purchased. And even if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person. Of course, a mere *volunteer*, or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, whether he have notice or not; for in such case no wrong or pecuniary loss can fall upon him, in compelling him to execute the trust to which the property that came to him without consideration was subject." Perry, Trusts, § 217.

It is unnecessary to consider whether the plaintiff paid a valuable consideration for the property conveyed to her by her husband, or took the title as a mere volunteer, for the reason that, when she received her deed, she had actual knowledge of the exchange that had been made, and of all its attending circumstances. It must follow then that plaintiff took the title charged with all the rights, liabilities, and duties which at that time rested upon her grantor.

But it is insisted that defendant lost the right to demand a deed from the plaintiff because he did not perfect his title, and tender his deed, until after the commencement of this action, and so his cause of action was barred by the provisions of section 339 of the Code of Civil Procedure. There are two sufficient answers to this: *First*, the statute of limitations was not pleaded; and, *second*, Gilbert, while he held the title, acquiesced in defendant's delay in procuring his patent, and, besides, the statute never runs in favor of a trustee, as against his *cestui que trust*, while the latter is in possession of his estate. *Love* v. *Watkins*, 40 Cal. 547; *Beebe* v. *Doud*, 22 Barb. 255.

There was no error in refusing to admit in evidence plaintiff's declaration of homestead. Obviously she could not, by filing it, defeat or impair the previously existing rights of defendant.

The point is made that defendant has no title to a small part of the land described in his cross-complaint as having been exchanged to Jacob Gilbert. No such issue was presented by the pleadings, or appears to have been raised at the trial. On the contrary, the pleadings admit that the legal title was in the defendant, and the court so found.

On the whole, we find no error in the record, and the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 672

PEOPLE *ex rel.* VAN VALER and others *v.* JACOB and others. (No. 11,360.)

(*Supreme Court of California.* July 15, 1886.)

1. PUBLIC LANDS—CALIFORNIA SWAMP LANDS—PATENTS—ACTION FOR CANCELLATION—ATTORNEY GENERAL—DISMISSAL.

When a suit is instituted, in the name of the state, by the permission of the attorney general, upon the relation of the real party in interest, seeking the cancellation of a patent for state swamp lands, and the state has no direct interest in the event of the suit, the attorney general is not authorized to move to dismiss, or to withdraw his consent to the use of the name of the people, to the prejudice of the relator.

2. APPEAL—TRANSCRIPT—MISSING PAPERS—IMPROPER CERTIFICATE—MOTION TO DISMISS.

Where respondent, in his brief, suggests imperfections in the transcript because of the absence of necessary papers, and because the transcript is not properly certified, and appellant, at the hearing, files the requisite papers with the proper certificate, the motion to dismiss will be denied.

Department 1. Appeal from superior court, Tulare county.

Action brought by the attorney general, January 19, 1884, to cancel a patent issued by the state of California to the defendants, November 23, 1883, for a tract of swamp and overflowed land in Tulare county. On motion of the attorney general the action was dismissed July 11, 1885. The relators appealed to the supreme court.

The motion to dismiss the appeal was based on the fact that the clerk had not properly certified the transcript, as required by rule 4 of the supreme court, and that certain papers had been omitted; and was made under rule 13, which is as follows: "Exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant in writing, at least five days before the hearing, or they will not be regarded; and, when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail."

The following is rule 4: "On a motion to dismiss an appeal for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment or order appealed from, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of filing and undertaking on appeal, and that the same is in due form; the fact and the time of settlement of the bill of exceptions and the statement on appeal, if there be any; and also that the appellant has received a duly-certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded."

Frederick P. Stratton, *Latimer & Morrow*, and *Wm. M. Pierson*, for appellants. *Brown & Daggett*, for respondents.

BY THE COURT. The certificate of the clerk of the court below, filed at the hearing, is sufficient, and the motion to dismiss is denied.

On the authority of *People* v. *North San Francisco H. & R. R. Ass'n*, 38 Cal. 564, the judgment is reversed, and cause remanded.

71 Cal. 307

BATES *v.* BATES. (No. 9,586.)

(*Supreme Court of California.* November 20, 1886.)

PARTITION—NEW TRIAL—PLAINTIFF'S MOTION TO SET ASIDE DECREE IN HER FAVOR.

Where plaintiff in partition proceedings has obtained the decree asked for in her complaint, based upon and in accordance with all the facts alleged therein, and admitted by the answer, she is not entitled to a new trial upon affidavits setting forth facts tending to prove that she was mistaken in her rights when she commenced her action, and which, if they exist, are contradictory to the averments of the complaint.

Department 1. Appeal from superior court, Alameda county.

Bill for partition. Decree. Motion for new trial denied. Plaintiff appeals.

The plaintiff and appellee was the widow of A. S. Bates, deceased, her second husband; she and the defendant, Otis Bates, being the only heirs. After the husband's death, the widow, besides being unacquainted with her husband's investments, was prostrated with grief, and unable properly to instruct her counsel, who, having to make the best of her imperfect instructions, brought this action for partition in her name, assuming the property left by the husband was common property of the widow and the heir. After a preliminary decree of partition had been made in accordance with her complaint, affidavits were obtained in British Columbia tending to show that she had inherited a fortune from a first husband, and that the deceased Bates had invested part of the same in the property sought to be partitioned by her. A motion for a new trial by plaintiff, based on such affidavits, was denied.

Philip G. Galpin, for appellant.

The mistake of fact was not made known until after a preliminary decree for partition had been made. Before any notice was given of the making of that or any other decision, the error was discovered, and a motion was made for a new trial. Had it been granted, the plaintiff would have amended her complaint so as to ask partition of the common property only, and a new decree could have been made to conform to the truth. The appellant asks for a new trial on the ground of subsequently discovered evidence, and insists that the court below did not lose jurisdiction to correct the evident mistake of fact so long as a motion for a new trial was pending. The appeals are from the judgment, and from the order denying a new trial. The court had power to grant a new trial on the ground of subsequently discovered evidence, and no necessity exists to file a new complaint to set aside the judgment.

A. M. Rosborough, for respondent.

MCKINSTRY, J. The record brought here contains no matter which would justify the reversal of the final judgment. There are many reasons why the order denying a new trial should not be disturbed. It is enough to say, however, that a plaintiff who has obtained exactly the decree to secure which the action was brought and prosecuted, and which is based upon, and is in accord with, all the facts alleged in the complaint and admitted by the answer, is not entitled to demand a new trial, upon affidavits setting forth matters which may tend to prove that she was mistaken in her rights when she commenced her action. It is perfectly apparent that a new trial of the issues

must result in the same decision and interlocutory judgment. A new trial is a re-examination of an issue of fact in the same court, after a trial and decision, etc. Code Civil Proc. 656. The former decision may be vacated, and a new trial granted, on the application of the party "aggrieved," for certain causes, (specified in section 657.)

Here the affidavits of the plaintiff do not tend to prove (1) irregularity in the proceedings of the court or opposite party; or (2) "accident or surprise," within the meaning of the third subdivision of section 657, Code Civil Proc.; or (3) newly-discovered evidence, which could have been given under the pleadings; or (4) insufficiency of the evidence; or (5) error in law occurring at the trial. The real purpose of the plaintiff here, as clearly appears, was to have the decision and judgment set aside, that she might amend her complaint, and thus be enabled to prove facts which, if they exist, are contradictory of the averments of the complaint on which the trial was had. She certainly was not entitled to a new trial of the issues made by the pleadings on which the judgment was based.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.

71 Cal. 310

BOARD OF COM'RS OF FUNDED DEBT SINKING FUND *v.* BOARD OF TRUSTEES OF CITY OF SACRAMENTO. (No. 11,560.)

(*Supreme Court of California.* November 26, 1886.)

CONSTITUTIONAL LAW—RETROACTIVE OPERATION—MUNICIPAL CORPORATION—COMMISSION—CONST. CAL. 1879, ART. 11, § 13; ART. 22, § 1.

The prohibition of Const. Cal. 1879, § 13, art. 11, providing that "the legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever," is not retrospective, and, notwithstanding section 1, art. 22, providing that "the provisions of all laws inconsistent with this constitution shall cease upon the adoption thereof," a law establishing such a commission prior to 1879 is not repealed, nor are proceedings by such board thereafter prohibited.

In bank. Appeal from superior court, Sacramento county.

Application of the board of commissioners of the funded debt sinking fund to compel the board of trustees of Sacramento city, by mandate, to levy a certain tax, under an act of the legislature of 1872. The court below issued the writ, and the trustees appealed. The facts are sufficiently stated in the opinion.

W. A. Anderson and *E. C. Hart*, for appellants. *H. O. & W. H. Beatty*, for respondents.

MCKINSTRY, J. This is an application of the board of commissioners of the funded debt sinking fund to compel the board of trustees of Sacramento city, by mandate, to levy a certain tax which is ordered to be levied by an act of the legislature passed in 1872. The court below issued an alternative writ, and the city trustees made a response, not denying any fact set up in the petition and affidavit, but setting up matters of law only as a response to the alternative writ. The court overruled the legal objections raised, and made the writ absolute. From this the trustees appealed.

Appellants contend the petition is fatally defective, in that it does not appear therefrom that petitioners have not a plain, speedy, and adequate remedy at law, and in that it does not appear therefrom that defendants have any municipal function to perform. The facts alleged in the petition show that there is no other plain, speedy, or adequate remedy. The powers and

duties of the defendants are declared and determined by a public statute, of which we take notice.

Appellants further contend that petitioners have no legal capacity to maintain this action. The petitioners are parties "beneficially interested," within the meaning of section 1086 of the Code of Civil Procedure. *County of Contra Costa* v. *Board of Sup'rs*, 26 Cal. 641.

The main contention of appellants is that the act of March 25, 1872, (St. 1871–72, p. 546,) was repealed on the adoption of the constitution of 1879, by reason of the clause in section 1, art. 22, of that instrument, which reads: "The provisions of all laws inconsistent with this constitution shall cease upon the adoption thereof." It is said that the provisions of the act of 1872 are "inconsistent" with section 13, art. 11, of the constitution. That section reads: "The legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever."

That the prohibition is prospective, and applies to the legislature created by the constitution in which the prohibition is found, seems too clear for argument. The prohibition became operative with the rest of the constitution, and could only limit the power of the legislature provided for in the constitution. Its language does not purport anything more or different. This much being conceded, is necessarily follows that the act of 1872 is not inconsistent with the section of the constitution above quoted. It is not pretended that it is inconsistent with any other provision of the constitution.

The prohibition of future enactments, of a particular character, by houses of the legislature brought into existence by the same constitution which contains the prohibition, cannot be held to annul past legislation without violating the plain meaning of the language. It may be that some provisions of the constitution prohibit future action, authorized in the past by a statute in force prior to the adoption of the constitution. In such cases, the prohibition (it might be argued) is pointed at such future action, and is not a repeal of the statute which originally authorized it. Thus, "no county-seat shall be removed unless two-thirds of the qualified electors shall vote in favor of such removal." Section 2, art. 11. This may not only prohibit any legislation attempting to authorize a removal, without the two-third vote, but may prohibit also the removal itself. Other examples might perhaps be put to illustrate the distinction. But, in each case, the meaning of the prohibitory clause must be ascertained by reference to its subject-matter, and to the other provisions of the constitution. There is no clause of the constitution which can be construed to prohibit proceedings, under the prior law, by the board of commissioners established by the act of 1872, or by other like boards.

In their original points counsel for appellant say: "It is contended by respondents that sections 12 and 13 of article 11 are not retrospective. Standing alone, *this would be true*, and there are numerous authorities sustaining that construction; but the plain intent to make them retroactive is disclosed by section 1 of article 22 of the constitution of California." In their brief in reply, however, counsel seem to contend that section 13, art. 11, of itself, and independent of section 1, art. 22, of the constitution, repealed the act of 1872. For the reasons above set forth, this view cannot be upheld.

Our conclusion is that the act of 1872 is not inconsistent with the constitution, and that it will remain in full force until altered or repealed by the legislature. Const. art. 11, § 1.

Judgment affirmed.

We concur: THORNTON, J.; MYRICK, J.; SHARPSTEIN, J.

71 Cal. 351

PEOPLE *v.* LAVELLE. (No. 20,203.)

(*Supreme Court of California.* December 2, 1886.)

CRIMINAL LAW—EVIDENCE—OPINION—APPEARANCE AS TO BEING RATIONAL.

In the trial of a defendant charged with felony, a question propounded to a witness, who was present at the time of the arrest, "What was the appearance of this man [the defendant] at that time, with reference to his being rational or irrational?" is admissible, on the ground that the evidence sought to be elicited thereby is as to a fact,—namely, his appearance at the time,—and not the opinion of the witness as to the sanity of the defendant, based upon an acquaintance with him.

In bank. Appeal from superior court, Tulare county.

Information for an assault with intent to commit murder. Judgment for defendant. The people appealed. The facts are sufficiently stated in the opinion.

Oregon Samlers, for appellant. *W. B. Wallace*, Dist. Atty., for respondent.

MYRICK, J. The defendant was accused by information of the crime of an assault with an intent to commit murder. Testimony had been given concerning the circumstances of the alleged assault. One Keener, a deputy sheriff, who was present at the time of the arrest, which immediately followed the alleged assault, was asked the question: "What was the appearance of this man [the defendant] at that time, with reference to his being rational or irrational?" This was objected to on the ground that it did not appear that the witness was competent to testify, from appearances, as to whether the man was rational or irrational. It is urged on this appeal that the court erred in overruling the objection, because the witness had not shown himself to be competent within subdivision 10, § 1870, Code Civil Proc. The evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant, based on an acquaintance with him, but was rather as to a fact, namely, his appearance at the time. The appearance of a person at a given time is one thing; the opinion of a witness as to the mental condition of that person, based on an acquaintance with him, is quite another.

No error appearing, the judgment is affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKEE, J.; THORNTON, J.

72 Cal. 17

ROWLAND *v.* MADDEN and others. (No. 11,220.

(*Supreme Court of California.* November 29, 1886.)

EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST—PLEADING ISSUE—PRESENTATION OF CLAIM—DENIAL—CODE CIVIL PROC. CAL. § 475.

Where, in a suit against executors upon a claim against decedent, plaintiff alleges in his complaint that on the ninth day of December, 1881, his claim, duly verified, was duly presented to defendants, as executors, for allowance, and defendants in their answer "deny that on the ninth day of December, at said city and county, or elsewhere, the claim of the plaintiff for $36,000, * * * or the claim as in plaintiff's complaint set forth, or the claim upon which this action is founded, or any claim whatever, was duly presented to these defendants for allowance," the allegation of presentation of the claim to the executors is material to plaintiff's complaint, and the denial of it in the answer, though open to criticism, is sufficient to raise an issue under Code Civil Proc. Cal. § 475.

In bank. Appeal from superior court, San Francisco.

Action against executors. Judgment for defendants. Plaintiff appeals.

Moses G. Cobb, for appellant. *A. N. Drown* and *W. H. Fifield*, for respondents.

SHARPSTEIN, J. The plaintiff sues the defendants as executors of the last will and testament of Jane Rowland, deceased, to recover the sum of $36,-

000, which he alleges was justly due to him from said testate at the time of her decease; and he further alleges that on the ninth day of December, 1881, said claim, duly verified by the oath of plaintiff, was duly presented to the defendants as executors of the will of said Jane Rowland, deceased, for allowance. The defendants in their answer deny that on the ninth day of December, 1881, the claim of plaintiff for said sum, or any claim whatever, was duly presented to these defendants for allowance, or that any proper or legal claim, or any of the matters or things in the plaintiff's complaint alleged, has been at any time duly or otherwise presented to these defendants for allowance. Upon this issue the court finds that the alleged claim of plaintiff was not, nor was any claim verified by the oath of plaintiff, duly or otherwise, presented to defendants, as executors as aforesaid or otherwise, for allowance on the ninth day of December, 1881, or at any other time.

The finding is not against the evidence, and appellant does not attack it on that ground. He contends that the pleadings do not raise any such issue; that the allegations of the complaint as to that matter, are wholly immaterial; but, if material, they are not sufficiently denied to raise an issue.

As to the materiality of the allegations we entertain no doubt. The case differs but little, if at all, in principle, from *Lathop* v. *Bampton*, 31 Cal. 17, in which it was held that the due presentation of the claim, in that case, to the executors, was a prerequisite of the right to maintain an action against him.

Treating the allegation as a material one, was it sufficiently denied to raise an issue? The defendants in their answers "deny that on the ninth day of December, at said city and county, or elsewhere, the claim of the plaintiff for the sum of $36,000, * * * or the claim as in plaintiff's complaint set forth, or the claim upon which this action is founded, or any claim whatever, was duly presented to these defendants for allowance." It appears by the record that this was treated as a denial, sufficient to raise an issue upon the plaintiff's allegation of a presentation of his claim to the defendants. It is doubtless obnoxious to criticism, but, under section 475, Code Civil Proc., the defect must now be disregarded.

Other questions are discussed by counsel upon which it is unnecessary to express any opinion at this time.

Judgment and order affirmed.

We concur: MORRISON, C. J.; MCKINSTRY, J.; MYRICK, J.; THORNTON, J.

71 Cal. 330

LARKIN *v.* LARKIN. (No. 11,348.)

(*Supreme Court of California.* November 29, 1886.

HUSBAND AND WIFE—DIVORCE—APPEAL—WIFE'S COSTS.

Where, in an action by a husband for divorce, judgment is given against the defendant, and a motion by her for a new trial is denied, and she appeals from the judgment and the order, on motion for new trial, the court may, in its discretion, by special order made after final judgment, order plaintiff to pay the attorney of defendant a sum for costs of her appeal.

In bank. Appeal from superior court, Alameda county.

Appeal from special order, after decree of divorce, allowing wife's costs.

Thos. H. Smith and *Mastic, Belcher & Mastic*, for appellant. *Charles F. Hanlon*, for respondent.

SHARPSTEIN, J. This is an appeal from an order made after final judgment in an action of divorce. The judgment was in favor of the plaintiff, and the defendant appealed from it, and the order denying her motion for a new trial, to this court. After taking such appeal she applied to the court below for an order that the plaintiff pay to her (defendant) a reasonable sum

for costs and counsel fees with which to prosecute her said appeal. The motion was heard on the affidavits of the respective parties, and an order made that the plaintiff pay the attorney of the defendant $175 as costs of her said appeal. From that order this appeal is taken.

In *Ex parte Winter*, 11 Pac. Rep. 630, it was held that the superior court had the power to make such an order, and to enforce compliance with it. Appellant, on this appeal, insists that the facts before the court were insufficient to justify the order. As we view it, there is sufficient in the record to sustain the action of the court. Order affirmed.

We concur: MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J

71 Cal. 329

GRANT *v.* LAMORI. (No. 11,712.)

(Supreme Court of California. November 29, 1886.)

APPEAL—FILING TRANSCRIPT—EXTENSION OF TIME.

Where a party who has taken an appeal obtains the signatures of four of the justices to an order extending the time, before the day on which the time expired for filing a transcript of the record, but this order was not filed with the clerk, through inadvertence, until after the time expired, and after a notice of motion to dismiss the appeal was given, a motion to dismiss will be denied.

In bank. Appeal from superior court, Los Angeles county.

Motion to dismiss under rule 2, subd. 3.

H. Allen, for appellant. *Howard & Scott*, for respondent.

BY THE COURT. Motion to dismiss appeal. The 40 days within which to file the transcript expired on the seventeenth of June, 1886. On the nineteenth of June, no transcript having been filed, and no order of record extending the time, the respondent moved to dismiss the appeal. Before the seventeenth of June the appellant obtained the signatures of four of the justices to an order extending the time, but this order was not filed until after the notice of motion to dismiss was given; it was filed, however, on June 21st. We are satisfied that the omission of the appellant to file the order of extension with the clerk was through inadvertence; and, under such circumstances, we do not think the ends of justice would be subserved by enforcing a strict rule, and dismissing his appeal.

The motion is denied.

71 Cal. 331

HITCHCOCK *v.* HASSETT, Assignee, etc. (No. 8,403.)

(*Supreme Court of California.* November 29, 1886.)

LANDLORD AND TENANT—RENT—LIEN.

A landlord, in California, has no lien for rent reserved, or for the value of the use and occupation of the property leased; and an agreement made by a lessee of land and sheep, to deliver or ship wool to his lessor in payment of or as security for rent, creates no interest in or lien upon wool not shipped as against the lessee's assignee in insolvency. THORNTON, J., dissenting.

Commissioners' decision.

In bank. Appeal from superior court, Sonoma county.

James W. Oates, for appellant. *J. H. McGee*, for respondent.

SEARLS, C. This is an action to recover possession of personal property. A demurrer was interposed to the complaint, which was sustained by the court; and, plaintiff declining to amend, final judgment was entered in favor of defendant, from which plaintiff prosecutes this appeal.

The complaint shows that in 1878 plaintiff leased to one Arthur Thing, for a term of five years, certain premises in the county of Sonoma, with 1,300

sheep and other stock and property, at an annual rental of $1,540, payable one-half on the fifteenth of June in each year, and the remaining half on the first of November in each year. The lease provided that the wool sheared from the sheep should be delivered at Cloverdale by the lessee in the name of the lessor, plaintiff, to be sold by the latter, and the rent to be retained and the balance to be paid to the lessee.

In August, 1879, plaintiff, by a separate lease, let to Thing for three years, from May, 1879, 2,700 sheep additional, at an annual rental of $516, payable in May and November of each year. This last lease provided that the lessee should not remove the sheep from the ranch, and that the wool arising from the sheep should be marked on the ranch in the name of the lessor and shipped to him at Cloverdale or Healdsburg, as the lessee might elect.

The rent due plaintiff on the first of November, 1881, was $1,028. The lessee, Thing, sheared, and had on the ranch ready to deliver to plaintiff, 5,500 pounds of wool, when, on the twenty-ninth day of October, 1881, he (Thing) filed his petition in insolvency, and was duly adjudged an insolvent by the court. Defendant was appointed assignee in insolvency, took possession of all the property, and refused to deliver the wool to plaintiff upon demand, or to pay the rent due. The wool is of the value of $1,500. Plaintiff demanded judgment for possession of the wool, or the value thereof if possession could not be had; and, *second*, if not entitled to possession of the wool, that a lien be established thereon in his favor for the rent due, and that defendant, as assignee, be ordered to pay the sum of $1,208, and interest, out of the proceeds of the sale of the wool.

It is apparent from the foregoing statement that the sheep and other property were leased for a rent reserved or covenanted to be paid in cash, at stated intervals. No interest was retained by the lessor in the wool, but it was made a medium through which, when delivered to the lessor, payment of the rent was to be made. Under one of the leases the wool was to be sold by the lessor, and the rent to be retained out of the proceeds of the sale, and the balance to be paid to the lessee. The other lease is silent as to what disposition is to be made of the wool; but as the rent is fixed, and is payable in cash, it must be presumed it was to be delivered either in payment at its cash value, or as security for the payment of the rent due.

A landlord in this state has no lien for rent reserved, or for the value of the use and occupation of property. The plaintiff, under his lease, had no property in the wool, as such, until it was sheared from the sheep, and delivered to him, under one of the leases, and under the other until marked and shipped to him. The property was not of the character specified in section 2955 of the Civil Code as that upon which a valid mortgage, usually termed a chattel mortgage, could be made, without delivery of possession; and, had it been, there was no attempt to execute such a mortgage. It was not pledged, and could not have been pledged without delivery of possession to the pledgee or a pledge-holder. Civil Code, § 2988.

If we treat it as an agreement to pledge, and assume the complaint to be broad enough in its allegations to warrant a decree enforcing it as such, the case is not altered. An agreement to pledge, as distinguished from an actual pledge, creates no lien as against a creditor of the intended pledgeor, or as against his assignee in bankruptcy or insolvency.

Equity will not regard as done that which one has agreed to do, when to so regard it would be to the injury of third persons who have acquired rights before the execution of the agreement. Jones, Pledges, § 28. "An agreement to deliver property in pledge amounts to nothing as security. The pledgee acquires no right of property until delivery is actually made." "A delivery cannot be dispensed with by a written agreement that the party making the pledge will hold it as the bailee of the pledgee." Jones, Pledges, § 29, and cases cited.

It follows that the plaintiff had no such interest in the wool, or lien thereon, as entitled him to a recovery, or to a judgment establishing a lien thereon in his favor, against the defendant, as assignee in insolvency of Arthur Thing, the lessee, and the order sustaining the demurrer was proper, and the judgment appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

MCKEE, J., concurring in the judgment. THORNTON, J., dissenting.

71 Cal. 300

In re Estate of Crowey, Deceased. (No. 9,574.)

(*Supreme Court of California.* November, 1836.)

1. HOMESTEAD—RIGHTS OF WIDOW TO—CALIFORNIA—LEASE OF HOMESTEAD.
 In proceedings by a widow to have a homestead set apart to her out of her deceased husband's estate under the California law, it appeared as follows: During the husband's life-time the husband and wife recorded their joint homestead declaration, claiming a tract of land, and two houses thereon, as a homestead. Of this tract the larger part was at that time rented to a tenant, who farmed it, and occupied the farm-house under a lease from the husband's ancestor, the term of which was unexpired at decedent's death. The husband, till his decease, occupied the other house, with five acres of land adjoining it. *Held*, the widow was entitled to have set aside to her as a homestead, only the house in which she and her husband lived, together with the five acres on which it was situated.[1]
2. APPEAL—REVIEWING EVIDENCE—SETTING ASIDE WIDOW'S HOMESTEAD.
 The supreme court of California will review the evidence upon an appeal from a judgment confirming the appraiser's report in proceedings to set aside a widow's homestead.

Department 1. Appeal from superior court, Napa county.

Proceedings by widow to have a homestead set aside. Order confirming appraisers' report. Heirs appeal.

One G. W. Crowey, by his will, devised a farm of 185.73 acres to his son William H. Crowey, (the decedent in the case,) subject to the proviso that no part of his estate (which included other property) should be distributed until five years from his death; the income during that period to be applied to the support of his wife and children, and the payment of taxes and expenses. Before his death he erected a dwelling-house on a portion of said land for the use of said W. H. Crowey and his wife, Mattie, (the widow,) and permitted them to take up their residence therein. On October 13, 1882, said G. W. Crowey leased said farm, "excepting the house now occupied by William H. Crowey, with five acres of land adjoining said house," to one J. C. Meredith for the term of one year. This lease was in writing, and signed by G. W. Crowey and W. H. Crowey, and did not expire till after the death of W. H. Crowey. Under it Meredith farmed the land, and occupied the farm-house, till after the death of W. H. Crowey. In the same month said G. W. Crowey died. On the twenty-fourth March, 1883, W. H. and Mattie Crowey, while living in the new house before mentioned, selected said farm as their homestead, and recorded their joint homestead declaration. On the seventh June, 1883, while residing in the said house upon said land, said W. H. Crowey died. The widow obtained a judgment of the superior court affirming the appraiser's report, setting aside to her as a homestead the house in which she and her husband lived, and 125 acres out of the land above described, from which judgment Jane Crowey, widow of said G. W. Crowey, appeals.

[1] See King v. Goetz, (Cal.) 11 Pac. Rep. 656, and note.

F. E. Johnston and *Thos. P. Stoney*, for appellant. *Freeman, Bates & Rankin* and *Joy & Ham*, for respondent.

McKINSTRY, J. The appeal is from a judgment confirming the report of appraisers setting apart a homestead, and was taken within 60 days. We can review the evidence. Code Civil Proc. 939.

W. H. and Mattie Crowey, when they filed their declaration of homestead, did not reside in a dwelling-house "situated" on any other than the five-acre tract mentioned in the findings and evidence, within the meaning of section 1237 of the Civil Code. The adjoining 180-acre tract had been leased by the ancestor of W. H. Crowey for an unexpired term, and was in the exclusive possession of Meredith, the lessee, who resided in the dwelling-house on the demised premises.

It is urged by respondent that, when land is occupied as a homestead, the fact that a part is rented out, or is used for business purposes, does not vitiate the homestead, nor limit the area of land protected by it. The 180-acre tract was never occupied by the homestead claimants, and it is not necessary here to decide what would be the effect of leasing a part of the actual homestead after the homestead should be declared.

Two California cases are cited as supporting the judgment of the court below. Of these, *Ackley* v. *Chamberlain*, 16 Cal. 181, was a case where the homestead claimant resided on a tract of 160 acres, using the whole, with the barns and outhouses, for farming purposes. The principal occupation of the claimant being the working of the farm on which he resided with his family, it was held that the mere fact that he also kept a tavern at his residence did not deprive him of his right to claim as a homestead the property occupied by himself and family before he used it as a hotel. Under the circumstances, the accommodation of travelers by a farmer was said not to be inconsistent with the main purpose of taking up the 160 acres, and the erection of the dwelling-house. In *Ornbaum* v. *His Creditors*, 61 Cal. 457, it was held by a majority of the justices of this court that the claimant had sufficient possession and user of all the land described in his homestead declaration when he filed it.

Section 1237 of the Civil Code defines the homestead as consisting of "the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." The homestead is selected by a declaration in which the claimant is required to state that he or she "is residing *on the premises* [described,] and claims *them* as a homestead." Civil Code, 1263. The act of 1860 exempted from forced sale, etc., "the homestead, consisting of a quantity of land, together with the dwelling-house thereon, * * * to be selected by the husband and wife, or either of them," etc. The selection was made by a declaration, in which the claimant was required to state that "he is, at the time of making such declaration, residing with his family on the premises, and that it is his intention to use and claim the same as a homestead."

In *Gregg* v. *Bostwick*, 33 Cal. 221, it was held, in accordance with all the decisions, that the word "homestead," in the statute of 1860, was used in its ordinary and popular sense. "Whatever is used, being either necessary or convenient, as a place of residence for the family, as contradistinguished from a place of business, constitutes the homestead." The use or occupation of the land must be by those residing in the house, and must be appropriate to and connected with the occupation of the dwelling-house. It is impossible to conceive of land constituting part of a "homestead" (as the term is commonly employed) of a family residing in a certain dwelling-house, which is not used at all by those living in the dwelling-house, and the right to use or occupy which is in no manner annexed to or connected with the occupancy of the house, but which, to the contrary, is used and possessed by the occupants

of another dwelling-house, who alone have the right to the use and possession of the land, and is part of the "home" of those residing in *that* house.

As was said in *Gregg* v. *Bostwick:* "The written declaration for which the statute provides does not of itself impress upon the land the quality of a homestead. It was not intended for any such purpose, but merely for the purpose of a public record of what is in fact the homestead. The premises to be described in the declaration are such, and only such, as the parties are residing on and using as a homestead." And in *Mann* v. *Rogers*, 35 Cal. 319, it is said that, when part only of the land described in the homestead declaration is actually used and appropriated as the "home" of the family, the remainder, not so used and appropriated, constitutes no part of the homestead claim. To the same effect is *Estate of Delaney*, 37 Cal. 179.

It is urged that cases decided while former homestead acts were operative are not authority since the last provisions of the Code relating to the subject took effect. But the differences of the language of the various statutes are not such, in our view, as to affect the decision of the question we have been considering.

In *Aucker* v. *McCoy*, 56 Cal. 527, it was held that, under section 1263 of the Civil Code, to constitute a valid homestead, the claimant must actually reside on the premises when the declaration is filed; that is, as applied to the facts of that case, his "residence," in the popular signification of the word, must extend to the land claimed to constitute part of the homestead. We say that a man resides on a *farm*, or on a *lot*, by which is meant a farm or lot which has a relation, well understood, to the house in which he makes his home. In *Tiernan* v. *His Creditors*, 62 Cal. 289, it was decided that where one lived in half of a double house, the other half having been always occupied by his tenants, the half so occupied was no part of his homestead. *Dorn* v. *Howe*, 52 Cal. 635, seems to have recognized the rule that a claimant must "reside" on the "premises" claimed as a homestead.

None of the cases heretofore decided in this state go to the point of holding that one can claim, as part of his homestead, land entirely disconnected from and having no relation, as to its use or possession, with the occupancy of the dwelling-house. If the question were entirely a new one, we would have no difficulty in construing the sections of the Code as excluding from the homestead, land which was not in the possession nor under the control of the claimant when the declaration was filed, but was then actually possessed and controlled by another, claiming a right to the exclusive possession and control of it, and which was appurtenant to *his* dwelling-house.

There should have been set aside to Mattie Crowey, as a homestead, the house in which she and her husband resided when their declaration was filed, together with the tract of about five acres on which the house is situated.

Judgment reversed, with direction to the court below to enter a judgment in accordance with the foregoing opinion.

We concur: MYRICK, J.; THORNTON, J.

(71 Cal. 349)

HEYWOOD, Ex'r, etc., *v.* BERKELEY LAND & TOWN IMP. ASS'N and others.
(No. 8,296.)

(*Supreme Court of California.* December 1, 1886.)

FERRY—LEASE—FORFEITURE—CONTINUOUS USE.

In an action for forfeiture of a lease of a wharf for covenant broken, a finding that "the leased premises have been used, in good faith continuously, for the usual and ordinary business of a ferry to and from San Francisco," will not be set aside, where it appears that the defendant's ferry-boat, being levied upon by a United States marshal under execution against defendants, failed to run for a month, and that in the interval a schooner ran irregularly, and carried all the freight that was brought for ferriage, and that the money paid as rent was nominal; the object of the lease being to enhance the value of neighboring lands of lessor and lessee.

In bank. Appeal from superior court, Alameda county. On rehearing. See S. C. 11 Pac. Rep. 246.

Action of *assumpsit*. Judgment for plaintiff. Defendant appeals.

The plaintiff seeks to enforce the forfeiture of a lease for breach of covenant by the lessee. The lease is of a wharf or landing-place at Berkeley. The lessor and lessee are both owners of lands around the demised premises. The lease contained a covenant that "the leased premises shall be used in good faith, continuously, for the usual and ordinary business of a ferry to and from the city and county of San Francisco, and shall not be used for any other purpose whatever." The consideration was one dollar; the object of the lease being to establish a ferry which would enhance the value of the neighboring property of the parties. At the time of the leasing, the lessee had been using the leased premises in connection with a ferry established by it, and was under a continuous contract with the defendant the Standard Soap Company to land, at the wharf, goods of that company. The Standard Soap Company has its factory near the wharf, and is doing business to the extent of nearly $300,000 per annum. At the time of the leasing, April 4, 1877, the lessee had expended $15,000 upon the leased premises, and the service of the ferry was performed by the lessee with a steamer which had cost the lessee $45,000. The lease is for a term of 10 years, with covenant of renewal for another term of 10 years. On April 1, 1880, the steamer of the lessee, after having made one trip, was seized by the United States marshal under process from the United States district court, and was retained in the custody of the marshal. During this interval she made no trip. April 29, 1880, she was sold to defendant Thomas, the president of the Standard Soap Company. She resumed her trips on the same day, and has ever since regularly performed the ferry service. On the same twenty-ninth day of April the lease was assigned to the president of the Standard Soap Company. While the steamer was in the hands of the marshal, a schooner, Nicotine, ran to the wharf in question, whenever weather permitted,—was sometimes gone a week, sometimes half a day, according to the wind and weather. She made seven or eight trips in all. She carried no passengers, and only freight from the Berkeley side; she had no regular place to run from on the San Francisco side. Her master had no contract to do the ferry business while the steamer was tied, but ran to that wharf of his own free will, and as a matter of money; doing other business, and going off to other landings. As soon as the steamer resumed her trips all the regular freight business returned to it, and from that time "this business has improved." Under these circumstances the court below found, as an ultimate fact, that "the leased premises" had "been used, in good faith, continuously, for the usual and ordinary business of a ferry."

Selden S. & Geo. T. Wright, for appellant. *Edward J. Pringle*, for respondent.

By the Court. The court below found "the leased premises in the complaint described have, since the first day of April, 1880, been used, in good faith, continuously, for the usual and ordinary business of a ferry to and from the city and county of San Francisco, and for no period since the first day of April, 1880, were the leased premises not used for the business or the purpose of a ferry;" and, as conclusion of law, the court found that the said lease was not and is not forfeited; that the defendants do not unlawfully withhold or detain the said leased premises from the plaintiff. We are of opinion that the finding of fact is justified by the evidence, and that no forfeiture was incurred. Judgment and order affirmed.

2 Cal. Unrep. 696

AYLESWORTH *v.* DEAN. (No. 11,327.)

(*Supreme Court of California.* August 28, 1886.)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—EXEMPT PROPERTY—FINDING.

An assignment for the benefit of creditors, that is shown not to include all of the debtor's property, will be held void, unless it is further shown that the omitted property is exempt from execution.[1]

Department 1. Appeal from superior court, county of Plumas.

Plaintiff is the assignee of Tremain & Co., for the benefit of their creditors, and brings this action against defendant, as sheriff, for the recovery of property alleged to have been wrongfully taken from his possession, as such assignee, in pursuance of an attachment against Tremain & Co. Defendant claims that the assignment is invalid because it does not include all of the assignor's property. It seems that all of the debtor's property is not, in fact, included in the assignment, but plaintiff claims that such as is omitted is exempt by law. The findings show that the assignment does not include all of the property, but do not show that the omitted property is exempt. Judgment for plaintiff. Defendant appeals, assigning as error the insufficiency of such finding to sustain the judgment.

A. L. Shinn, *E. T. Hogan*, and *W. W. Kellogg*, for defendant and appellant.

R. H. F. Variel and *M. Ball*, for plaintiff and respondent.

BY THE COURT. It does not appear from the findings that the property omitted from the assignment was in fact exempt from execution.

Judgment reversed, and cause remanded.

[1] As to fraudulent reservations in assignments for benefit of creditors, see McReynolds v. Dedman, (Ark.) 1 S. W. Rep. 552, and note.

71 Cal. 335

EMERSON *v.* BERGIN. (No. 9,487.)

(*Supreme Court of California.* November 30, 1886.)

1. WATERS AND WATER-COURSES—IRRIGATING DITCH—DIVERSION OF WATER—TRESPASS—STRANGER—INJUNCTION.

In 1865 one R. and E. owned farms upon a stream, R.'s farm being higher up the stream than E.'s. In that year, under an agreement with other owners, R. and E. went above their farms, and constructed a dam across the stream, and, by a flume and pipes, diverted its waters to their respective farms. E. paid one-half the expense of the dam and flume down to the point where R. used the water, and all of the expense thence on, to his own farm, and each of them took one-half of the water diverted. In 1868, R. sold his farm to D., and, in 1872, D. sold to P., the wife of B. From 1865 until June, 1881, the water flowed through the flume and pipes, and was distributed to the two farms, one-half to each, without objection or complaint from any one. In June, 1881, E. repaired the flume, and placed upon the land of P. a distributing cistern, into which all of the water was conducted. To distribute the water from the cistern, he inserted in the side of it two wooden pipes to carry the water, and then covered and locked the cistern up. On the fourteenth of July, 1881, B., without notice to E., so far as appears, and without any direction or authority from P., his wife, broke open the cistern, and plugged up the pipe leading to E.'s farm, thereby obstructing the flow of any water through it. *Held*, that B. had no greater rights in the premises than a stranger, and should be enjoined from any further interference with the cistern.

2. APPEAL—WHEN TAKEN—WITHIN A YEAR OF JUDGMENT.

Where an appeal from a judgment is not taken within one year from the date of rendition of the judgment, it should be dismissed.

Commissioners' decision.

Department 2. Appeal from superior court, Santa Clara county.

Action to restrain the obstruction of the flow of water. Judgment for plaintiff. Defendant appealed. The facts are stated in the opinion.

S. O. Houghton, for appellant. *G. A. Heinlen*, for respondent.

BELCHER, C. C. This action was commenced to obtain a perpetual injunction restraining the defendant from obstructing the flow of water into a pipe leading from a distributing cistern, on land owned and occupied by the wife of defendant, to land owned and occupied by plaintiff. By his answer defendant admitted that he had obstructed the flow of water into the pipe, as alleged in the complaint, and then set up certain facts to show that he was justified in so doing. At the trial, after the first witness was sworn and had commenced giving his testimony, the defendant objected to the admission of any testimony under the complaint; but no reason was stated why the testimony was not admissible, and the objection was overruled. At the conclusion of the trial, findings were filed and judgment entered in favor of plaintiff. The defendant moved for a new trial, and, his motion being denied, appealed from the judgment and order.

It is now claimed that the complaint did not state facts sufficient to constitute a cause of action, and that the court erred in admitting any testimony in support of it. Doubtless the complaint might have been improved in some respects, but, in the absence of a demurrer, we think it sufficient, and the ruling proper.

The court found that plaintiff had complied with the terms of the agreement made between him and defendant in November, 1879, and there was testimony tending to support the finding. It is argued, however, for the appellant, that the defendant had no interest in the land, and so the agreement, though executed by him, conferred no rights whatever on the plaintiff. Assuming this to be so, it becomes unnecessary to consider what rights the agreement would, if valid, have conferred upon the plaintiff, and the case may be decided upon the other facts presented by the record.

The other facts are as follows: In 1865 one Robert McCubbin and the plaintiff owned farms situate upon a stream known as the Arroyo Permanente,

McCubbin's farm being higher up the stream than the plaintiff's. In that year, under an agreement made with other owners of land upon the stream, McCubbin and plaintiff went above their farms, and constructed a dam across the stream, and, by means of a flume and pipes, diverted its waters to their respective farms, to be there used for domestic and other purposes. The plaintiff paid one-half of the expense of the dam and flume down to the point where McCubbin used the water, and all of the expense thence on to his own farm, and each of the parties took one-half of the water diverted. In 1868, McCubbin sold his farm to George Donner, and, in 1872, Donner sold to Francisca Price, who is now the wife of defendant, and, as defendant alleges in his answer, "is now the owner and in the exclusive possession" of the said property. From 1865 until June, 1881, the water flowed through the flume and pipes, and was distributed to the two farms, one-half to each, without objection or complaint from any one. In June, 1881, the plaintiff repaired the flume, and placed upon the land of Mrs. Bergin a distributing cistern, into which all of the water was conducted. To distribute the water from the cistern he inserted in the side of it, and on the same level, two wooden pipes of the same size and capacity to carry water, and then covered and locked the cistern up. One of the pipes took water to the point where Mrs. Bergin used it, and the other to the farm of plaintiff. The water continued to run through these pipes until the fourteenth day of July, 1881, and the court finds that all the water which came into the cistern "would be and was equally divided, and one full half of the water so flowing into said cistern, and so divided, would and did flow through one of said pipes to and into an open flume, out of and from which the defendant could use the same for his, or for his and his wife's, own purposes." On the last-named day the defendant, without notice to the plaintiff, so far as appears, without any direction or authority from his wife, broke open the cistern, and plugged up the pipe leading to plaintiff's farm, thereby obstructing the flow of any water through it. This action was commenced on the next day.

Conceding, now, that plaintiff had only a license to conduct water across the land of defendant's wife, which was subject to be revoked at any time, still no mere volunteer had any right to interfere with his works. Mrs. Bergin, and not the defendant, owned the property, and, if the plaintiff had only a license, she could have revoked it. So, too, if the cistern was not placed upon her land with her consent, and she was not satisfied with the method of distributing the water, she could have required the cistern to be removed. But the defendant had no such power. He does not allege or pretend that he was acting by her direction, or under her authority, and hence he had no greater rights in the premises than a mere stranger. The court below acted rightly, therefore, in enjoining him from further interference.

The appeal from the judgment was taken more that a year after the judgment was entered, and should be dismissed, and the order denying a new trial should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order affirmed.

71 Cal. 325

TIPTON and Wife *v.* MARTIN and others. (No. 11,109.)

(*Supreme Court of California.* November 29, 1886.)

HOMESTEAD—ABANDONMENT—REMOVAL—ST. CAL. 1860, §§ 1, 10, p. 311.

A homestead created under sections 1 and 10, St. Cal. 1860, p. 311, cannot be abandoned by the mere fact of a removal from the homestead premises, with or without the intent of not returning to them.[1]

Department 2. Appeal from superior court, Tehama county.

Action to enjoin the sale of land on the grounds that the premises constituted a homestead, and were exempt from execution. Judgment for plaintiffs. Defendants appealed. The facts are stated in the opinion.

Chipman & Garter, for respondents. *John F. Ellison* and *W. Henry Jones*, for appellants.

MCKEE, J. It appears from the record in this case that defendant Martin, as the sheriff of Tehama county, had levied on a parcel of land, as the property of the plaintiff John C. Tipton, by an execution issued upon a judgment against said Tipton in favor of V. P. Baker, one of the defendants herein; and, being about to sell the land under said execution, the plaintiffs commenced the action in hand to enjoin the sale on the ground that the premises constituted their homestead, and were exempt from execution.

The defendants contend that the land, although selected by the plaintiffs as their homestead, was not exempt from execution, because the plaintiffs had relinquished their homestead right thereon by abandonment. This contention was made upon the following facts alleged by the defendants in their answer to show abandonment: "That in the month of ———, 1878, the plaintiffs removed from said premises and from this state, and freely and voluntarily moved into the territory of Montana with the intention of remaining there and residing there permanently, and without any intention of returning again to this state, or upon said premises, and have since said month of ———, 1878, continuously resided in said territory of Montana, and do now reside therein, and since they moved into said territory of Montana the said John C. Tipton has taken the initiatory steps to acquire title therein to United States land under and by virtue of the United States homestead laws, and the said application for said land under said United States homestead laws is still pending."

The plaintiffs demurred to the sufficiency of the facts as thus pleaded. The demurrer was sustained by the court. Defendants declined to amend their answer, and judgment final was entered against them, from which they have appealed; and the only question arising on the appeal is whether the facts, as set forth in the answer, are sufficient in law to constitute an abandonment of the homestead.

Under the homestead law of 1851 a homestead right was founded upon occupancy of the homestead premises by the family. Such an occupancy constituted presumptive evidence of the appropriation of the premises as a homestead, (*Cook* v. *McChristian*, 4 Cal. 26;) and, as it was founded upon occupation, cessation of the occupancy constituted an abandonment. Hence removal from the premises was considered as presumptive evidence of abandonment. *Taylor* v. *Hargous*, Id. 268. Under that law, therefore, abandonment was a question of act and intent, ascertainable and determinable from evidence, like any other fact in a proceeding. If removal was only for a temporary purpose, and there was no intent to remain away permanently, it would not constitute abandonment; but, if the act of removal was coupled with an intent never to return, abandonment was considered as complete.

[1] See Honaker v. Cecil, (Ky.) 1 S. W. Rep. 392; Bowman v. Watson, (Tex.) 1 S. W. Rep. 273.

Benedict v. *Bunnel*, 7 Cal. 246; *Moss* v. *Warner*, 10 Cal. 296; *Guiod* v. *Guiod*, 14 Cal. 506; *Harper* v. *Forbes*, 15 Cal. 202. Thereby the homestead right was destroyed, and the land, upon which the right had existed, became subject to execution creditors of the owner thereof.

That continued to be the law of the homestead and of its abandonment until the year 1860. In that year there was a statute passed on the twenty-eighth of April which changed the character of the homestead. Instead of being a right founded upon occupancy by the family, a homestead created under its provisions was declared to be an estate in joint tenancy, which upon the death of either of the spouses, descended to and vested absolutely in the survivor, subject to the power of the probate court to set it apart for the benefit of the survivor and the legitimate children, (sections 1, 10, St. 1860, p. 311; *McQuade* v. *Whaley*, 31 Cal. 526; *Estate of James*, 23 Cal. 416; *Barber* v. *Babel*, 36 Cal. 11; *Watson* v. *His Creditors*, 58 Cal. 556; *Herrold* v. *Reen*, Id. 443;) and, as an estate in joint tenancy, it could not be transferred or abandoned except according to the provisions of the law under which it was created. Now, the statute of 1860 provided that, in the case of a homestead selected by a husband and wife under its provisions, the only evidence of abandonment should be a declaration of abandonment signed by the husband and wife, and acknowledged by them and recorded as a conveyance of real property. Section 2, St. 1860, p. 312.

The homestead in question was selected on the sixeenth of January, 1862, upon common property of the claimants; and the selection protected the land, as against subsequent creditors, as much as if the claimants were vested with the fee-simple title. *Brooks* v. *Hyde*, 37 Cal. 373. It is well settled that title to real property cannot be abandoned. Occupancy of the property is not, therefore, necessary to preserve the right. The right is not barred or destroyed except by an adverse holding for the statutory time necessary to create the presumption of an adverse title.

As an estate in joint tenancy with the right of survivorship, the homestead created under the act of 1860 could not be abandoned by the mere fact of a removal from the homestead premises with or without the intent of not returning to them. "A homestead," says the Code, which embodies the statutory provisions of the homestead laws of 1860 and 1862 upon the subject, "can be abandoned *only* by a declaration of abandonment, or a grant thereof, executed and acknowledged by the husband and wife if the claimants are married, or by the claimant if unmarried;" and "the abandonment is effectual *only* from the time it is recorded." Sections 1243, 1244, Civil Code. Abandonment of a homestead cannot be proved in any other way. As we have said: "The homestead having once been regularly created out of a parcel of land in accordance with the statute, the estate so created continues to exist until put an end to in the mode pointed out by the statute. * * * Under our law we know of no abandonment of the homestead except in the statutory mode." *Porter* v. *Chapman*, 65 Cal. 365; S. C. 4 Pac. Rep. 237.

It follows that the court below properly sustained the demurrer, and there is no error in the judgment appealed from.

Let the judgment be affirmed. So ordered.

We concur: THORNTON, J., SHARPSTEIN, J.

71 Cal. 338

TULLY *v.* TULLY. (No. 8,492.)

(*Supreme Court of California.* November 30, 1886.)

JOINT TENANTS AND TENANTS IN COMMON—ESTOPPEL—BY DEED.

A deed of a squatter's interest in what was supposed to be public land, made to two men, one of whom paid the purchase money, the object of the joint deed being to use the name of the gratuitous grantee as a pre-emptor in procuring title from the United States to so much of the land as should be in excess of 160 acres, does not create a tenancy in common; and, in an action by the gratuitous grantee against his co-grantee to recover an undivided one-half of the lands described in the deed, the latter is not estopped, by that deed, from setting up as a defense a good title subsequently acquired by him from the true owners of the land. MCKINSTRY and MCKEE, JJ., dissenting.

In bank. Appeal from superior court, Santa Clara county.

See former opinion in 9 Pac. Rep. 841.

The facts in this action, as found by the court below, are that on November 11, 1856, the defendant and respondent purchased of Martin Murphy, the person in possession, his interest in 236 acres of land in Santa Clara county, California; paying therefor $900 from his private funds. The deed was made to plaintiff and appellant and defendant. The deed was delivered to the defendant, who also received the exclusive possession of the land. Both defendant and his grantor supposed, at the time the deed was made, that the land was a part of the public domain; and the object of the joint deed was to use the plaintiff's name as a pre-emptor in procuring title from the United States to so much of the land as should be in excess of 160 acres. Defendant continued in the exclusive possession of the land, from the time of the purchase from Murphy, until the commencement of this action, with the exception of the period from the fall of 1859 to the fall of 1860, when plaintiff occupied it, under a verbal agreement to farm it for one-fourth the product as rent. On the nineteenth November, 1858, one Antonio Chaboya received a patent from the United States of the rancho "Yerba Buena," which included this land. On the twenty-seventh February, 1861, defendant purchased the legal and equitable title to the land in dispute from Chaboya's grantees, and had the conveyance properly recorded March 9, 1861. He paid $4,400 for that title. Plaintiff has never offered to pay to defendant any portion of that sum, and has never requested defendant to convey to him any portion of or interest in said premises. At the trial judgment was entered for defendant. Plaintiff appeals.

W. G. Lorigan and *S. F. Lieb*, for appellant. *L. Archer*, for respondent.

THORNTON, J. This is an action of ejectment to recover a parcel of land in Santa Clara county. When the first purchase was made in 1856, the whole purchase money ($900) was paid by the defendant, John Tully. Under the purchase John Tully took and received from his vendor and grantor the exclusive possession of the land in suit. In pursuance of this purchase the deed was made by procurement of John Tully to the plaintiff, Owen Tully, and himself. Under this purchase of 1856, no title whatever was acquired. The land bought was at that time supposed, both by John Tully and his grantor, to be public land. This was not so. The land was part of a Mexican grant formerly made to Antonio Chaboya, to whom a patent including the premises was regularly issued by the United States in November, 1858. In February, 1861, John Tully acquired by a proper conveyance the true title to this land from the vendees of Chaboya, paying from his own funds therefor the sum of $4,400.

The history of the possession is correctly given in a dissenting opinion herein drawn up by Justice MCKEE. It appears that John Tully has been in the exclusive possession of this land, claiming the same as his own, for about 24 years prior to the commencement of this suit, and, since the purchase of

the true title in 1861, plaintiff has never offered to pay to defendant any portion of said sum of $4,400, and has never requested defendant to convey to him any portion or interest in the premises, nor has he ever attempted or offered to enter into possession of this land, or claim any right to the possession thereof, until one year next before the commencement of this action.

In this action, which is ejectment, the paramount legal title usually prevails. This legal title is with defendant, and must prevail, unless the defendant is prevented by law from availing himself of it.

It is urged on behalf of plaintiff that he is so prevented; that he is estopped from using such title, because, when he acquired his title, in 1861, he was in possession as tenant in common with plaintiff. We do not think he was really so in possession. The plaintiff, though apparently tenant in common, really was not. He was a mere trustee of defendant for such title as was acquired by the purchase and conveyance made in 1856. The defendant, as appears from the above statement, paid the whole purchase money upon the purchase of 1856, and caused the deed thereon to be made to plaintiff and himself. The plaintiff's tenancy in common amounted only to holding the legal title in trust for defendant, which title the defendant had the undoubted right, when he made the purchase, in 1861, and received a conveyance thereunder, to have had conveyed to him by plaintiff. Plaintiff, being a mere naked trustee for defendant, would not, in offering to pay one-half of the purchase money under the purchase of 1861, be entitled to have any portion of the true title then purchased conveyed to him. Equity would not clothe plaintiff with any such right. His being a trustee for the defendant would rebut such equity. Under these circumstances, though the action is ejectment, we must hold that defendant is not estopped from availing himself of the true title to protect his possession.

We think the judgment and order should be affirmed, and it is so ordered.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.

MCKINSTRY, J. I dissent. It was held in *Olney* v. *Sawyer*, 54 Cal. 379, that, in an action at law by one tenant in common against another, to be let into the possession of demanded premises, the defendant cannot justify an ouster of the plaintiff by setting up an outstanding title—even if it be the true title—purchased by him while in possession under the common title. As this case is presented by the pleadings, the appeal must be determined by reference to the strictly legal rights of the respective parties. So regarding it, it was the duty of the defendant to let the plaintiff into the common possession. He might then have asserted his paramount legal title in a separate action.

It was decided by the former supreme court of New York, in 1841, that when a parent having a possessory title to lands dies in possession, leaving several children his heirs at law, who succeed to such possession, it is not competent for one of such heirs, who has obtained exclusive possession of the whole of the premises, to defeat a recovery, by his co-heirs, of their proportional parts or shares, by setting up a title acquired from the *owners* of the land. He must surrender possession to his co-heirs, and then bring ejectment. NELSON, C. J., said: "One of the co-heirs, having derived his possession from the common ancestor, as well as through his co-heirs, is disabled, while standing on this possession, from disputing their title. I do not deny that the title thus set up may be valid, nor but that the party may avail himself of it after surrendering this possession. In a court of law he clearly could. There might be considerations existing between the co-heirs that would lead a court of equity to declare the purchase to have been made for the benefit of all upon proper terms." *Phelan* v. *Kelley*, 25 Wend. 389. In the case at bar the plaintiff and defendant entered into the possession, as tenants in com-

mon, under a title derived from the same source; the defendant holding for the plaintiff to the extent of the latter's interest.

Under our system the equitable considerations referred to by Chief Justice NELSON, could be alleged in a cross-complaint; and if it appeared, for example, that the co-tenant who had been let into the possession by the purchaser of the outstanding title had paid or tendered, within a reasonable time, his proportionate share of the cost of acquiring the true title, (or elected with reasonable diligence to participate in the purchase,) equity might hold the purchase to have been made in part for his benefit. *Mandeville* v. *Solomon*, 39 Cal. 125.

But, even if it should be made to appear that the party had indicated his intention, with reasonable promptitude, to participate in the purchase of the true title, there might be controlling equities which would prevent him from obtaining a decree for a conveyance of such title to an aliquot portion. Thus, in the case at bar, it would seem that the present plaintiff had but the naked legal conveyance to an undivided moiety of the original possessory title; the defendant having paid the whole of the purchase price. If, in an action brought by the defendant here to recover the whole possession after letting plaintiff into the common possession, the defendant in such action should rely upon his equitable right to the benefit of the true title on payment of his share of the purchase money, and it should be made to appear that he had neglected and refused to pay to the plaintiff therein his part of the original purchase,—the purchase of the possessory title,—it may be a court of equity would refuse a decree for a conveyance of any portion of the true title. It is apparent, too, that the issues might be complicated by questions as to the validity of a purchase made in part in the name of Tully, (plaintiff herein,) with a view to securing for the present defendant the government title to more land than he was authorized to acquire directly under the statutes of the United States. It is enough to say that these matters cannot be gone into under the pleadings in the present action.

If facts exist (independent of the conveyance of the true title to him) which give the defendant a perfect equity on which he could defend his exclusive possession in the present action of "ejectment," those facts have not been pleaded herein. It is settled that to establish such a defense in ejectment the facts constituting the perfect equity must be alleged in the answer as fully as they are required to be in a cross-complaint. *Arguello* v. *Bours*, 8 Pac. Rep. 49; *Kentfield* v. *Hayes*, 57 Cal. 409. As I understand it, the defendant here has been given all the benefit of a decree declaring a resulting trust in his favor in land, to which he cannot deny the plaintiff has the legal title, without any pleading on which such decree could be based.

It may be said that, to prevent circuity of actions, the defendant here should be permitted to retain the exclusive possession. Why compel him to let the plaintiff into the possession only that the plaintiff may be excluded again under a judgment in an action brought by the present defendant? But, *first*, it may be that in such new action the present plaintiff would be held entitled to participate in the true title; *second*, on authority of *Olney* v. *Sawyer*, *supra*, the defendant cannot in this action rely on his acquisition of the paramount title; *third*, the same objection might be made in every case where the rule applies that a tenant cannot dispute his landlord's title.

As was said in *Phelan* v. *Kelly*, *supra*: "The rule of law that a person coming into possession of lands under the agreement or license of another cannot be permitted to deny the title of the latter, when called upon to surrender, is of almost universal application. Even if he had a valid title *at the time*, he is deemed to have waived it, and, as between the parties, to have admitted title in the person under whom he entered;" citing cases.

Of course, one of two co-tenants may oust the other, and acquire the exclusive title by adverse possession. But the statute of limitations was not

pleaded herein, and the plaintiff objected to evidence tending to prove the defendant's adverse possession on the ground that the same was irrelevant, incompetent, immaterial, and not pertinent to any issue in the case. Moreover, if the limitation had been pleaded, the transcript contains no finding of the fact that the defendant has had adverse possession for the statutory period, nor any finding which includes a finding of adverse possession. As a conclusion of law from preceding findings of fact, the court below held that the plaintiff was barred by sections 318 and 319 of the Code of Civil Procedure, and the bill of exceptions expressly recites that no other facts were proved than those set forth in the five findings. The facts stated in the five findings do not establish adverse possession, for the reason, among others, that there is no statement that the defendant has paid any taxes on the demanded premises, or that no taxes were assessed thereon.

McKEE, J. I dissent. The action is one at law in which the plaintiff asks to be let into possession of a tract of land containing about 236 acres, in which he claims to be a tenant in common with the defendant. The title asserted by the plaintiff to an undivided one-half of the land is derived from a deed made to himself and the defendant on the eleventh of November, 1856. Under that deed defendant entered into the exclusive possession of the land, and occupied it exclusively until the fall of the year 1859, when he delivered possession to the plaintiff, who entered upon the land and cultivated it, during the farming season of 1860, upon an arrangement with the defendant to cultivate the same on shares. In November, 1860, the plaintiff withdrew from the possession, and the defendant re-entered, and continued to exclusively occupy and enjoy the use of the land. Meantime the land was claimed to be within the boundary lines of a Mexican grant which had been finally confirmed to the claimant, to whom the United States issued a patent for the land; and on the twenty-seventh of February, 1861, the defendant, being in possession, acquired by purchase the outstanding patent title by a deed which he took in his own name, and caused to be recorded on the thirteenth of March, 1861; and from the date of the deed until the commencement of this action—a period of 24 years—he has been in the actual exclusive possession of the land.

Upon these facts the court below held that the defendant, having been continuously in the actual and exclusive possession of the land, claiming to be the owner thereof in hostility to the plaintiff, was the legal and equitable owner, and "that any and all right of the plaintiff, if any he ever had, was barred by the provisions of sections 318 and 319 of the Code of Civil Procedure, before the commencement of this action, and that defendant is entitled to judgment for his costs." I think the decision is erroneous.

The defendant did not claim by his answer to have derived any title to the land from an adverse possession of the same sufficient to give him title under the statute of limitations. The answer contained (1) a general denial; (2) affirmative allegations of seizin in fee for over 20 years; (3) allegations that the cause of action was barred by the provisions of section 319 of the Code of Civil Procedure; and (4) that the cause of action did not accrue to the plaintiff within five years before the commencement of the action. These were the only issues made by the pleadings.

Now, as plaintiff and defendant originally acquired title to the land in common, the actual and exclusive possession thereof by defendant did not affect the plaintiff's right; for defendant's possession as a tenant in common with the plaintiff, in whatever title they had to the land, was the possession of the plaintiff. *Waring* v. *Crow*, 11 Cal. 367; *Knox* v. *Marshall*, 19 Cal. 617; *Colman* v. *Clements*, 23 Cal. 245; *Owen* v. *Morton*, 24 Cal. 373; *Miller* v. *Myle*, 46 Cal. 535. That possession continued while the relation of tenants in common existed; and the legal presumption is that the relation continued to exist

until the defendant ousted and disseized the plaintiff, by notice, express or implied, that he claimed the land adversely to the plaintiff, or by acts and declarations equivalent to notice of such a claim. There was no evidence, and there is no finding, that defendant, in or by his actual possession, ever ousted and disseized the plaintiff. The basis of the decision and finding is the fact of 24 years of exclusive actual possession by the defendant. But that possession, held by the defendant as a tenant in common with the plaintiff, did not divest the plaintiff of his rights in the land, or vest absolute title to the land in the defendant, either by the purchase of an outstanding title or under the statute of limitations.

There is no doubt that a tenant in common, in exclusive actual possession of land held in common may buy in an outstanding title, and take a conveyance thereof to himself alone; but the purchase does not *per se* dissolve the tenancy in common between himself and his co-tenant. The title acquired inures to the benefit of both. The general rule is that a tenant in common who buys in an outstanding title holds it in trust for his co-tenants. *Mandeville* v. *Solomon*, 39 Cal. 134. The mere fact of the purchase does not affect their legal relation; nor is it affected by mere seizin and possession of one after the purchase, however long continued; nor does such a possession constitute an adverse possession which sets in motion the running of the statute of limitations. There can be no adverse possession against a co-tenant out of actual possession until ouster and disseizin. The tenant in common out of actual possession has the right to assume that the actual possession of his co-tenant is his possession, and is held under and in subordination to their common title, whatever it be, and that the exclusive possession is not adverse to him.

It is true, there arises out of the purchase of an outstanding title an additional relation between a tenant in possession and his co-tenant out of actual possession; namely, that of trustee and *cestui que trust*. But the rights and remedies incident to this new relation, being distinct from the legal ownership of the land, are exclusively cognizable in equity.

This is not an equitable action; it is an action at law,—ejectment for the recovery of real property,—in which the court below could only try and determine the issues raised by the pleadings in the case. There was no issue before the court that the defendant held and possessed the land upon a claim of title, written or unwritten, adversely to the title of the plaintiff, as tenant in common with the defendant, for five years before the commencement of the action. Sections 321–323, 325, Code Civil Proc.

Sections 318 and 319, upon which the court below based its decisions, are inapplicable. The first provides that no action can be maintained for the recovery of real property unless the plaintiff, his ancestor or grantor, was seized or possessed of the property within five years before the commencement of the action. But, being a tenant in common with the defendant, the plaintiff was so seized until the defendant's possession became hostile or adverse. Besides, section 318 is not pleaded at all. Section 319 is the only one pleaded; but, as has been held, that section was never intended to apply to an action of ejectment. It has reference only to *personal* actions founded upon title to real property. *Richardson* v. *Williamson*, 24 Cal. 301.

I think the judgment and order should be reversed, and the cause remanded for further proceedings.

2 Cal. Unrep. 698

KETCHUM *v.* BARBER. (No. 11,423.)

(*Supreme Court of California.* August 31, 1886.)

1. DEED—DESCRIPTION OF GRANTEE.
 A deed to Henry Stull & Co. vests the legal title in Henry Stull alone, and his deed will give to his grantee a good and valid title.[1]
2. EJECTMENT—PROOF OF OUSTER—ADMISSIONS IN PLEADINGS.
 In ejectment, if the defendant in his answer admits acts amounting to an ouster, but denies plaintiff's title or right to possession, plaintiff is not bound to prove ouster, and, if he prove title and right to possession in himself, is entitled to recover.

Department 2. Appeal from superior court, county of Amador.

Ejectment for possession of a certain mining and water ditch running across defendant's lands. Plaintiff claimed title through one Henry Stull, who in turn derived, or claimed to derive, title from defendant by virtue of a deed made to Henry Stull & Co. Defendant in his answer admitted having given to Stull & Co. a right to dig and maintain the ditch, but claimed that it had been abandoned, and admitted that hence he had re-entered upon and used the ditch continuously to the time of trial. On the trial, plaintiff, to make out his title, introduced the deed to Stull & Co. in evidence, and also put in evidence the deed from Stull to himself, and proved by witnesses the possession thereunder of himself and Stull, and closed. Defendant moved for a nonsuit on the ground that plaintiff had neither proven title nor possession in himself, nor ouster by defendant. The nonsuit was granted and plaintiff appealed.

Eagon & Armstrong, for plaintiff and appellant. *McGee & Farnsworth*, for defendant and respondent.

BY THE COURT. The nonsuit was improperly granted The deed to Henry Stull & Co. vested the title in Henry Stull. *Winter* v. *Stock*, 29 Cal. 411, 412. The answer shows a sufficient ouster.

Judgment reversed, and cause remanded for a new trial.

[1] See Cherry v. Gilmore, (Wis.) 17 N. W. Rep. 252.

(71 Cal. 306)

SCHWARTZ *v.* COWELL. (No. 9,691.)

(*Supreme Court of California.* November 24, 1886.)

1. EJECTMENT—TITLE—ATTACHMENT—OFFICER SERVING—CODE CIVIL PROC. CAL., § 542, Where a plaintiff in ejectment claims title through an attachment, if it appears that the officer to whom it was directed failed to comply with the requirements of section 542, Code Civil Proc. Cal., the omissions on the part of the officer are fatal to his title, and plaintiff cannot recover in the action.
2. JUDGMENT—LIEN—JUSTICE'S COURT—COUNTY COURT—DOCKETING OF JUDGMENT. S. recovered a judgment against B. before a justice of the peace, August 5, 1875, which, on appeal, was affirmed in the county court, April 10, 1877. On June 18, 1875, B. for a valuable consideration conveyed his land to C. by deed, duly recorded on the same day. *Held*, that C. thus acquired the title of B. before any lien was created in favor of S. by virtue of the docket of his judgment or otherwise.

Department 1. Appeal from superior court, Santa Cruz county.

This is an action of ejectment. On June 16, 1875, one Charles Brown was the owner of the premises. On that day one Steen commenced an action against him in a justice's court to recover $150 upon contract, and on the same day a summons and a writ of attachment were duly issued against him. The said writ of attachment was on the same day delivered to a constable of the county, and on the seventeenth day of June, 1875, the constable attempted to levy the attachment on the premises by filing with the county recorder a copy of the attachment, together with a description of the property, and a notice that it was attached; but the recorder did not index the attachment when filed, nor did he do so until the twenty-fourth day of the said month. A final judgment was rendered in the cause against Brown, upon an appeal, in the county court, on the tenth day of April, 1877, and the judgment was on the same day docketed in the judgment docket of that court. An execution was issued on the judgment, and under it the premises were sold to the plaintiff, and thereafter conveyed to him by deed, by the proper officer, which was duly recorded. There was no evidence offered by the plaintiff showing, or tending to show, that any copy of the attachment, with a description of the property, and a notice that it was attached, or either of them, was ever left with an occupant of the property, or, if there was no occupant, by posting the same in a conspicuous place, or any place on said property. It further appears that on the eighteenth of June, 1875, the said Charles Brown duly granted and conveyed, for a valuable consideration, the said premises by deed to the defendant, which deed was duly recorded, and upon the delivery of the deed, on the said eighteenth of June, 1875, the defendant went into immediate possession, and has ever since been in possession, of the same. The cause was tried upon these and other facts not necessary to be stated, and resulted in a judgment for defendant. Plaintiff appealed.

Chas. B. Younger and *J. M. Lesser*, for appellant. *Jos. H. Skirm* and *Pillsbury & Blanding*, for respondents.

MCKINSTRY, J. 1. The plaintiff derived no title through the attempted attachment in the action of *Steen* v. *Brown*. There is no finding, nor does it appear, that plaintiff offered any evidence tending to prove that a copy of the attachment, together with a description of the property attached, and a notice that it was attached, was left with the occupant of the property, or posted upon it. Code Civil Proc. 542, subd. 1. No lien was created by the attempted levy of the attachment, to which the right of the purchaser at the execution sale could relate. *Watt* v. *Wright*, 66 Cal. 202; S. C. 5 Pac. Rep. 91; *Main* v. *Tappener*, 43 Cal. 206; *Sharp* v. *Baird*, Id. 577; *Porter* v. *Pico*, 55 Cal. 172.

2. The judgment in the action of *Steen* v. *Brown* was entered by the justice of the peace, August 5, 1875; and the judgment was rendered in the county

court, April 10, 1877. On the eighteenth of June, 1875, Brown, defendant in that action, for a valuable consideration conveyed, by grant, bargain, and sale deed, the premises herein demanded to the defendant Cowell, which deed was duly acknowledged and recorded on the same day. Cowell thus acquired the title of Brown before any lien was created in favor of Steen by virtue of the docket of his judgment, or otherwise. Judgment affirmed.

We concur: THORNTON, J.; MYRICK, J.

SCHWARTZ *v.* COWELL and another. (No. 9,690.)

(*Supreme Court of California.* November 24, 1886.)

Department 1. Appeal from superior court, Santa Cruz county.

Action of ejectment to recover certain lots in Santa Cruz, purchased by plaintiff at an execution sale. Judgment for defendants. Plaintiff appealed.

Chas. B. Younger and *J. M. Lesser*, for appellant. *Jos. H. Skirm* and *Pillsbury & Blanding*, for respondents.

BY THE COURT. On authority of *Schwartz* v. *Cowell*, *ante*, 252, (No. 9,691,) opinion this day filed, judgment affirmed.

2 Cal. Unrep. 720

FISK v. LEE. (No. 9,790.)

(*Supreme Court of California.* November 29, 1886.)

INTEREST—COMPUTATION—INTEREST ON COMPOUND INTEREST.

Where defendant, in California, executed her promissory notes payable in 30 days, with interest thereon at the rate of 4 per cent. a month, interest to be paid monthly in advance, and, if not so paid, to become a part of the principal, and bear thereafter the same rate of interest, compounding monthly in advance, the court may properly, in calculating the interest due to plaintiff, allow interest on compound interest, or "interest on interest on interest."

Department 1. Appeal from superior court, Alameda county.

Action to enforce payment of notes and mortgage.

On or about the seventeenth day of June, 1881, the defendant borrowed from the plaintiff the sum of $200 in gold coin of the United States, and to secure the payment of the same, with interest, she executed and delivered to the plaintiff her four promissory notes, for $50 each; each being in the words and figures following:

"$50. SAN FRANCISCO, CAL., June 17, 1881.

"Thirty days after date, without grace, I promise to pay to Asa Fisk, or order, the sum of fifty and 00-100 dollars, to be paid only in gold coin of the

United States of America, for value received, with interest thereon, in like gold coin, from date at the rate of four per cent. per month until paid; interest to be paid monthly in advance, and, if not so paid, to become a part of the principal, and bear thereafter the same rate of interest, compounding monthly in advance, for value received. This note to be paid at the banking-house or office of Asa Fisk, in the city of San Francisco. ABBA LEE."

The defendant at the same time, to secure the said notes, executed a mortgage on certain lots in the town of Haywards, Alameda county, California, in which it was stipulated, among other things, that defendant should pay 30 per cent. on said principal and interest as attorney's fees in case of foreclosure, and would also pay taxes and assessments, which, if not paid, should be added to the principal, and bear interest at 4 per cent. a month. The defense was that the notes and mortgage did not correctly set forth the terms of the agreement made between plaintiff and defendant respecting the loan, and the terms of the agreement were that plaintiff would loan defendant $250 for five or six years, and defendant should pay interest therefor at 4 per cent. per annum; that defendant, being wholly inexperienced in business, had never previously executed any promissory note or mortgage, and had no one to advise her except plaintiff; that she was short-sighted, and unable to read without the aid of her eye-glasses, and, having left them at home, did not read over the notes and mortgage before signing them; that, in preparation of the notes and mortgage, she relied entirely on the plaintiff, and believed that they had been prepared in accordance with, and expressing therein the terms of, her previous agreement with plaintiff for the loan.

On the hearing judgment was given that plaintiff was entitled, on her said loan of $200, to the total sum of $744.31, and foreclosure sale was ordered, and, in case of the property proving insufficient, a judgment should be docketed for the balance against defendant, and execution issued thereon. The defendant appeals. Apparently there was an exception taken by defendant to the allowance of interest upon compound interest, which the appellate court overruled.

R. Percy Wright, for appellant. *E. H. Rixford*, for respondent.

BY THE COURT. The court below did not err in its calculation of interest. The mode adopted is in strict accord with the contract of the parties. Judgment affirmed.

71 Cal. 14

FLOURNOY v. VAN CAMPEN. (No. 11,371.)

(*Supreme Court of California.* September 18, 1886.)

STATUTE OF FRAUDS—DEBT OF ANOTHER.

A promise to answer for the debt, default, or miscarriage of another must be in writing, to be valid under the California statute of frauds.[1]

Department 1. Appeal from superior court, Merced county.

Action by a physician to recover for professional services rendered to defendant's mother, and alleged in the complaint to have been rendered "at defendant's special instance and request." Plaintiff's own testimony at the trial showed that he had rendered part of the services at the special request of the mother herself. He offered, however, to prove by parol that, pending his treatment of the mother, at her request, the defendant had orally promised to pay plaintiff for the services he was rendering. Defendant objected to evidence of any such contract, unless it was in writing. The objection was overruled, and plaintiff was allowed to prove such a contract by parol. Judgment went for plaintiff. Defendant appealed.

J. K. Law, for defendant and appellant. *F. H. Farrar*, for plaintiff and respondent.

Ross, J. The complaint counts upon a contract alleged to have been made by defendant with plaintiff for the rendition of the services of the latter, and is sufficient. But the plaintiff's own testimony shows that prior to any agreement with defendant he had been employed by defendant's mother to attend her professionally, and, pursuant to that employment, had commenced his treatment of her. His recovery in the court below against the defendant included compensation for services rendered by him as well before as after the contract with defendant, and is not susceptible, as the record is presented, of severance. Certainly the services rendered prior to the contract with defendant were rendered at the instance of defendant's mother, and for them she was bound to pay. That debt was her debt, and for it defendant could, under the statute, only bind himself in writing.

It results that the judgment and order must be reversed, and the cause remanded for a new trial. So ordered.

We concur: MCKINSTRY, J.; MYRICK, J.

JOHNSON v. WALDEN. (No. 11,176.)

(*Supreme Court of California.* September 18, 1886.)

ACTION—CHANGE OF VENUE—AFFIDAVITS OF MERIT—"THE CASE."

Where, on a motion by defendant to change the venue of an action, the affidavits of merit in support thereof fails to state that defendant has fully and fairly stated "the case" to his attorney, the court will not make the order for a change of venue.

Department 1. Appeal from superior court, Sacramento county.

This action was brought by an attorney to recover money claimed to be due him from defendant for services performed for defendant, at his request, in Sacramento county, California. Defendant demurred to the complaint, and at the time of filing such demurrer made a demand and motion that the place of trial be changed to Stanislaus county, and filed an affidavit of merits in support thereof, the material part of which reads as follows: "I have a just and meritorious defense to said action, and I have stated fully and fairly all the grounds of my defense thereto to my attorney, S. W. Geiss, Esq., of Modesto, Stanislaus county, California; and I am by my said attorney informed, and I

[1] See Lookout M. R. Co. v. Houston, (Tenn.) 2 S. W. Rep. 36, and note.

sincerely believe, that I have a good and sufficient and meritorious defense to said action." The superior court of Sacramento county, California, granted the motion, and ordered the place of trial to be changed to Stanislaus county. From that order plaintiff appealed.

Grove L. Johnson, in person, and *Albert M. Johnson*, for plaintiff.

The affidavit of merits is defective in not stating that defendant has fully and fairly stated "*the case*" to his attorney. *People* v. *Larue*, 5 Pac. Rep. 157; *Nickerson* v. *California Raisin Co.*, 61 Cal. 268. Both these cases are directly in point. Both these cases were cited and read to the superior court of Sacramento county at the time of the argument of the motion to change the place of trial, and were by it overruled.

S. W. Geiss, for respondent.

By The Court. On the authority of *Nickerson* v. *California Raisin Co.*, 61 Cal. 268, order reversed.

5 Cal. Unrep. 744

Bishop *v.* Glassen. (No. 9,621.)

(*Supreme Court of California.* October 23, 1886.)

1. Public Lands—Homestead—Pre-Emption.
 Public lands of the United States, in the actual occupation and exclusive possession of one party, are not subject to pre-emption or homestead settlement by another.
2. Appeal—Rehearing.
 Where, on the hearing in the supreme court, there is no appearance for the appellant, and the judgment is affirmed, such judgment will not be vacated, for the purpose of another hearing, though a sufficient and good showing be made concerning such non-appearance, so as to authorize the court to do so, if it appears that it would be useless to do so for the reason that, upon another hearing, a like judgment must follow.

Department 2. Appeal from superior court, county of Contra Costa.

Ejectment. The complaint alleged, and the court found, that plaintiff had been in the peaceable possession of surveyed United States lands which were open to pre-emption; that while in such possession and the actual occupation of such lands defendant forcibly ejected plaintiff from said land, and took, and continued to the time of the action to hold, said lands unlawfully from defendant. Defendant in his answer claimed to have entered on said lands as a homestead pre-emptor, and that, after his entry, he had tendered to the United States land-officer his claim for the same, together with the necessary fees, which, however, such officer had refused. The court found that such land at the time defendant entered was in the actual occupation and exclusive possession of plaintiff, and therefore not then subject to pre-emption or homestead settlement. Judgment went for plaintiff. Defendant appealed. At the time for hearing in the supreme court the appellant failed to appear. The supreme court affirmed the judgment, as appears below, and the appellant then made a showing of the absence of this attorney from the state as ground for his non-appearance.

B. B. Newman, for defendant and appellant. *Mills & Jones*, for defendant and respondent.

By the Court. We have examined the transcript herein, and are of opinion that this case must be governed by the rulings of this court in *Davis* v. *Scott*, 56 Cal. 165; *Hosmer* v. *Duggan*, Id. 258, and *McBrown* v. *Morris*, 59 Cal. 64. This must result in an affirmance of the judgment. Conceding that the showing is sufficient to authorize the court to grant the motion here made, and vacate the judgment of affirmance heretofore rendered, it would be useless to do so where, upon the hearing, the like judgment must follow. The motion is therefore denied. *Estate of Montgomery*, 59 Cal. 584.

Ordered accordingly.

71 Cal. 238

Ex parte ZEEHANDELAUR. (No. 20,230.)

(*Supreme Court of California.* October 29, 1886.)

1. HABEAS CORPUS—RETURN TO WRIT—CONTEMPT.
 A return to a writ of *habeas corpus*, sued out by a witness who has been committed for contempt in refusing to answer a question, should show that the question which he refused to answer was pertinent to the matter in issue before the court, and, on the return failing to show this, the prisoner will be discharged.
2. CONTEMPT—WITNESS—REFUSAL TO ANSWER IMPERTINENT QUESTION.
 Where a judge puts to a witness a question which is not pertinent to any issue before the court at the time the question is put, the refusal of the witness to answer it is no contempt, and the court has no jurisdiction to imprison him for such refusal.

In bank. On *habeas corpus*.

Charles F. Hanlon, for petitioner. *Aylett R. Cotton* and *M. A. Wheaton*, *contra*.

SHARPSTEIN, J. The Code requires the person on whom a writ of *habeas corpus* is served to make a return thereto, and if the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return. Pen. Code, § 1480. Such a return has been made in this case, and the petitioner excepts to the sufficiency of it, because, as he insists, no legal cause is shown for his imprisonment. The return shows that during the progress of a trial in the superior court the petitioner was called and sworn as a witness, and was asked a question by the court which he refused to answer. For such refusal he was adjudged guilty of contempt, and ordered to be imprisoned until he should answer said question. There are no facts recited in the order which show, or tend to show, that the question was pertinent to the matter in issue. "A witness must answer questions legal and pertinent to the matter in issue." Code Civil Proc. § 2065. It is his right "to be examined only as to matters legal and pertinent to the issue." Id. § 2066. Such being his right, we think it follows that the refusal to answer a question not pertinent to the issue was no contempt, and that the order adjudging him guilty of a contempt, which fails to show that the question was pertinent to the issue, is invalid. Conceding as we do, that the court had jurisdiction of the action on trial, we cannot concede its power to inquire into matters outside of the issues therein. It had the power to order questions pertinent to the issues to be answered, but it had not the power to order questions not pertinent thereto to be answered. As to matters not in issue, it had no jurisdiction.

In order to show a legal cause for the imprisonment of the petitioner, the return in this case should show that the question which he refused to answer was pertinent to the matter in issue before the court, and, as this is not shown by the return, no legal cause for the imprisonment of the petitioner is shown, and he should be discharged, and it is so ordered.

MYRICK, J. I concur in the judgment. The question which the petitioner refused to answer, and for which refusal he was adjudged guilty of contempt, was not pertinent to any matter involved in any issue then before the court. Under such circumstances, his refusal was no contempt, and the court had no jurisdiction to imprison him.

The petitioner should be discharged.

MORRISON, C. J., (*concurring.*) The petition in this case shows that the petitioner was called upon to testify in a certain divorce case pending in the superior court of San Francisco, wherein one Alice Hinkle was plaintiff and P. Hinkle the defendant, and in the course of the proceedings the petitioner was asked the following question by the judge of the court: "I desire to know

if Mr. Hinkle, or Mr. Lowenthal, or anybody connected with Mr. Lowenthal's office, who has been present during the trial, has made to you any statements as to what transpired during the progress of the trial?" This was the first and only question asked the petitioner, which the petitioner declined to answer, and was thereupon imprisoned for contempt of court for such refusal. It does not appear for what purpose the question was asked, and it is not clear how an answer thereto could have been material to the divorce case then on trial. Unless the matter sought to be elicited from the witness had some bearing on the case on trial, or was in some manner material to matter in issue, it is hard to understand what right the court had to inquire into it, or how the refusal of the witness to answer it constituted a contempt of the court.

By section 1211 of the Code of Civil Procedure it is provided that "when a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt," etc. If all the facts set forth in this case are admitted to be true, it does not follow therefrom that the defendant was guilty of a contempt of court in declining to answer the question, and that he thereby committed a contempt of court.

I am of opinion that the petitioner should be discharged, and it is so ordered.

THORNTON, J., (*concurring.*) I cannot perceive that the court had jurisdiction to compel, by imprisonment, an answer to the question put to the petitioner. It appears that during the progress of the trial of *Hinkle* v. *Hinkle*, which was an action for a divorce, petitioner was called and sworn as a witness, and one question only was put to him. It is not stated in the commitment that petitioner was called as a witness in the cause on trial, but the statement is made generally, as given above. The following is the question put: "I desire to know if Mr. Hinkle, or Mr. Lowenthal, or anybody connected with Mr. Lowenthal's office, who has been present during the trial, has made to you any statements as to what transpired here during the progress of the trial?" How such a question could be pertinent in the divorce case on trial I cannot perceive. It may have been pertinent with regard to a violation of an order made that the case of *Hinkle* v. *Hinkle* should be heard with closed doors, from which the public generally should be excluded, and on a trial of some one for such violation; but the commitment does not show that such an order for the pending trial had ever been made. But, without some regular proceeding against a person for the violation of such an order, I am of opinion that the court is without jurisdiction to put such a question to anyone. In my judgment the court had no jurisdiction, conceding that the order for the trial with closed doors had been made and entered, to ask such a question of a witness, with a view of ascertaining if a certain person had been guilty of such violation, and in advance of a regular trial for an alleged violation of such an order.

It is argued that the petitioner cannot urge such ground for his discharge as is above stated, because he did not urge it before the court which ordered his imprisonment. I cannot agree that such a contention is sound. If the court is entirely without jurisdiction, the order called in question here is void, and the petitioner cannot, for the reason alleged, be precluded from availing himself of it.

I concur in the conclusion that the prisoner should be discharged for the reasons above given.

71 Cal. 384

PEOPLE v. JOHNSON. (No. 20,232.)

(*Supreme Court of California.* December 7, 1886.)

1. CRIMINAL LAW—JUDGMENT FOR WRONG OFFENSE—STATEMENT TO PRISONER.
The misstatement of his offense, by the judge, to a prisoner appearing for sentence, is not ground for reversal, especially if the defendant has, after conviction, moved in arrest of judgment on the ground that the information charges no crime; but the entry of judgment of conviction as for an offense other than that charged in the information is ground for reversal.

2. EMBEZZLEMENT—INFORMATION—BAILEE—SECTION 507, PEN. CODE CAL.
That in an information for embezzlement of property, under section 507 of the Penal Code of California, the defendant is not named as "bailee" or "tenant" or "lodger," as the case may be, does not render the information demurrable, if the terms of the contract between the defendant and the person alleged to have been specially injured are specifically set forth, and the contract clearly shows that the defendant was thereby constituted a bailee, and received the property in that capacity.

3. CRIMINAL LAW—ARREST OF JUDGMENT—PEN. CODE CAL. 1185, 1004.
Under the Penal Code of California, 1185, 1004, a motion in arrest of judgment must be founded upon defects in the indictment or information appearing upon the face of it.

In bank. Appeal from superior court, Yolo county.

Information for embezzlement. Judgment for the people. Defendant appealed.

Thomas & Hurst, for appellant. *Atty. Gen. E. C. Marshall*, for respondent.

MCKINSTRY, J. The information charges, if it charges any offense, embezzlement, and the verdict was guilty as charged. At the time appointed for pronouncing judgment, the following proceedings (as appears from the minutes) took place: "The district attorney, with the defendant and his counsel, Thomas & Hurst, came into court. The defendant was duly informed by the court of the information duly presented and filed on the tenth of April, 1886, by the district attorney of the county of Yolo, charging said defendant with the crime of grand larceny; of his arraignment and plea of 'not guilty as charged in said information;' of his trial and the verdict of the jury on the twenty-eighth day of July, 1886, 'guilty.' The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied he had not. And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment that whereas, the said R. H. Johnson having been duly convicted in this court of the crime of grand larceny, it is therefore ordered, adjudged, and decreed that the said R. H. Johnson be punished by imprisonment in the state prison of the state of California, at Folsom, for the term of twelve months. The defendant was then remanded to the custody of the sheriff of the said Yolo county, to be by him delivered into the custody of the proper officers of said state prison, at Folsom."

The transcript contains no bill of exceptions, setting forth of what the defendant was informed when he was called up for judgment, or that defendant excepted to the statement by the court that the information charged him with the crime of "grand larceny." Conceding, without deciding, that the statement made by the court to defendant as to the contents of the information was properly entered as a portion of "the minutes of the trial," which by section 1207 of the Penal Code constitute a part of the "record" of the action, and that we should therefore take notice of any error in such statement, the defendant was not injured by the misnomer of the offense charged in the information.

The bill of exceptions shows that the defendant moved in arrest of judgment, basing his motion on the alleged insufficiency of the information, and

on irregularities in the acts of officers which preceded the information. If it could be presumed that the defendant, to whom the information had been read, and who had been supplied with a copy of it, (section 988,) and who had been tried upon it, had forgotten the crime charged in it when he was called for sentence, the fact that he then and there moved in arrest because the information charged no crime, would seem to be sufficient to overcome such presumption, and to establish that he was fully informed of its contents. This court must give judgment without regard to errors which do not affect the substantial rights of the parties. Pen. Code, 1258.

But section 1207 of the Penal Code provides: "When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had," etc. There can be no doubt that this statement of the offense is part of the judgment. The clerk has no power to enter, and it is at least error in the court to direct, a judgment declaring that a defendant has been convicted of one offense, when in fact he has been convicted of another and distinct offense. The entry of a judgment declaring that a defendant has been convicted of an offense of which he has not been convicted is more than a mere "technical" error. A judgment is a solemn record, which is ordinarily conclusive evidence of the facts recited in it, and we ought not to permit such evidence to stand when, on direct appeal, it appears that the matters recited in it are not true.

Inasmuch as no proper judgment has been entered in the court below, the judgment in form must be set aside, and a proper judgment rendered and entered. The court below should appoint a time for pronouncing judgment, on reasonable notice to defendant and his counsel, and defendant should be present, that the law may be complied with. Nevertheless, as the defendant has already had his day in court during the proceedings preliminary to the rendition of judgment, with an opportunity to show legal cause why judgment should not be pronounced against him, the court is simply to render judgment as required by law upon a conviction for embezzlement, which judgment the clerk is to enter as rendered. In other words, the proceedings are to be taken up at the point when they ceased to be sufficiently regular, and are to be regularly completed.

The appellant claims that his motion in arrest should have been granted. If he be correct in this, we will not direct a judgment to be rendered and entered simply that on another appeal it shall be reversed. The question as to the alleged error in denying the motion in arrest has been fully argued, and we proceed to consider and pass upon it. If no judgment ought to have been rendered or entered in the cause, the defendant should be discharged, and the proceedings based on the information be dismissed. By the information the defendant is charged with the crime of embezzlement, "committed as follows: The said R. H. Johnson, on the twenty-fourth day of May, A. D. 1884, in the county of Yolo, in the state of California, was intrusted with one sorrel horse, of the value of $100, by Joel Woods, said horse being then and there the property of said Joel Woods; that by the terms of said trust said R. H. Johnson was to use said horse for his own benefit for a part of one day, and return said horse to said Joel Woods on the twenty-fourth day of May, 1884; that said Johnson did not return said horse to said Joel Woods according to the terms of his said trust, but did then and there, on the said twenty-fourth day of May, 1884, in said Yolo county, willfully, unlawfully, feloniously, and fraudulently convert said horse to his own use, and embezzle the same, contrary to his said trust, and contrary to the form, force, and effect of the statute," etc.

Section 507 of the Penal Code reads: "Every person intrusted with any property, as bailee, tenant, or lodger, * * * who fraudulently converts the same, or the proceeds thereof, to his own use, * * * is guilty of embezzlement."

The defendant moved in arrest of judgment, and now here claims that the facts set forth in the information do not constitute a public offense. Pen. Code, 1004, 1012, 1185. It is insisted that the information is fatally defective in that it does not charge, in express terms, that the defendant was a "bailee." The decisions of the courts of the several states as to the sufficiency of the charging parts of indictments depend very largely on the various statutes. Under the section of the Penal Code of California we think it does not render the information subject to general demurrer that the defendant is not named therein as "bailee" or "tenant" or "lodger," as the case may be, if the terms of the contract between the defendant and the person alleged to have been specially injured are specifically set forth, and the contract clearly shows that the defendant was thereby constituted a bailee, and received the property in that capacity.

Of cases cited by counsel for defendant and appellant, *People* v. *Cohen*, 8 Cal. 42, was one in which the charge was that defendant, "being bailee of four hundred thousand dollars, the moneys, goods, and chattels of Adams & Co., did feloniously and willfully convert the same to his own use, with the intent to steal the same." The supreme court held that all conversions of property by bailees were not *ipso facto* felonies, but that the word "bailee," under the statute there considered, should be construed, in a limited sense, as designating bailees "to keep, transport, and deliver." The objection to the indictment was that the facts showing the nature of the bailment, and that it was of the class of bailments contemplated by the statute, were not alleged. In the information now before us the facts are stated to show the character of the contract of bailment under which the property was received by the defendant. In *People* v. *Peterson*, 9 Cal. 314, the defendant was charged, "being then and there the bailee" of certain money and gold-dust, "the money, goods, and chattels of John A. Clary," to have feloniously converted, etc. The indictment was held insufficient, because it did not state the "character" of the bailment. To the same effect is *People* v. *Poggi*, 19 Cal. 600. *People* v. *Smith*, 23 Cal. 280, points out the distinction, well established, between larceny and embezzlement, in cases where a bailee has obtained possession of property from the owner with the latter's consent. In *Ex parte Hedley*, 31 Cal. 109, the petitioner for *habeas corpus* had been held to answer on a charge of embezzlement. He was remanded by the court. He was held under a statute which related to embezzlement by "any clerk, apprentice, servant, or agent." It was not disputed that the petitioner was the "agent" of Wells, Fargo & Co., and there was no question as to averments in an indictment, for no indictment had been found. *People* v. *Tomlinson*, 66 Cal. 344, S. C. 5 Pac. Rep. 509, would seem to hold that the facts showing the character of the agency, where one is indicted under section 508 of the Penal Code, and is alleged to have been the agent, need not be alleged.

The cases cited from other states do not support the contention of appellant. Under a New York statute relating to "clerks and servants," it was charged in the indictment that the defendant received money "as the agent," and facts were not alleged showing that the defendant was either a clerk or servant. It was said by the supreme court of New York: "The term 'agent' is *nomen generalissimum*, and, although it includes clerks and servants, it is by no means restricted to such persons." *People* v. *Allen*, 5 Denio, 79. *People* v. *Tryon*, 4 Mich. 667, was decided upon a Michigan statute relating to embezzlements by attorneys of property of their clients. *State* v. *Newton*, 26 Ohio St. 265, holds that a county auditor is not an officer charged with the custody of money, within the meaning of a statute of Ohio. In *Gaddy* v. *State*, the court held that, to charge a bailee with embezzlement, the indictment must, by direct averment, charge that the embezzled property came into his possession, or was under his care, by virtue of his agency, or of the bailment. 8 Tex. App. 127. It was held that, under a statute of Minnesota

which defined embezzlements of goods intrusted to a defendant for delivery to be carried for hire, an indictment was insufficient which failed to aver those facts.

None of the cases cited seem to sustain the proposition that where the facts showing that a party charged is a "bailee" are fully stated, and all the other facts necessary to constitute the offense are averred, an indictment is fatally defective because he is not in terms alleged to be a "bailee." On principle, we can see no reason why it should be so held. If it be necessary to allege facts showing the character of the agency, it becomes a question of law rather than of fact, whether, upon the averments, the defendant was or was not a bailee. If not necessary to state the facts showing the character of the agency, yet it is not a matter of which the defendant can complain if such facts are stated, and he thus given fuller notice of the charge than would be given by simply designating him as "bailee."

Another ground in arrest of judgment was that "the court had no jurisdiction of the person of the defendant, or of the offense charged." In support of this ground the defendant introduced certain evidence. We discover no reason why the proceedings before the magistrates should affect the validity of the information, or deprive the superior court of jurisdiction. Moreover, a motion in arrest of judgment must be founded upon defects in the indictment or information appearing on the face thereof. Pen. Code, 1185, 1004.

The judgment is reversed and set aside, with direction to the court below to render and enter an appropriate judgment.

We concur: MORRISON, C. J.; MCKEE, J.; MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.

71 Cal. 382

GROSS *v.* SUPERIOR COURT. (No. 11,437.)

(*Supreme Court of California.* December 7, 1886.)

ACTION OR SUIT—CHANGE VENUE—APPEAL FROM JUSTICE'S COURT—CONST. CAL. ART. 6, § 5.

Under Const. Cal. art. 6, § 5, enacting that the superior courts in California "shall have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law," a superior court to which an action has been appealed from a justice's court in the same county, where it was properly commenced, has no jurisdiction to make an order changing the place of trial to the superior court of another county.

In bank. *Certiorari* to superior court, city and county of San Francisco.

Action for goods sold and delivered.

F. M. Husted, for petitioner. *E. H. Wakeman*, for respondent.

SHARPSTEIN, J. Petitioner commenced an action in the justice's court at San Francisco, against John S. Cleland, a resident of Siskiyou county, upon a cause of action for goods sold to Cleland by petitioner at San Francisco. The defendant answered, and went to trial. Judgment was rendered against him, and he appealed to the superior court of San Francisco. After the papers were filed in the superior court on the appeal, the defendant moved for a change of place of trial, on the sole ground that he was a resident of the county of Siskiyou, which motion was granted. This proceeding is *certiorari*, to review the order granting the motion.

The constitution provides that superior courts "shall have appellate jurisdiction in such cases, arising in justices' and other inferior courts in their respective counties, as may be prescribed by law." Article 6, § 5. As this case did not arise in a justice's or other inferior court in Siskiyou county, it is quite clear that the constitution confers no jurisdiction of it on the superior court of that county, and that the appellate jurisdiction is exclusively in the superior court of San Francisco, where the case was commenced and tried

in a justice's court. It therefore follows that the order changing the place of trial must be annulled. Order annulled.

We concur: MORRISON, C. J.; MCKINSTRY, J.; MYRICK, J.; THORNTON, J.

71 Cal. 380

WARREN *v.* ROBINSON and another. (No. 9,758.)

(*Supreme Court of California.* December 6, 1886.)

TRIAL — BY COURT WITHOUT JURY — FINDINGS — SUFFICIENCY TO SUPPORT JUDGMENT — SERVICES AND MATERIALS.

In an action for the value of services rendered and material supplied, where the complaint alleges that the services were rendered and material supplied at defendant's request, who agreed to pay what they were reasonably worth, that their reasonable value is so much, that defendants are and were husband and wife, and that the house at and upon which the services were rendered and the material supplied is the separate property of the wife, and defendants in their answer traverse all the allegations of the complaint, the finding of the court "that all the material allegations in plaintiff's complaint are fully sustained and proved, and that said labor performed and materials furnished, as alleged in said complaint, were and are for the benefit, profit, convenience, and use of defendants, and to said houses and premises, and that the charges for said labor performed and materials furnished were and are reasonable and proper," is insufficient to support a judgment for the plaintiff.

Department 1. Appeal from superior court, San Mateo county.

Action for value of services rendered and material supplied. Judgment for plaintiff. Defendants appeal.

Nygh, Fairweather & Durst, for appellants. *Geo. H. Buck* and *Geo. E. Filkins*, for respondent.

MCKINSTRY, J. The complaint alleges the defendants to be husband and wife, and that the services rendered and materials furnished (the value of which is sued for) were rendered at the special instance and request of defendants upon and furnished for a building the separate property of the wife; that the defendants promised to pay for such services and materials. The court found "that all the *material* allegations in the plaintiff's complaint are fully sustained and proved." This is insufficient. *Cassidy* v. *Cassidy*, 63 Cal. 352; *Ladd* v. *Tully*, 51 Cal. 277. The finding continues: "And that said labor performed and materials furnished, as alleged in said complaint, were and are for the benefit, profit, convenience, and use of defendants, and to said house and premises, and that the charges for said labor performed and materials furnished were and are reasonable and proper." There is no distinct finding that any labor was performed or that any materials were furnished. There is no finding that the services, etc., were rendered at the instance or request of the defendants, or either of them, or that husband or wife promised to pay therefor, or that the defendants were husband and wife, or that the services, etc., were rendered in or about the separate property of the wife, or that the house mentioned in the complaint was her separate property; nor is there any distinct finding of the value or reasonable worth of the services rendered or materials furnished.

Judgment reversed, and cause remanded for a new trial.

We concur: MYRICK, J.; THORNTON, J.

71 Cal. 322

In re STUTTMEISTER. (No. 11,527.)

(*Supreme Court of California.* November 27, 1886.)

1. CERTIORARI—WHEN IT LIES—CODE CIVIL PROC. CAL. § 1068.
 Under the Code of Civil Procedure of California, § 1068, the writ of *certiorari* will not lie where there is an appeal from the action complained of; and if there is an appeal, but the time for taking it has elapsed, the writ will not lie.[1]
2. APPEAL—WHAT APPEALABLE—ORDER OF PROBATE COURT—CODE CIVIL PROC. CAL. § 963, SUB. 3.
 An order of the probate California courts, directing the sale of real estate, is appealable, under Code of Civil Procedure, § 963, sub. 3.[1]

Commissioners' decision. In bank.

Application for a writ of *certiorari*. Dismissed. The facts are sufficiently stated in the opinion.

Ben. Morgan, for petitioner. *S. S. Wright* and *J. H. Moore*, for respondents. *John A. Collins, in pro. per.*

SEARLS, C. This is an application by W. O. Stuttmeister, as administrator with the will annexed of the estate of F. W. R. Stuttmeister, deceased, for a writ of *certiorari*, directed to J. V. COFFEY, judge of the superior court, department 9, (probate,) in and for the city and county of San Francisco, requiring him to certify to this court, for review, the record in the matter of the estate above referred to. An alternative writ issued, under which the

[1]See note at end of case.

record is before us, and from which it appears that on the twenty-third day of July, 1885, an order was made by the superior court, in probate, requiring the petitioner, as administrator of the estate of F. W. R. Stuttmeister, to sell, at public auction, certain real estate belonging to the estate of deceased, situate on Howard street, San Francisco. The petition for the order of sale was filed by and on behalf of John A. Collins, an adjudged creditor of the estate, and is in the usual form, showing the existence of debts, the necessity of a sale to pay the same, that the administrator has failed to apply for an order, etc. The order of sale recites the facts of notice, and service upon the administrator; finds the existence of debts against the estate; necessity of sale of the real property to pay such debts, etc., in the usual form; shows that the administrator was present by attorney, and consented to the order. Subsequently, and on the nineteenth day of February, 1886, after notice and hearing, an order was made by the court, reciting that the administrator had unreasonably neglected and refused to comply with the order of sale of July 23, 1885, and ordering him, without delay, to proceed to sell the property as in the order of sale directed, etc. Thereupon the writ herein was sued out.

"A writ of review [*certiorari*] may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." Code Civil Proc. § 1068. The writ will not lie where there is an appeal from the action complained of. *People* v. *Shepard*, 28 Cal. 117; *People* v. *Turner*, 1 Cal. 152; *Clary* v. *Hoagland*, 13 Cal. 174; *Newman* v. *Superior Court*, 62 Cal. 545; *Golden Gate H. M. Co.* v. *Superior Court*, 65 Cal. 187; S. C. 3 Pac. Rep. 628; *Slavonic M. B. Ass'n* v. *Superior Court*, 65 Cal. 500; S. C. 4 Pac. Rep. 500. And if there is an appeal, but the time for taking it has elapsed, the writ will not lie. *Bennett* v. *Wallace*, 43 Cal. 25; *Faut* v. *Mason*, 47 Cal. 8. An order of the probate court, directing the sale of real estate, is appealable. Code Civil Proc. § 963, sub. 3; *Estate of Corwin*, 61 Cal. 161. It follows that, as petitioner had a remedy by appeal for any errors or irregularities involved in the order of sale, the writ of review will not lie.

If it be urged that the order of February 19, 1886, requiring the administrator to proceed with the sale as directed in the previous order, is not appealable, it must be admitted. *Estate of Martin*, 56 Cal. 208. But the answer is, if the original order was regular and proper to be made, petitioner is not entitled to any relief; if it was not, he should have appealed from it. Were the rule otherwise, every defendant against whom a final judgment is rendered, requiring the performance of a specific act, could wait until adjudged guilty of contempt for non-performance of the required act, and then, by a writ of review, call for the examination of alleged errors in the judgment. The writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction, for which an appeal does not lie; and the error here (if any) was in the order of sale, and not in the subsequent order directing the administrator to proceed therewith.

The application should be dismissed.

We concur; BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the application for a writ of *certiorari* is denied.

NOTE.

No appeal lies from an order dismissing a petition for the revocation of the probate of a will, or denying motions to set aside the orders and decrees made in the matter of the probate of a will, Estate of Sbarboro, (Cal.) 11 Pac. Rep. 563; nor from an order refusing to vacate an order of distribution and settlement of the final account of an ex-

ecutor, In re Lutz, (Cal.) 8 Pac. Rep. 39; nor from the appointment of commissioners to receive and examine claims against an estate, Putney v. Fletcher, (Mass.) 5 N. E. Rep. 640; nor from an order made by consent of the party appealing, In re Pemberton, (N. J.) 4 Atl. Rep. 770.

An order denying a motion for a new trial in the matter of the probate of a will is appealable. In re Pemberton, (N. J.) 4 Atl. Rep. 770.

As to appeals from other orders of the probate court, see Morey v. Sohier, (N. H.) 3 Atl. Rep. 636; Charles v. Charles, (Minn.) 29 N. W. Rep. 170; Hardy v. Minneapolis & St. L. Ry. Co., (Minn.) 28 N. W. Rep. 219; Auerbach v. Gloyd, (Minn.) 27 N. W. Rep. 193; Daniells v. St. Clair Circuit Judge, (Mich.) 27 N. W. Rep. 1; Hart v. Circuit Judge, (Mich.) 23 N. W. Rep. 326; In re Brown, (Minn.) 21 N. W. Rep. 474; In re Huntsman, (Minn.) 21 N. W. Rep. 555.

71 Cal. 395

PEOPLE *v.* MCCOY. (No. 20,190.)

(*Supreme Court of California.* December 9, 1886.)

1. CRIMINAL LAW—MANSLAUGHTER—ARRAIGNMENT—STANDING MUTE—PLEA BY COUNSEL.
 Where, upon an appeal from a judgment of conviction in a trial for manslaughter, the record shows that the defendant was regularly arraigned; that he was asked if he pleaded guilty or not guilty; and that he personally made no answer, but, in his presence, his attorney, answering, said, "We plead not guilty," whereupon the clerk of the court made an entry in the minutes of the court that the "defendant pleads not guilty of the offense charged in the information, and, by consent of all parties, the cause is set for trial on the twentieth of October, 1885:" *held*, that the substantial rights of the defendant were in no way prejudiced.
2. SAME—DUTY OF COURT—PEN. CODE CAL. § 1024.
 Under section 1024, Pen. Code Cal., where, in the conduct of a criminal trial, the prisoner, on being arraigned, stands mute, it is the duty of the court to enter on the minutes a plea of "not guilty."
3. SAME—INSTRUCTIONS REFUSED EMBRACED IN CHARGE—FALSUS IN UNO FALSUS IN OMNIBUS.
 Where, on a trial for manslaughter, the court is asked to instruct the jury, "A witness false in one part of his testimony is to be distrusted in all," the instruction is a plain proposition of law to which the defendant is entitled; but if, in the charge to the jury, it has been already substantially given, the court is not bound to repeat it.
4. SAME—JUROR—MISCONDUCT—WHEN TO BE TAKEN ADVANTAGE OF—NEW TRIAL.
 Where a party in the trial of a criminal action sees or knows of an act of misconduct by a juror which he does not bring to the attention of the court, or object to at the time, or at any other time during the trial, or on the hearing of a motion for a new trial, it will be too late to make it the basis of objection and exception after the court has disposed of the motion, and pronounced judgment.
5. SAME—NEW TRIAL—GROUNDS FOR MOTION—RECORD—APPEAL.
 If, in the trial of a criminal case, the record fails to disclose the grounds upon which a motion for a new trial was heard and determined, the ruling of the court upon the motion cannot be made the subject of review on appeal.

In bank. Appeal from superior court, Ventura county.

Information for manslaughter.

Hall & Hamer, *L. F. Eastin*, *J. M. Brooks*, and *L. C. Keeby*, for appellant. *Atty. Gen. E. C. Marshall*, for respondent.

MCKEE, J. The defendant in this case having been convicted of the crime of manslaughter, appealed from the judgment of conviction, and from an order denying his motion for a new trial.

The first assignment of error is that the verdict returned by the jury, and the judgment rendered by the court, are void, because the defendant did not *personally* plead to the information, and, in consequence, there were no issues raised upon which he could be tried and convicted. But the record shows that the defendant was regularly arraigned; that upon his arraignment he was asked if he pleaded guilty or not guilty; and that personally he made no answer, but, in his presence, his attorney, answering, said, "We plead not guilty;" whereupon, the defendant still standing mute, the clerk of the court made an entry in the minutes of the court, in the following words,

namely: "Defendant pleads not guilty of the offense charged in the information, and, by consent of all parties, the cause is set for trial on the twentieth of October, 1885." The plea of the defendant, as it was formulated for him by his attorney, was therefore regularly entered upon the minutes. He consented to it, and in the form in which it was made we cannot see that any of the substantial rights of the defendant were in any way prejudiced. Besides, if the refusal of the defendant to answer in person was equivalent to a refusal to plead to the information, the law cast upon the court the duty of having entered on the minutes of the court a plea of not guilty. Section 1024, Pen. Code. That was in effect done, and thereby issues were raised according to law, upon which the defendant was legally tried and convicted.

The next assignment of error is that the court refused, at defendant's request, to give the jury the following instruction: "A witness false in one part of his testimony is to be distrusted in all." Unquestionably that is a plain legal proposition, which a court is bound by law to give to a jury on all proper occasions. Section 2061, Code Civil Proc.; *White* v. *Disher*, 7 Pac. Rep. 826; *Brown* v. *Griffith*, 9 Pac. Rep. 425. But the court in its charge to the jury had substantially given the proposition to them as law; and, as we have repeatedly held, a court is not bound to repeat any of its instructions.

Lastly, the refusal of the court to grant a new trial is assigned as error. The judgment roll shows that, on the day appointed for pronouncing judgment, the defendant moved *viva voce* for a new trial, "on grounds then stated, and taken down by the court reporter." But the grounds of the motion, whatever they were, are not embodied in the bill of exceptions prepared by the defendant and settled by the court.

There is in the bill an affidavit, made by one of the defendant's attorneys, which contains a statement that some of the jurors, while engaged in the trial of the cause, occupied their time by reading copies of a newspaper which contained an editorial condemnatory of the administration of justice in criminal actions in the courts of the country, but it had no reference to the case on trial. There is no doubt, however, that the reading of newspapers by jurors while engaged in the trial of a cause is an inattention to duty which ought to be promptly corrected; and, if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial. Jurors in a criminal action are sworn to render a true verdict according to the evidence. They cannot, under the oath which they take, receive impressions from any other source. If it be proved as a fact, or may be presumed as a conclusion of law, that their verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial. Subd. 2, § 1181, Pen. Code.

But there is nothing in the bill of exceptions which affirmatively shows that the motion for a new trial was made on that ground. The affidavit itself, if regarded as a part of the bill, does not show it. It contains a statement that the affiant had no knowledge of the objectionable character of the editorial in the newspaper, in the hands of the jurors, until after the close of the trial and the recording of the verdict, and that, on the argument of the motion for a new trial, he brought it to the attention of the court, and made it a ground of motion for a new trial. But, assuming that the editorial contained matter which it was objectionable for a juror to read, there was no showing that any of the jurors read the objectionable matter, or that it in any way influenced their verdict, or predjudiced any substantial right of the defendant. Such a showing was not made on the hearing of the motion. The motion was heard and decided on the third of December, 1885, and the affidavit was not made until the sixteenth of January, 1886,—six weeks after the court had denied the motion and pronounced judgment. Therefore the affidavit could not

have been used on the hearing of the motion; and, in fact, the bill of exceptions affirmatively shows that it was not used. Where a party, in the trial of a criminal action, sees or knows of an act of misconduct by a juror, which he does not bring to the attention of the court, or object to, at the time, or at any other time during the trial, or on the hearing of a motion for a new trial it will be too late to make it the basis of objection and exception after the court has disposed of the motion and pronounced judgment.

The judgment pronounced brought the proceeding to an end, and was final and conclusive, subject only to be reviewed and reversed for errors apparent on its own record; and, where such a record fails to disclose the grounds upon which a motion for a new trial was heard and determined, the ruling of the court upon the motion cannot be made the subject of review on appeal.

Judgment and order affirmed.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.; MCKINSTRY, J; THORNTON, J.

71 Cal. 314

HARRIS *v.* HARRIS. (No. 11,223.)

(*Supreme Court of California.* November 26, 1886.)

HUSBAND AND WIFE—SEPARATE ESTATE—PRE-EMPTION—RIGHTS OF WIFE ON DIVORCE.

Where a wife, before her marriage, was the holder of a pre-emption right to land, which she paid for with funds loaned her upon her personal faith and credit, and, after her marriage, a patent was issued to her by the United States, the patent relates back to the date of her entry; and in an action for divorce, and a moiety of the land, brought by the husband, the land will be adjudged the separate property of the wife, free from all claim, interest, or control of the husband.[1]

In bank. Appeal from superior court, San Joaquin county.

Suit for divorce upon the ground of willful desertion, and for a division of land claimed to be community estate. Judgment for defendant. Plaintiff appealed. The facts are sufficiently stated in the opinion.

W. C. Green and *J. B. Hall*, for appellant. *James A. Loutitt* and *Woods & Levinsky*, for respondent.

MCKINSTRY, J. In this action for divorce the plaintiff claims a moiety of the land patented to the defendant, on the ground that the money paid for the government title belonged to the community.

1. Even if it appeared that the money was paid out of community funds, the land would be the separate property of the wife. With full knowledge and consent of the plaintiff, the land was proved up and paid for in her name, and the proof of her occupation and "declaration" or affidavit was as necessary a prerequisite to the acquisition of the government title as was the payment of the price. The patent is a record which proves the facts which preceded its issue, on proof of which the proper officers of the United States were authorized to issue it. For certain purposes the possession of either spouse is the possession of both. But here the pre-emption declaration and exclusive occupation of the defendant preceded her marriage with the plaintiff, and constitute part of the acts which culminated in the certificate of purchase and patent. The plaintiff ought not to be permitted to ignore her declaration and possession, (without proof of which she could not have received the benefits of pre-emption,) and treat the acquisition of the government title simply as an ordinary purchase, made after the marriage, with community funds. Under the pre-emption laws, a woman, after her marriage, may secure a pre-emption based on occupancy, the right to which is her separate property. That was done in this case, and the plaintiff, who seeks

[1] See note at end of case.

to benefit by the transaction, cannot say the pre-emption title was not acquired legally and regularly.

She then had a right to acquire the United States title. Can the husband say that he obtained an interest in the pre-emption claim, prior to the certificate of purchase, by reason of the payment, with his consent, of money of which he had the control? Such a claim would seem to be invalid, because the express or implied agreement that he should have such an interest would be in fraud of the United States statute. If she "directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except herself," it was void. Act of congress of September 4, 1841, § 13. It will not do to say that no contract was made; that the interest of the plaintiff, as a member of the community, arose out of the relation the parties so occupied towards each other under the state law. If he has an interest in this land, it is not one created by the marriage, but by reason of the fact that community money was paid for it. This was done, as the case shows, with his express consent, and, in any event, his consent would be implied. The attempt of plaintiff, therefore, is to enforce a claim growing out of an agreement made before the certificate was issued. The court will not aid in the enforcement of such agreement, because it is in violation of the spirit and letter of the pre-emption law.

2. But there was evidence that the money used to secure the government title was paid to the defendant by Cahill, in consideration of a promise that she should convey to him 40 acres so soon as she should obtain the United States title to a tract of 160 acres under the pre-emption laws. That contract was fully executed. When it was entered into, the possessory title to the 160-acre tract was in the defendant as her separate property. If the land had never been proved up and paid for, the possessory right would still be her separate property as between herself and husband. It may be conceded that her mere possession, in connection with her pre-emption declaration, gave her no vested interest in the land which the United States was bound to recognize. But her possession commenced prior to the marriage,—was as to all persons except the United States a separate property right. In her possessory title the plaintiff had no part. The contract with Cahill was that she should convey, when she should get the government title, a portion of the tract, the possessory title to the whole whereof was in her as her separate property. She had a standing on which, and the payment of the money received from Cahill, she could acquire the true title. She, in accordance with her contract, perfected her title, as pre-emptor, by proceedings initiated by her "declaration" and sole possession, made and begun before her marriage. The plaintiff necessarily concedes the regularity and validity of those proceedings. The promise of defendant to Cahill could be performed only by and through a merger in the government title of her possessory title. The transaction was not a loan from Cahill to the community. The defendant parted with a portion of the right annexed to her possessory title, on which could be secured the government title; Cahill receiving the benefit of her possession *pro tanto*. The plaintiff had no interest in any part of the consideration which passed from the defendant to Cahill, either as a member of the community or otherwise. The money became her separate property when she received it, and continued such until she paid it to the United States.

Even if it should be conceded that the patent is absolutely void, the plaintiff could assert no claim here. It is only property "*acquired*" by either spouse after marriage which is community property.

Judgment and order affirmed.

We concur: MORRISON, C. J.; MYRICK, J.; THORNTON, J.; SHARPSTEIN, J.

NOTE.

In California, property acquired after marriage becomes community property, unless it be acquired by gift, descent, devise, or bequest, or on the credit of the separate estate, Schuyler v. Broughton, 11 Pac. Rep. 719; but the rents, issues, and profits of the separate estate remain separate property, Id.; Shumway v. Leakey, 8 Pac. Rep. 12; In re Higgins, 4 Pac. Rep. 389. In Arizona the rents, issues, and profits, during coverture, of the separate estate of a married woman, remain her separate property. Stiles v. Lord, 11 Pac. Rep. 314; Woffenden v. Charouleau, Id. 117, overruling Woffenden v. Charaleau, 8 Pac. Rep. 302. In Arkansas the earnings of a married woman, arising from her labor, become her separate property. Sellmeyer v. Welch, 1 S. W. Rep. 777. In Kentucky the common-law rule prevails that all the personal property of the wife at her marriage, or which she may acquire during coverture, unless it be her separate estate, belongs to the husband, unless she has been created a *feme sole*. Wiggins v. Johnson, 1 S. W. Rep. 643. In Ohio, prior to act of April 3, 1861, money received by the wife became the property of the husband, unless the circumstances imparted to it a different character. In re Wood, 5 Fed. Rep. 443. In Montana the husband is entitled to the rents and profits of his wife's property, unless it is otherwise provided in the deed, Hopkins v. Noyes, 2 Pac. Rep. 280; or she has filed a list of such property pursuant to the statute, Palmer v. Murray, 9 Pac. Rep. 896; Herman v. Jeffries, 1 Pac. Rep. 11. In Texas the profits arising from her separate estate become community property. Smith v. Bailey, 1 S. W. Rep. 627.

Property which comes to a married woman from any source except her husband, is her sole and separate property, and not liable to seizure for his debts, in the District of Columbia, Hitz v. National Met. Bank, 4 Sup. Ct. Rep. 613; in Iowa, Second Nat. Bank v Gaylord, 24 N. W. Rep. 56; in Minnesota, Ladd v. Newell, 24 N. W. Rep. 366; Hassfeldt v. Dill, 10 N. W. Rep. 781; in Nebraska, Broadwater v. Jacoby, 26 N. W. Rep. 629; Leighton v. Stuart, Id. 198; Edgerly v. Gregory, 22 N. W. Rep. 776; Spellman v. Davis, 15 N. W. Rep. 336; Bemis v. Davis, 13 N. W. Rep. 284; in New Jersey, Kutcher v. Williams, 3 Atl. Rep. 257; in Oregon, King v. Voos, *post*, 281; in Wisconsin, Dayton v. Walsh, 2 N. W. Rep. 65.

In Pennsylvania the property of a married woman is not subject to execution for the debts of her husband if she can show that she did not acquire it on the credit of her husband. Spering v. Laughlin, 6 Atl. Rep. 54; Tibbins v. Jones, 4 Atl. Rep. 383; Kingsbury v. Davidson, Id. 33; Hess v. Brown, 2 Atl. Rep. 416; Simpson v. Kennedy, 3 Atl. Rep. 191, and note; Gregg v. George, 6 Atl. Rep. ——; or has received it as a gift, Gibson v. Sutton, 6 Atl. Rep. ——; Hess v. Brown, 2 Atl. Rep. 416.

71 Cal. 393

BROWN *v.* WELDON. (No. 9,606.)

(*Supreme Court of California.* December 9, 1886.)

1. PROMISSORY NOTES—ACTION ON—PLEADING—COPY OF NOTE—CODE CIVIL PROC. CAL. § 447.

Under section 447, Code Civil Proc. Cal., providing that the "genuineness and due execution of a promissory note are deemed admitted" when a copy of the note is set out in the complaint, and no answer under oath is filed, a demurrer to a complaint in an action on a promissory note will not be sustained on the ground that it does not allege that defendant promised to pay the note, when a copy of the note is so set out in the complaint.

2. SAME—WHEN AND WHERE MADE—PRESUMPTIONS.

A copy of a promissory note being set out in the complaint in an action thereon, the complaint is not demurrable on the ground that it contained no allegation as to when and where it was made, as, *prima facie*, it was made when and where it bore date.

Department 1. Appeal from superior court, Alameda county.

This is an action on a promissory note. The complaint alleges that defendant is indebted to plaintiff in the sum of $765; sets up a copy of the note; alleges its delivery to Mrs. L. H. Brown, the payee, its indorsement by her to plaintiff, and his ownership; that the note is long past due and owing to him; that there is now due thereon the full sum of $500, and interest from its date at 1 per cent. per month, amounting to the full sum of $765, no part of either principal or interest having been paid. The defendant demurred to the complaint because (1) the court has no jurisdiction of the person of the defendant, or the subject-matter of the action; (2) the complaint does not state facts sufficient to constitute a cause of action; (3) the complaint is ambiguous, unintelligible, and uncertain, in this: that it does not state when or where said pretended promissory note was made, or that defendant ever promised to pay the same, or any part thereof. Demurrer overruled. Defendant answered. Cause tried. Judgment for plaintiff. Defendant appeals from the judgment, and from the order denying his motion for a new trial.

Welles & Whitmore, for appellant. *H. P. Brown*, for respondent.

McKINSTRY, J. The complaint is inartificially and loosely drawn. But we do not think it fails to state a cause of action; nor is it subject to demurrer as ambiguous or uncertain. But it so far departs from established precedents, and so nearly approaches the line which separates pleading which may be tolerated, though not approved, from pleading radically defective, that we refuse to treat this appeal as frivolous.

Defendant's motion for nonsuit was properly denied. The genuineness and due execution of the promissory note were admitted. Code Civil Proc. 447. *Prima facie*, it was made when and where it bore date. The findings are sufficient.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.

71 Cal. 375

ROCHE *v.* WARE, Adm'r, etc. (No. 11,282.)

(*Supreme Court of California.* December 6, 1886.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS—PROOF OF ACCOUNT-BOOKS—CODE CIVIL PROC. CAL. § 1880.

Section 1880, Code Civil Proc. Cal., providing that "parties to an action * * * against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person," cannot be witnesses, does not prevent a party from testifying, in such an action, to prove his account-books as preliminary to their introduction in evidence; and, it not appearing that he was not within the jurisdiction of the court, books proven by the testimony of the party's wife are inadmissible.

In bank. Appeal from superior court, Colusa county.

Stabler & Bayne, for appellant. *T. J. Hart* and *Geo. A. Blanchard*, for respondent.

MCKINSTRY, J. Plaintiff's books of account were admitted in evidence over the objection of defendant that they were not sufficiently proved. The only evidence on which the books were admitted consisted of testimony of the wife of plaintiff, which tended to prove that the plaintiff had no clerk; that entries were made in original books by the plaintiff on the evening of each day purporting to be charges for work done and material furnished dur-

ing the day; and that the accounts, as entered in the blotter or day-book, were correctly transferred to the ledger.

In the English courts tradesmen's books were not formerly legal evidence in favor of the party making them. It would seem that the practice of allowing a party's books of account as evidence came into use in New York and New Jersey with the Dutch colonists, and into the eastern states with the English colonists from Holland, who settled in New England. *Beach* v. *Mills*, 5 Conn. 496; *Conklin* v. *Stamler*, 8 Abb. Pr. 395; Introduction to 1 E. D. Smith. It would seem, also, that, by the Dutch law, the cogency, as evidence, of the books might be strengthened by the testimony of the party.

Yet in *Vosburgh* v. *Thayer*, 12 Johns. 461, it would appear to have been assumed that the party could not testify with respect to his own books. The supreme court of New York there held that books of account ought not to be admitted "unless a foundation is first laid for their admission by proving that the party had no clerk; that some of the articles charged have been delivered; that the books produced are the account-books of the party; and that he keeps just and honest accounts; and this by those who have dealt or settled with him." And the court added: "Under these restrictions, from the necessity of the case, and the consideration that the party debited is shown to have reposed confidence by dealing with and being intrusted by the other party, they are evidence for the consideration of the jury." In subsequent New York cases it was held that a party's books of account were inadmissible unless he proved, not only that he kept just and honest accounts by those who had settled with him by his books, but also that the party charged had dealt with him, and that some of the articles charged were actually tendered or delivered. *Morrill* v. *Whitehead*, 4 E. D. Smith, 239; *Conklin* v. *Stamler*, 2 Hilt. 432; S. C. 8 Abb. Pr. 395.

The practice of all the other states, so far as we are informed, where books of account are admitted in evidence, is to *authorize*, at least, the preliminary proof to be made by the party himself. In a note to section 118 of the first volume of Greenleaf's Evidence it is said, (many cases being cited to sustain the statement:) "The rules of the several states with regard to the admission of this evidence are not perfectly uniform; but in what is about to be stated it is believed they concur. * * * If the books appear to be free from fraudulent practices, * * * the party himself is then required to make oath, in open court, that they are the books in which the accounts of his ordinary business transactions are usually kept, and that the goods therein charged were actually sold and delivered to, and the services actually performed for, the defendant." He should also swear that "the entries were made at or about the time of the transactions, and are original entries thereof."

It may be conceded that, if able to do so, the party may prove by other witnesses the matters which he is allowed to testify to himself. But if the party who kept the books, being in a position to give testimony, does not offer himself as a witness to those matters, he must at least prove by others those things which he would be required to prove by his own testimony. It was said generally by DALY, C. J., and BRADY, J., in the New York common pleas, that, since the Code provisions allowing parties to testify, the books of account of a party are no longer evidence on his behalf; that the admissibility of such books, on certain preliminary proofs, had been put on the ground of necessity, arising from the former incompetency of a claimant to be a witness on his own behalf; and that the reason of the rule was destroyed by the legislation authorizing the examination of the parties. *Conklin* v. *Stamler*, 8 Abb. Pr. 400. But it would seem there to be admitted, not only that the books might be referred to to refresh the memory of the witness, but that the entries themselves might be evidence, if the witness could testify that the transaction was correctly recorded when the entry was made, although he might not be able to recollect the "fact."

In the case now here it is urged that the ruling of the court below should be sustained on the ground of necessity, because the plaintiff was prohibited from becoming a witness by section 1880 of the Code of Civil Procedure. It would by no means follow that the preliminary proof would be sufficient if the plaintiff was prohibited from making it by his own testimony. The section of the Code, however, did not forbid his being a witness for the purpose of making such proof. Section 1879 of the Code of Civil Procedure provides: "All persons, without exception, otherwise than is specified in the next two sections, * * * may be witnesses." And by section 1880 it is declared: "The following persons cannot be witnesses. * * * (3) Parties to an action * * * against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

The evident purpose of the provisions of the Code is to render competent (with certain exceptions) persons incompetent at the common law; as parties to the record, and those directly interested in the event of the action. The parties under certain circumstances excepted from the general rule established by the Code, continue incompetent in the same manner, and to the same extent, that all parties were formerly incompetent. But, before the Code, the party offering his books, although incompetent to be a witness with respect to the issues submitted to the jury, was competent to give testimony, addressed to the court, going to establish the facts which rendered the books admissible. This was determined in *Landis* v. *Turner*, 14 Cal. 573. There FIELD, C. J., said.

"The defendants objected to the examination of the plaintiff on the ground of his incompetency as a party to the suit, and to the introduction of the book of entries on the ground that it was not sufficiently proved. Neither of these objections was well taken. The evidence of the plaintiff was upon an incidental and preliminary matter, and the rule which excludes the testimony of parties has no application. That rule has reference to the matters in issue, and not to incidental matters auxiliary to the trial of the cause upon which the testimony is addressed solely to the court. *Bagley* v. *Eaton*, 10 Cal. 146. The book of entries constituted the evidence in the case bearing upon the issue. The testimony of the party only laid the foundation for the introduction of that evidence. The referee occupied the double character of judge and jury, and the admissibility of the book was to be decided by him, in the first instance, in his character as judge; and, to enable him to determine the question, the testimony was properly received. The credit and weight given to the entries were entirely distinct from the preliminary matter. There are, it is true, numerous decisions against the reception of the party's testimony in cases like the present, but the clear weight of authority is the other way. His testimony is taken in nearly every state of the Union. When this case was argued, we supposed the rule was otherwise, recalling at the time the decisions of the New York courts on the subject. A somewhat extended examination since has satisfied us that the prevailing and the better rule in the United States differs from that of New York. The testimony of the party must often be the only means of establishing the fact that the book contains the original entries, that the party kept no other books, and that he had no clerk; and, as it is subject to the scrutiny of a cross-examination, it must afford protection against the perpetration of fraud by false entries."

The plaintiff was competent to make the preliminary proof. There is no pretense he was not within the jurisdiction. For aught that appears he was present at the trial.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; THORNTON, J.; MCKEE, J.

MYRICK, J. I concur in the judgment.

72 Cal. 110

DEMICK *v.* CUDDIHY. (No. 9,708.)

(*Supreme Court of California.* December 7, 1886.)

1. MORTGAGE—RIGHTS OF MORTGAGEE—MORTGAGEE IN POSSESSION—APPLICATION OF RENTS AND PROFITS—CONTRACT AFFECTING.
 A mortgagee in possession may, under contract with the mortgagor to that effect, apply the rents and profits of the mortgaged premises, in excess of the interest due on the mortgage debt, to the payment of unsecured indebtedness due or to become due from the mortgagor to the mortgagee.
2. JUDGMENT—REVERSAL—FAILURE TO FIND ON ISSUES RAISED.
 A judgment rendered upon a finding of the truth of the allegations of a cross-complaint, without any findings on the issues raised by the answer to the original complaint in the action will not be sustained, when the allegations of the cross-complaint do not cover the issues thus raised.

Department 1. Appeal from superior court, Del Norte county.

This is an action by Demick, appellant, as the grantee of one George H. Crumpton, to redeem a mortgage.

Cuddihy, the respondent, filed an answer and also a cross-complaint, in which he asked for a decree of foreclosure and order of sale of the premises, and recovered judgment in the court below. This appeal is taken from the judgment, and from the order of court refusing to grant a new trial; the contention being on the amount due. The mortgage was given by deed and defeasance on the twenty-ninth April, 1881, to secure payment of $800, with interest at 1 per cent. per month, and the mortgagee (defendant) went into immediate possession of the mortgaged premises. These premises consisted of several houses and lots in the town of Happy Camp, Del Norte county, California. The plaintiff claims that the rent received should be applied—*First*, to the payment of interest due on the mortgage; and, *second*, to the extinguishment of the mortgage debt. Defendant claims that there was, at the time of the execution of the mortgage, a parol agreement to apply the rents in excess of the interest on the mortgage to the payment of antecedent and subsequent debts of the mortgagor, Crumpton, to defendant. Plaintiff demurred to the defense made in the answer that there was an agreement between the mortgagor and mortgagee disposing of the rents and profits of the mortgaged premises. Demurrer overruled.

L. F. Cooper, for appellant. *R. G. Knox*, *W. H. H. Hart*, and *Aylett R. Cotton*, for respondent.

MCKINSTRY, J. The demurrer of plaintiff to "the second separate cause of defense" was not well taken. The answer alleges:

"(1) That, at the time of the execution of the mortgage in the complaint set forth, the mortgagor thereof was indebted to this defendant for goods, wares, merchandise, and money, aside from the consideration of said mortgage, had and received; (2) that from time to time since the execution of said mortgage, and prior to the deed from George H. Crumpton to the plaintiff herein, in the complaint set forth, the said Crumpton has incurred sundry items of indebtedness to this defendant; (3) that it was mutually understood and agreed, by and between said George H. Crumpton and this defendant, that any rents collected under and by virtue of said mortgage in excess of the interest on the principal sum thereof should be applied to the liquidation of the debts existing at the time of the execution of said mortgage and those thereafter to be incurred, and such excess was and has been so applied."

Counsel for appellant say: "Our theory is that in an action to redeem a mortgage, where the mortgagee is in possession of the premises, he is accountable for the rents and profits; and the same, as they are received by him, should be applied to the extinguishment of the mortgage debt. In support of this view we cite Story, Eq. Jur. (12th Ed.) § 1016*a*; *Gibson* v. *Crehore*, 5

Pick. 158; Jones, Mortg. §§ 671, 772; *Morse* v. *Merritt*, 110 Mass. 460, where the court say: 'So long as any portion of the mortgage debt remained due, the mortgagee would take the rents recovered, in trust, to account for and apply towards its payment.' "

But we know of no equitable principle which will prohibit a binding contract between mortgagor and mortgagee in possession, or mortgagee who has been authorized to collect the rents, by which it is stipulated that the excess of rents beyond interest of the mortgage debt shall be applied to other indebtedness due from the mortgagor, or to become due up to an assignment of the equity of redemption. The equity imposed upon the mortgagee receiving rents to apply them to the interest and then to the principal of the mortgage debt, etc., (in absence of specific agreement,) may be overcome and supplanted by a specific agreement between mortgagor and mortgagee for the disposition of the rents.

The court below, however, failed to find upon the issues made by the allegations in the answer above quoted, and the implied denials thereof. The court found "that all the allegations of the said defendant's cross-complaint are true." The allegations above recited are not in the *cross-complaint*, and there is no finding that the averments in the answer are true.

Judgment and order reversed, and cause remanded for a new trial, and with leave to the parties to apply to the court below for leave to amend their pleadings if they shall be so advised.

We concur: MYRICK, J.; THORNTON, J

71 Cal. 353

In re Disbarment of Tyler. (No. 11,442.)

(*Supreme Court of California.* December 3, 1886.)

1. Attorney and Counsel—Retainer—What Amounts to.
An attorney who is retained by a guardian to recover the possession of certain promissory notes, and a policy of life insurance pledged as security for their payment, becomes the attorney of the person from whom the recovery is sought, when that person, at the attorney's request, places the papers in his hands for the collection of the loss under the policy, paying the attorney a fee, and taking from him a receipt, in which the attorney promises and agrees, when the money is paid, to turn over to such person, after the lapse of a certain time, and the non-occurrence of certain litigation, the part thereof claimed by him. Myrick, J., dissenting.

2. Same—Unprofessional Conduct—What is—Suspension.
A failure on the part of the attorney to pay over such money, when collected as agreed, coupled with the institution of a suit against his client, at his instigation, by a claimant to the fund,—the suit being brought in the name of another attorney to conceal from the client his connection with the claimant's case,—and the giving of a bond, with sureties known by the attorney to be insolvent, to stay execution on an appeal from a judgment rendered in favor of the client for the money appropriated, is such unprofessional conduct as to warrant the suspension of the attorney for two years, and until satisfaction of the judgment. Myrick, J., dissenting, as to the term of suspension.

3. Reference—Referee's Discretion—Cross-Examination.
Referees are invested with large discretion as to the limits within which a cross-examination shall be confined.

4. Same—Adjournment—To Allow Counsel to be Procured—Harmless Errors.
The action of a referee in refusing to adjourn a session immediately upon the withdrawal of an attorney from the case, in order to give his client an opportunity to secure other counsel, is not ground for interference by the supreme court, unless the client has been injured thereby.

In bank.

Pillsbury & Blanding, for complainant. *James L. Crittenden*, for respondent.

Thornton, J. This is an application for the disbarment of George W. Tyler. The accusation is preferred by J. M. Hogan, in which it is stated that he (Hogan) was the plaintiff, and sued Tyler, the defendant, in an action entitled *J. M. Hogan* v. *George W. Tyler*, which has been heard and finally determined in this court; that on the thirtieth of March, 1882, he recovered a judgment in said action against Tyler in the superior court of the city and county of San Francisco, in the sum of $3,862, and $284.10 costs, with interest thereon from the date of judgment; that Tyler, on the nineteenth of September, 1882, appealed from this judgment to this court, which appeal was determined in this court on June 24, 1885, by affirming the judgment;[1] that thereafter a *remittitur* was issued in the cause, and was filed and docketed in the above-named superior court on July 30, 1885; that payment of said judgment has been demanded of said Tyler, upon execution issued thereon since the filing of the said *remittitur;* that Tyler has failed and refused to pay the same, and no part of it has been paid; that upon said appeal Tyler procured an undertaking to stay execution on said judgment to be given, and execution thereon was stayed, by virtue of this undertaking, pending said appeal; that the sureties on said undertaking, and each of them, is wholly irresponsible financially, and entirely unable to respond in damages; that each of them was so irresponsible when the said undertaking was given, and that this was then well known to Tyler; that he (Tyler) procured said sureties to make such undertaking, well knowing that they were worthless, and with intent to evade the law requiring such undertaking; that the money for which the judgment above referred to was had and recovered in the action

[1] See Hogan v. Tyler, 7 Pac. Rep. 454.

above stated against Tyler, to-wit, the sum of $3,862, was by him theretofore collected and received as the agent and attorney of the complainant, Hogan, and which he failed and refused to pay over to complainant before the commencement of said action,—all of which will more fully appear by the transcript on appeal of said cause to this court, numbered 8,744 of the records thereof, to which special reference is made, and which is asked to be taken and considered as a part of this accusation.

Complainant charges that Tyler is, and was at all times hereinafter mentioned, an attorney and counselor of this court, and that he has willfully violated his duties as such attorney and counselor, and has been guilty of unprofessional conduct, more particularly in this:

First. That on or about the third of June, 1880, Tyler, in this state, agreed to act as the attorney of complainant in the collection of certain money, the sum sued for and recovered in the action hereinbefore mentioned, and by reason of such employment received from complainant certain policies of insurance, a promissory note, and an authority in writing to receive said money; that Tyler thereafter collected said money by virtue of said employment, and the confidence reposed in him as such attorney; that he (Tyler) violated the confidence so reposed in him, and his duties as attorney, and practiced deceit upon complainant concerning said money by instigating and procuring a suit to be brought against complainant and himself by one Fred N. Hedge, in the superior court of the city and county of San Francisco to recover the said money, and to defraud complainant thereof, and concealed from complainant the facts concerning said suit, and converted said money to his own use, and has failed and refused to pay over this money to complainant.

Second. That on or about August 6, 1880, the said Tyler did willfully violate his duty as an attorney and counselor at law, and the confidence reposed in him as such by complainant, in this: That Tyler, being then the attorney and in the possession of $3,862 of the moneys of this complainant, which he had theretofore collected for complainant as his attorney, and contriving to cheat and defraud complainant, did instigate and procure a suit to be commenced in the superior court above mentioned, by Fred N. Hedge, against himself and complainant, for the recovery of the money above mentioned, and did procure said Hedge to falsely represent and allege to said court in his complaint in that action, that he (Tyler) threatened to pay said money over to complainant unless such action was instituted, and, wrongfully and without cause, to ask said court in said complaint to enjoin and restrain Tyler from paying over said money to complainant before the termination of said action, whereas, in fact, Tyler had then no intention of paying over said money to complainant; and thereby Tyler sought to mislead said superior court, and the judges thereof, by a false statement of fact, and failed to maintain the respect due by him to said court and its officers, as an attorney of said court.

Third. That prior to the sixth day of August, 1880, Tyler had collected the money for complainants as above stated, as his attorney, agent, and trustee, and held the same as such; that on or about the said last-named day, and while he was the attorney, agent, and trustee of complainant, and without complainant's knowledge, Tyler did instigate, encourage, and procure said Hedge to commence the action above mentioned against complainant and himself, and did thereafter encourage and procure said Hedge to continue the prosecution of said action, and did procure the said action to be commenced and continued, with intent to cheat and defraud said complainant, and to prevent said money from coming to the complainant, and with the corrupt motive to thereby wrongfully acquire said money, and the whole thereof; that Tyler did at all times have a corrupt interest in said action, and the result thereof, which interest was hostile to complainant, and Tyler was thereby making use of said Hedge to hide and conceal such interest, and to deceive and mislead this complainant, and did then and there, at all times, counsel and maintain said ac-

tion, well knowing that the same was illegal and unjust, and was calculated and intended to cheat and defraud complainant, and in so doing he was violating his duty and obligations to complainant.

Fourth. The accusation in the fourth count or paragraph sets forth the same facts as to collecting, receiving, and holding the money aforesaid, the instigation and procurement of Hedge to commence the action against complainant and Tyler, the procurement of Hedge to continue the prosecution of said action, the intent with which Tyler procured it to be commenced and continued, and the motive thereof, as are contained in the third count or paragraph, and in addition states that prior to the commencement, to-wit, on the thirtieth day of July, 1880, Tyler being then the attorney, agent, and trustee of complainant, did, without the knowledge or consent of complainant, enter into an arrangement with said Hedge for the commencement and prosecution of said action, whereby it was agreed that Tyler should receive one-third of all said moneys so to be received of complainant, and thereafter, on October 7, 1880, the said Hedge, at the instance and procurement of Tyler, sold and assigned all his right in said suit ostensibly to one Walter C. Dimmick, but in reality for the interest and benefit of Tyler, and this assignment was so made to Dimmick with intent to cheat and deceive complainant; that Tyler never informed complainant during the pendency of the action that he had an interest therein, or that he had instigated or maintained the same.

Fifth. That on July 30, 1880, Tyler was an attorney and counselor of this court, and on that day, and by virtue of his position as such attorney and counselor, he did, with the consent and at the request of complainant, collect and receive the sum of money belonging to complainant, and did thereafter have and hold the same as the agent and trustee of complainant, and not otherwise; and while so holding and retaining said money of complainant, and without his knowledge or consent, Tyler, on said thirtieth day of July, did enter into an agreement with one Fred. N. Hedge to obtain and recover said money from complainant, Tyler to have one-third of all that might be so recovered; and to that end he (Tyler) caused a complaint to be drawn, and an action to be commenced thereon, on August 6, 1880, in the court aforesaid, for the recovery of said money, wherein Hedge was made plaintiff, and Tyler and complainant defendants; that he (Tyler) did thereafter secretly prosecute this action, until it was, on August 30, 1881, dismissed at the instance of Tyler, to avoid a trial thereof; that on October 7, 1880, Tyler procured Hedge to make a transfer of all his interest in said action, ostensibly to one Walter C. Dimmick, but in reality for the benefit of Tyler; that Tyler instigated and prosecuted said action during the pendency thereof, and until August 30, 1881, without the knowledge or consent of complainant, and during all times failed and neglected to inform complainant of the facts touching the action, and his connection therewith; that during said times, and prior to September 15, 1881, Tyler converted all of said money to his own use, and has entirely failed to pay over said money, or any part thereof, to this complainant; that Tyler has squandered said money, and is now unable to pay the same, and complainant is remediless in the premises; that by reason of the matters next hereinbefore stated, complainant charges that Tyler has been guilty of unprofessional conduct as an attorney, and as such has violated his duties, and the confidence reposed in him by complainant, and has practiced deceit upon complainant, and has encouraged and instigated the commencement and prosecution of an action, to-wit, the said suit of *Hedge* v. *Tyler and Complainant*, from a corrupt motive and interest, and is unworthy to be permitted to practice as an attorney and counselor of this court.

We have carefully examined and weighed the evidence, and consider the following facts established by it:

The respondent, Tyler, had been for many years prior to the fifteenth of May, 1880, and since that date, an attorney and counselor at law, duly ad-

mitted to practice by this court, and authorized to practice his profession in all the courts of this state, and since his admission has been engaged in practice in this court, and other courts of this state; that J. M. Hogan, on the fifteenth of May, 1880, and for some time prior thereto, had in his possession a promissory note, executed by Samuel Langdon, and two policies of insurance which had been issued upon the life of Langdon. The note and policies of insurance are described in a certain paper, which will be hereinafter inserted, executed by respondent on the third day of June, 1880, and delivered to Hogan. Hogan had received the note and policies above mentioned from Mrs. Charlotte Hedge in the capacity of her attorney and legal adviser. He was then practicing as an attorney and counselor at law, under an admission by one of the district courts of the state. Mrs. Hedge was the guardian of her two sons, George H. and Fred. N. Hedge. The note of Langdon was made payable to her as such guardian, and was executed for a loan of money held by Mrs. Hedge as part of the estate of her two sons above mentioned. The policies of insurance had been assigned to her by Langdon as security for the payment of his note.

While Hogan was holding this note, and the policies above mentioned, he lent Fred. N. Hedge various sums of money, in all amounting to $500, and, not long after Hedge became of age, Hogan purchased of him all his interest in the note and policies above mentioned, and in the estate of his deceased father, Nelson Hedge, for the sum of $850, which sum was made up of the $500 theretofore lent him, and $350 paid him at the time. At the time of this purchase Hogan took from Fred. Hedge an assignment to him of the interest so purchased. This assignment bears date the twenty-ninth of March, 1880. Prior to this assignment Langdon had died. Mrs. Hedge had, before the fifteenth day of May, 1880, demanded of Hogan the note and policies above mentioned, and he had refused to deliver them to her, on the ground that he was part owner of them by virtue of his purchase and assignment from Fred. Hedge, and had as much right to their custody as Mrs. Hedge. The claim of Hogan became known to the insurance companies who had issued the policies. Mrs. Hedge was demanding of the companies the payment of the policies, and Hogan had notified them that he had an interest in them, and warned them not to pay Mrs. Hedge. In this condition of affairs the companies were unwilling to pay until it was determined in some way to whom they could pay, so as to procure a discharge from their liability. Thus matters stood when Mrs. Hedge employed the respondent to get the note and policies from Hogan, without recourse to legal proceedings, if it could be so effected, or by such recourse if requisite. The respondent, after such employment, promptly addressed a letter to Hogan, of which the following is a copy:

"SAN FRANCISCO, May 15, 1880.

"*J. M. Hogan, Esq.*—DEAR SIR: Your letters to Mrs. Hedge and George Hedge have been placed in my hands to answer. I will say that I have been employed as counsel for Mrs. H. There is no desire on her part or mine to deprive any one of the money coming to them. The money, or the $10,000, must come through Mrs. Hedge. It will come into my hands, with your consent, and then every one shall have his own. Please call and see me when you come down. Very respectfully, GEO. W. TYLER."

This communication seems to have been addressed to Hogan at Stockton, of which city he was then and still is a resident, and soon after its receipt Hogan came to San Francisco, and had an interview with Tyler in regard to the subject of Tyler's letter. The result of that interview was that Hogan surrendered the note and policies to Tyler, and gave his consent in writing that the money due on the policies should be paid to respondent. During the interview above mentioned Hogan explained fully to Tyler his relation to and claim on the note and policies, substantially as above set forth, and gave

him a history of the mode in which he had acquired such claim. Upon the surrender of the possession of these papers to Tyler, he signed and delivered to Hogan a paper, of which the following is a copy:

"This certifies that I have, this third day of June, A. D. 1880, received from J. M. Hogan policy number 54,115, issued upon the life of Samuel Langdon by the Union Mutual Life Insurance Company of Maine, for the sum of $10,000, dated January 18, 1875, assigned to Charlotte Hedge; and also policy number 60,350, issued upon the life of Samuel Langdon by the New England Mutual Life Insurance Company of Boston, Mass., for the sum of $5,000, dated April 26, 1878, and assigned to Charlotte Hedge; also a promissory note made by Samuel Langdon, payable to Charlotte Hedge or order, guardian of George H. and Fred. N. Hedge, for the principal sum of $8,175.66, payable one day after date, bearing interest at 1 per cent. per month, credited on back thereof with payments,—January 11, '80, $35.69; January 27, '80, $200; February 11, '80, $300. I have received foregoing papers at the request of said Charlotte Hedge that said J. M. Hogan should deliver same to me as her attorney; and whereas, said J. M. Hogan claims to be the owner of, and entitled to receive, the one-half of all moneys due, payable, received, or collected upon said promissory note by said Charlotte Hedge or any person, and to have a lien interest upon said two insurance policies, as collateral security for payment of said promissory note, therefore, in consideration of delivery to me of said papers, and of request of said Hogan that I so act in the matter, I do promise and agree with said Hogan that I will receive from said two insurance companies whatever money is paid by either said insurance companies upon said policies, and to the extent of the one-half of the amount unpaid on said promissory note, and which said one-half at this date amounts to about $4,600, I agree to hold and retain the same. Inasmuch as I have been notified that Fred. N. Hedge has, or claims to have, some interest in said money, I agree to notify him of the payment of the same to me; and if he does not, within ten days from receiving such notice, bring some suit against said Hogan to determine the right to said money, I agree to pay the same to said Hogan on demand. In case such suit is brought, I will pay at once to whomsoever the court shall decide to be entitled to the same.

"GEO. W. TYLER,
"636 Clay Street."

It is contended that Tyler at the same time that he executed the foregoing paper also agreed with Hogan, as his attorney and counselor at law, to persuade and induce Fred. N. Hedge not to bring a suit for the portion of the money claimed by Hogan; but we are not satisfied that Tyler's engagement extended any further than set forth in the paper just above recited. At the same time it was agreed that Tyler was to receive of Hogan $100 of the portion claimed by Hogan when collected, whether as a payment for services to Hogan as his attorney, or as a gift to Tyler, does not clearly appear. Hogan testifies that it was to be paid for such services; Tyler says it was a gift from Hogan, and that he distinctly refused to be his attorney.

Tyler thus procured the possession of the note and policies, and, invested with the authority of Mrs. Hedge, and the further consent of Hogan to collect the money due on the policies, the money was paid by the insurance companies to Tyler. On the thirtieth of July, 1880, Tyler writes Hogan that on that day he had received from "the insurance company $8,260.05, and have this day notified Fred. Hedge of the fact, and unless he sues in ten days from to-day I will forward the one-half to you (less $100) as agreed." On the same day that Tyler wrote as above stated to Hogan, he received from Fred. N. Hedge the following paper:

"I hereby empower Geo. W. Tyler to take such steps as may be necessary to set aside and cancel an assignment of my interest in the estate of my fa-

ther, Nelson Hedge, to J. M. Hogan, and to secure my interest in said estate. I agree to pay said Tyler one-third of all the moneys received by me for his services, and he is to receive nothing if he recovers nothing. Said Tyler is to pay expenses of suit, and deduct same from amount recovered.

"FRED. N. HEDGE.

"*July* 30, 1880."

On the sixth of August, 1880, an action was commenced in the superior court for the city and county of San Francisco by Fred. N. Hedge, as plaintiff, against J. M. Hogan and respondent, as defendants, to cancel and annul the above-mentioned assignment of Hedge to Hogan, and to enjoin Tyler from paying over to Hogan more than $850, with interest, until the final termination of the action, and for judgment against Tyler for the moneys received by him, less the sum above-mentioned, etc. The complaint in this action was prepared by the respondent; was filed with the clerk of the court aforesaid on the date last above-mentioned, having the name of H. H. Reid signed thereto as attorney for plaintiff. Tyler procured Reid to sign his name as attorney for plaintiff, but the action was really commenced by Tyler, and was to be managed, controlled, and prosecuted by him. The complaint set forth that plaintiff had been overreached and cheated by Hogan in the purchase and transfer of his interest in the note of Langdon and the policies of insurance, and that the same had been effected by Hogan when he (plaintiff) was intoxicated.

On the same day on which this complaint was filed Tyler wrote Hogan, inclosing in the letter a check for $888. At or about the same time he informed Hogan that Fred. Hedge had commenced suit against him. Hogan received the money ($888) on the check, and kept it. He acknowledged receipt of Tyler's letter inclosing the check on the seventh of August, 1880; and states in his reply to this letter that he does not admit "that $888 is the full amount of my claim, nor the full amount of the money in your hands, received by you from the Union Mutual Life Ins. Co., belonging to me. On the contrary, the one-half of that $8,260 belongs to me, and you will please not deliver to Fred. Hedge, or any other person, except by order of court or upon my order." This letter thus proceeds: "I am obliged to you for notifying me that Fred. has brought suit. You did not tell me when the suit was instituted, nor who are the parties defendant. Please let me know. If you are sole defendant, I will defend you in the action. I will get an attorney in San Francisco to do so. When was you served with papers? Please send me a copy of complaint."

To this letter Tyler replied. This reply is written on the sheet which contains Hogan's letter of August 7th. It is without date, and no doubt written soon after the receipt of the letter to which it is a reply, and it is as follows:

"*J. M. Hogan, Esq.:* I am not sole defendant; you and I are defendants. Of course I know $888 is not what you claim, and my receipt to you is security that I will only pay the money to whomsoever the court shall order it paid. I sent you the money for the reason that as to that amount there was no dispute, and therefore no reason for my keeping it. I understand you will be served in a few days. I shall simply answer that the money is in my hands, and ready to be paid over to either, as court may direct.

"Yours, truly, TYLER".

Soon after receiving this letter Hogan came to San Francisco, and had an interview with Tyler. He told Tyler that he would employ E. S. Pillsbury, Esq., an attorney of San Francisco, to appear and defend them in the Hedge suit, to which Tyler consented.

On demurrer filed by Pillsbury on behalf of Tyler, it was held Tyler was not a necessary party to the action. Tyler dropped out of the action as a party thereto, as far as shown by the record. Hogan answered, denying, *inter alia*, all allegations of fraud, circumvention and concealment, and that

he acquired his interest from said Hedge while he was in a state of intoxication.

While the cause of *Hedge* v. *Hogan* was pending, some depositions were to be taken of certain witnesses at Stockton. On these occasions Tyler appeared to represent plaintiff, and Reid made no appearance.

On the twenty-sixth of February, 1881, Tyler addressed a note to Hogan in the following words:

"*J. M. Hogan, Esq.*—DEAR SIR: One Walter C. Dimmick has notified me and left with me an assignment in writing from Fred. N. Hedge to him of all interest in the suit of *Hedge* v. *You and Me.* I hereby notify you of that fact, so you may be informed.

"Very truly, GEO. W. TYLER."

The above-named Dimmick, a brother-in-law of Tyler, who resided in Colorado, was afterwards substituted as plaintiff in this action in place of Hedge.

The case was called for trial on the thirtieth of August, 1881. The respondent appeared for plaintiff, and moved, on his own affidavit, for a postponement of the trial. This was opposed by a counter-affidavit of Hogan. The court continued the cause until the Monday following, upon payment by plaintiff of defendant's witness fees, amounting to $16. Whereupon the respondent, for plaintiff, moved for a dismissal of the action, and on this motion a dismissal was ordered by the court.

That this action was encouraged and instigated by the respondent, and was maintained at his expense and by his efforts, we have no doubt. That he was personally interested in the cause, and was to share in the recovery, if any was had, the testimony distinctly establishes. In our judgment, the evidence shows that Tyler never informed Hogan of his contract with Hedge, or of his connection with the suit brought by the latter, and that he prosecuted that suit, concealing from Hogan his contract with Hedge, and his real connection with the suit, until the time it was dismissed.

On the trial of this cause one reason was alleged by Tyler for dismissing the action above mentioned, while the complainant contended that it was dismissed for another and a different one. Whether it was dismissed for the reason set forth by respondent, or for the reasons contended by complainant, is, in our view, entirely immaterial. It clearly appears that the cause was never tried, and that it was dismissed on the motion of respondent, who acted for plaintiff in making the motion, and that respondent was personally interested in whatever money might have been recovered in the action. As the reason for which the suit was dismissed by Tyler is immaterial, the depositions of Hedge, Clark, and Shurtleff may be excluded from consideration.

Soon after the dismissal of the action of *Hedge* v. *Hogan*, Hogan demanded payment of the portion of money coming to him on the policies above mentioned, and which Tyler had retained in his hands under the agreement above set forth. Tyler refused to pay him anything. Thereupon an action was brought by Hogan, as plaintiff, against Tyler, as defendant, to recover it. This action was instituted in the superior court for the city and county of San Francisco, and was commenced on the fifteenth of September, 1881.

The complaint therein contained two counts,—one based on the averment that the defendant had collected a certain sum as agent for plaintiff; the other, on an averment that the defendant had collected a certain sum of money as attorney at law for plaintiff. In both counts it was averred that the money had been demanded of defendant, and that he had refused to pay. The defendant answered the complaint, denying its material allegations. The cause came on for trial, was regularly tried, and resulted in a verdict for plaintiff for $3,862. The verdict was rendered on the twenty-fourth of March, 1882, and on the twenty-fifth of the same month judgment was entered on the verdict for $3,865.25, with interest, etc. This judgment was, on appeal, affirmed

by this court, and a rehearing on said appeal was by this court, in bank, denied. The *remittitur* was in due time sent from this court to the court below. Subsequently, by letter, Hogan demanded of respondent payment of the amount due on the judgment so affirmed. A reply in writing to this letter was made by respondent, and sent to Hogan, in which, in language of defiance, bitterness, abuse, and insult, he refused to pay the money, or any part of it. Afterwards Hogan took steps to have the respondent examined on proceedings supplementary to execution on the judgment aforesaid. Such examination was had, from which it clearly appeared that respondent was totally unable to pay, and that he had converted to his own use and spent the money above referred to, which he had received, and which it had been adjudged was due to and belonged to Hogan.

On the appeal to this court in the above-mentioned cause of *Hogan* v. *Tyler* the defendant was desirous of staying the execution of the judgment pending the appeal. To effect this, an undertaking to stay execution was filed, two of the sureties to which were John S. Wheeler and Philip Schenck. This stay undertaking was in the form and with the condition prescribed by law. The sureties were irresponsible, and without the means of payment, when the undertaking was executed by them. Upon the affirmance of the judgment, and the rendition of judgment against the sureties on the undertaking, it was found that they were entirely without means to pay any part of the judgment. The evidence satisfies us that respondent, Tyler, knew, when the undertaking was executed, that the sureties were without means to meet the obligation of the undertaking, and that they were then without ability to respond to any judgment which might be rendered against them on it. We are forced to the conclusion that the respondent, by design, filed an undertaking the signers of which were worthless as sureties, with the intent that it should be worthless to the plaintiff as security, in case the judgment appealed from should be affirmed.

The paper of the third of June, 1880, above set forth, executed by Tyler, and delivered by him to Hogan, in which he receipts for the note of Langdon, and the policies of insurance, is not only a receipt, but a contract between Tyler and Hogan. The terms of the contract are set forth distinctly in the portion of said paper beginning with the words, "Therefore, in consideration of," etc. For a consideration expressed in this document, Tyler promises and agrees with Hogan. It so clearly states: "I do promise and agree with said Hogan that I will receive from said two insurance companies whatever money is paid by said insurance companies upon said policies; and to the extent of the one-half of the amount unpaid on said promissory note, and which said one-half at this date amounts to about $4,600, I agree to hold and retain the same." Tyler having here agreed with Hogan to hold and retain the money thus received, could not pay it over to Mrs. Hedge, for whom it is clear that he was acting as attorney at law. It is evident that he did not intend to recognize any right in his client, Mrs. Hedge, to have any portion of this half which he binds himself to hold and retain.

But the foregoing is not the whole of the agreement. The document sets forth further terms of agreement. It proceeds thus: "Inasmuch as I have been notified that Fred. N. Hedge has, or claims to have, some interest in said money, I agree to notify him of the payment of the same to me, and if he does not within ten days from receiving such notice, bring some suit against said Hogan, to determine the right to said money, I agree to pay the same to said Hogan on demand. In case such suit is brought, I will pay at once to whomsoever the court shall decide to be entitled to the same." In our judgment the above words show an agreement with Hogan to hold the money on certain conditions, which are thus expressed: If, upon his (Tyler's) notifying Fred. Hedge that this half of the money has been paid to him, Hedge does not bring suit for it against Hogan within ten days from the date of receiving such notice,

he is to pay it over to Hogan. If suit is brought, and judgment on such suit is rendered in Hogan's favor, he is to pay it to Hogan; if in Hedge's favor, he is to pay it to Hedge. The legal effect of this agreement is that the money is held and to be held and paid over to Hogan, if suit is not brought within the time specified, and if suit is brought and determined in Hedge's favor, then to be paid over to Hedge. The money is only to be paid over to Hedge if suit is brought, and judgmeut passes for him. It turned out that suit was brought and dismissed. What was the effect of such dismissal? In our judgment, upon such dismissal, as the ten days referred to in the contract had then elapsed, Tyler held the money as the agent of Hogan, and was bound to pay it to him.

This document of the third of June certainly shows a contract with Hogan, and a contract of agency with him. Tyler received the half of the money by consent of Hogan, and he was then to hold it as above set forth. He seems to have had no doubt that he had a right to enter into such a contract. It does not appear that there was anything in his employment by Mrs. Hedge, or his relations to Fred. Hedge, which conflicted with it. In fact, Tyler stated that Mrs. Hedge consented that he should keep this money in his hands if Fred. Hedge had an opportunity to litigate the question whether it was to go to him or Hogan. The claim of Fred. Hedge, if he had any, was regarded in the contract, and a reasonable time was given him to bring the suit to enforce such claim. It does not appear that this contract conflicted with any duty that he owed to Fred. Hedge. There is evidence that he objected to contracting with Hogan to use his influence with Fred. Hedge or Mrs. Hedge to persuade the former not to sue Hogan for the money which Hogan claimed. Tyler refused to enter into any such agreement with Hogan, and, in our judgment, no such agreement was made.

From the relation which Tyler sustained to Hogan, it was his duty to make known to him all the facts in relation to his connection with Hedge, his agreement with him, and the relation he bore to the Hedge suit. This he did not do until about the time the suit was dismissed. The information then given was in his affidavit for a continuance. But, as above stated, the contract entered into does show a contract of agency, trust, and confidence by Tyler with Hogan; and to say that this contract was one in which Tyler became an attorney *de facto*, and not an attorney at law, for Hogan, would be making a distinction savoring too much of a mere refinement of words. Tyler was an attorney at law; had been for many years practicing as such when he entered into this contract. He was contracting concerning a matter of difference which might be, and did become, a matter of litigation. Tyler collected the money as attorney at law,—a business in which attorneys at law are much engaged. He collected it with the consent and by the authority of Hogan, on the conditions named in the contract; and by this contract, and on its terms, he became the agent and attorney of Hogan to collect and hold the money, and pay it over to him (Hogan) on the conditions named in such contract. If Hedge had brought the suit for this money within 10 days, and it had been adjudged in the action that he (Hedge) was entitled to the money, Tyler would then have ceased to be the attorney of Hogan. The suit brought by Tyler for Hedge was dismissed. Tyler's responsibility to Hogan, then, never ceased.

We think that the testimony justifies us in holding that he was the attorney at law of Hogan, on the terms of the contract which was made between them.

An exception was made to the ruling of the referee who took the testimony in this case, by which he stopped the cross-examination of one of the witnesses of complainant. The cross-examination of the witness had, in our judgment, been unnecessarily prolonged, and the referee acted within a proper discretion in stopping it as he did. On this ruling being made by the referee, counsel for the respondent, who was conducting the cross-examination, re-

tired from the cause, and respondent then asked for time to procure other counsel. The referee said that it was not long before the noon recess, that the cause should proceed until that time, when respondent might procure counsel. If we could perceive that respondent was injured by this ruling of the referee, we would interfere for his relief, but we do not see that he did suffer any injury.

We will say, further, that in bringing the action of *Hedge* v. *Hogan and Tyler* the respondent was really on both sides of the case. He was really attorney for the plaintiff, and interested in any recovery of money by plaintiff, and was himself a defendant in the action. By this conduct he violated his obligations to Hogan under the contract as his agent and attorney, and violated his duties as attorney at law. In the relation of agent which he bore to Hogan under his contract it was in violation of his duty to Hogan, as his principal, to assume an attitude antagonistic to him, without his knowledge and consent.

We are of opinion that the accusation in regard to the undertaking on appeal, and the portion of the accusation numbered 1, is sustained by the evidence herein.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

MCKEE, J. I concur in the opinion on the sole ground that the accusation is sufficiently sustained by the evidence of the acts and conduct of the respondent, in connection with the judgment and undertaking on appeal in the case of *Hogan* v. *Tyler*, referred to in the prevailing opinion.

MYRICK, J. From the statement contained in the foregoing opinion it appears that the respondent, G. W. Tyler, is charged in this proceeding with having agreed to act as the attorney for complainant in the collection of certain money, and, by reason of such employment, received from complainant certain policies of insurance, a promissory note, and an authority in writing to receive said money; that thereafter he collected said money by virtue of said employment, and the confidence reposed in him as such attorney, etc. It will be remembered that Mrs. Hedge had held the note and policies as guardian of her two sons, (to whose estates the note belonged,) and that she had placed them in the hands of Mr. Hogan as her attorney; that after one of the sons attained majority, Mr. Hogan, for the consideration of some $850, took an assignment of his interest, amounting to about $4,500; that Mr. Hogan then asserted his right to retain the possession of the note and policies, and refused to surrender them to Mrs. Hedge, from whom he had received them as her attorney; that Mrs. Hedge and the son claimed the latter had been overreached in the matter of the assignment, and Mrs. Hedge employed Mr. Tyler to get the note and policies from Mr. Hogan, of which employment the latter had notice. Mrs. Hedge was unable to recover the money on the policies, as they were out of her possession, and Mr. Hogan had given notice to the companies not to pay to her; neither would the companies pay to Mr. Hogan. Thereupon, at an interview had between Mr. Tyler and Mr. Hogan, the latter delivered the polices and note to the former, and Mr. Tyler gave his receipt therefor, in which he stated: "I have received foregoing papers at the request of Charlotte Hedge that said J. M. Hogan should deliver same to me as her attorney." The policies were paid without suits. It seems clear to me that, as between Mrs. Hedge and Mr. Hogan, Mr. Tyler was the attorney of the former, of which Mr. Hogan had notice, and that he (Hogan) delivered the papers to Tyler at the request and as the attorney of Mrs. Hedge, and not as the attorney of himself; that the allegation of employment of Tyler by Hogan as his attorney at law is not sustained. Whatever may have been the duty of Mr. Tyler to Mr. Hogan as attorney in fact, or agent, is not now for consideration; I am dealing only with his duty as an attorney at law.

In regard to the giving of the undertaking on appeal, I am of opinion that Mr. Tyler violated his duty and obligation as an attorney at law. Hogan had recovered a judgment against him. He gave notice of appeal, and caused an undertaking to be executed and filed. The statute requires that the undertaking be accompanied with the affidavit of each surety that he is worth the sum specified in the undertaking. In my opinion Mr. Tyler knew that the surety Wheeler was insolvent, and with that knowledge procured him to join in the execution of the undertaking. His object, doubtless, was to prevent Hogan from realizing the fruits of a successful litigation. In so doing he violated his duty as laid down in subdivision 4, § 282, Code Civil Proc. The acts done by Mr. Tyler and Wheeler, in regard to the deed from the former to the latter, do not render obscure the real transaction, and its purpose.

While I am of opinion the acts of the respondent deserve censure, and the imposition of a penalty, I am not in favor of his removal or his suspension for an extended period. I think the penalty of suspension for six months sufficient; but there should be added the provision that the suspension continue thereafter until the object of requiring an undertaking, viz., payment of the judgment, interest, and costs, in case of affirmance, be accomplished.

MORRISON, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J. All the justices of this court being of the opinion that the evidence proves the respondent guilty of a violation of his duty as attorney and counselor, and of his oath of office as such, and that the allegations in the accusation with respect to his conduct in procuring and filing the undertaking to stay execution on appeal from the judgment in the case of *Hogan* v. *Tyler* have been fully proved, and no four of the justices concurring in any other judgment than that hereinafter stated, but five of the justices, after full consultation, having agreed on the judgment following, it is ordered and adjudged that respondent, George W. Tyler, be deprived of the right to practice as attorney or counselor in any and all the courts of this state, and be suspended from practicing as attorney or counselor at law in any of said courts for the period of two years from the date of the entry hereof, and until the judgment in favor of J. M. Hogan against the said respondent, mentioned and described in the accusation, shall be fully satisfied and paid, if the same shall not have been satisfied during such period of two years.

2 Cal. Unrep. 702

WHITTLE *v.* DOTY. (No. 11,170.)

(*Supreme Court of California.* August 31, 1886.)

APPEAL — ACTION TO QUIET TITLE — FINDINGS NOT CONTRADICTORY — MATERIAL ISSUES COVERED.

Where, on appeal from a judgment in a cause tried by the court without a jury, the findings are not contradictory, and cover all the material issues presented therein, the judgment of the trial court must be affirmed.

Department 2. Appeal from superior court, Amador county.

The plaintiff in his complaint, for a second cause of action, which is the one considered on this appeal, alleged that he was the owner in fee of the S. W. ¼ of the N. W. ¼ of section 23, in township No. 7 N., of range No. 9 E., Mount Diablo base and meridian, situated in the county of Amador and state of California. The defendant answered, and claimed an interest adversely to the plaintiff in and to the following portion of said land, to-wit: Commencing at the north-west corner of said subdivision, and running thence east, along the northern boundary thereof, to the north-east corner thereof; thence south, about nine and one-half rods, to a fence crossing said subdivision from east to west; thence west 80 rods, along said fence, to the western boundary of said subdivision; thence north seven and one-half rods, to the place of beginning,—said piece of land containing four and one-quarter

acres, more or less. The plaintiff claimed that the claim of the defendant was without right, and prayed that he might be enjoined from asserting any claim whatever to the premises adverse to himself. The case was tried by the court without a jury, and, in accordance with its findings of facts, entered a judgment for the plaintiff, quieting in him the title to the land, and restraining the defendant from setting up any claim thereto. The defendant contended that the findings were contradictory, and failed to cover the material issues; but the court entered up its judgment, and defendant appealed.

Eagon & Armstrong, for appellant, Doty. *Blanchard & Swisler*, for respondent, Whittle.

BY THE COURT. The findings are not contradictory, and they cover all the material issues. Judgment affirmed.

2 Cal. Unrep. 709

CAHEN and others *v.* MAHONEY. (No. 9,850.)

(Supreme Court of California. September 16, 1886.)

1. ATTACHMENT—DISSOLUTION—AFFIDAVITS—COUNTER-AFFIDAVITS.
 Where, upon a motion to dissolve an attachment, the counter-affidavits of the defendant are fully answered by the affidavits produced in behalf of plaintiffs, the court has no right to disregard or discredit the showing on behalf of plaintiffs, and, on appeal, the order dissolving the attachment will be reversed.
2. SAME—UNDERTAKING—SUFFICIENCY.
 The undertaking in this case executed by the plaintiffs examined, and *held* to be sufficient.

Department 2. Appeal from superior court, Stanislaus county.

This was an attachment sued out by the plaintiffs against the defendant upon an alleged indebtedness. The affidavit required by law was made and filed in the cause, and an undertaking was executed by the plaintiffs in the following words:

"Whereas, the above-named plaintiffs have commenced, or are about to commence, an action in the superior court of the county of Stanislaus, state of California, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiffs by the said defendant the sum of seven hundred and fourteen and 57-100 dollars of the United States, besides interest, and are about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein, now, therefore, we, the undersigned, residents of the said county of Stanislaus, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake, in the sum of five hundred dollars, and promise to the effect, that, if the said defendant recovers judgment in said action, the said plaintiffs will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of five hundred dollars.

"*Dated the twenty-sixth day of September*, 1884.

[Signed] "C. A. STONESIFER. [Seal.]
"J. C. TRANER." [Seal.]

The justification and verification were as follows:

"C. A. Stonesifer and J. C. Traner, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and free, state of California, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

[Signed] "C. A. STONESIFER.
"J. C. TRANER.

"Subscribed and sworn to before me this twenty-sixth day of September, 1884.

[Signed] "WM. O. MINOR, Notary Public."

Affidavits and counter-affidavits were filed by both plaintiffs and defendant in support of their respective claims and defenses; and at the November term, 1884, the defendant moved the court to dissolve the attachment on several grounds; among them, that no sufficient or proper undertaking was made or filed, and that the pretended undertaking was not properly verified or justified. The court below dissolved the attachment, and from this judgment plaintiffs appealed.

C. A. Stonesifer and *Wm. O. Minor*, for appellants, Cahen and others. *Stanton L. Carter*, for respondent, Mahoney.

BY THE COURT. The court erred in dissolving the atttachment in this case. The affidavit of the defendant was fully answered by the affidavits produced on behalf of plaintiffs. The court had no right to disregard or discredit the showing on behalf of plaintiffs. The undertaking was sufficient. Order reversed.

2 Cal. Unrep. 717

PEOPLE v. HIGGINS. (No. 20,214.)

(*Supreme Court of California.* September 30, 1886.)

CRIMINAL LAW—APPEAL—INSTRUCTIONS.

Where the instructions given by the court are contradictory, the judgment will be reversed.

Department 1. Appeal from superior court, Mendocino county.

Prosecution for assault with deadly weapon, with intent to do great bodily harm. Defendant was found guilty, fined $100, and appealed to the supreme court.

The Attorney General, for the People. *J. A. Cooper*, for appellant.

BY THE COURT. In respect to the crime of which defendant was convicted, the instructions of the court below to the jury were conflicting, for which reason the judgment and order are reversed, and cause remanded for a new trial.

2 Cal. Unrep. 727

GREER v. TRIPP. (No. 9,643.)

(*Supreme Court of California.* December 10, 1886.)

STATUTE OF LIMITATIONS—EJECTMENT.

Evidence *held* to sustain defense of statute of limitations, and judgment affirmed.

Department 1. Appeal from superior court, San Mateo county.

Action of ejectment. Among other defenses, defendant set up the statute of limitations. It appeared that defendant claimed under deeds executed in 1858, had from that time claimed title, most of the time was in possession, and was in possession when this action was instituted, on May 10, 1876. The superior court held the action barred, and, plaintiff's motion for a new trial being denied, he appealed to the supreme court.

John Reynolds, for appellant. *Fox & Kellogg*, for respondent.

BY THE COURT. There was sufficient evidence to support a finding in favor of defendant upon the plea of the statute of limitations to uphold the judgment.

Order denying plaintiff's motion for a new trial affirmed.

71 Cal. 399

SCHROEDER *v.* SCHMIDT. (No. 9,812.)

(*Supreme Court of California.* December 13, 1886.)

APPEAL—WHEN TAKEN—JUDGMENT—ORDER ON—MOTION FOR NEW TRIAL.

An appeal cannot be taken from a judgment before the judgment is entered, but may be taken from an order denying a motion for a new trial before the entry of judgment.

In bank. Appeal from superior court, city and county of San Francisco.

John F. Burris, for appellant. *E. W. Blaney*, for respondent.

SHARPSTEIN, J. Respondent moves to have the appeals from the judgment and the order denying the motion for a new trial dismissed, on the ground that the appeals were taken *before* the judgment was entered. That is doubtless a sufficient ground for dismissing the appeal from the judgment. *McLaughlin* v. *Doherty*, 54 Cal. 519; *Thomas* v. *Anderson*, 55 Cal. 43. But the appeal from the order denying the motion for a new trial was taken within 60 days *after* the order was made. That is within the time prescribed by the Code. Code Civil Proc. 939. We think no sufficient ground for dismissing the appeal from the order denying the motion for a new trial has been shown in this case, and the motion to dismiss that appeal is denied.

Appeal from the judgment dismissed.

We concur: MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.; MYRICK, J.; MCKEE, J.

71 Cal. 48

PEOPLE *v.* GIACAMELLA. (No. 20,222.)

(*Supreme Court of California.* September 22, 1886.)

CRIMINAL LAW—INFORMATION—DESCRIPTION OF OFFENSE—ATTEMPT TO COMMIT ARSON—PEN. CODE CAL. §§ 447, 448.

An information alleging, in accordance with section 447, Pen. Code Cal., that the "defendant did, in the night-time of said day, willfully, maliciously, and feloniously attempt to burn a building," is sufficient to charge the crime of an attempt to commit arson. It is not necessary to set out the provisions of section 448 relating to the circumstances of the commission of the offense.

Department 1.

The Attorney General, for the People. *Wm. P. Veuve*, for appellant.

MYRICK, J. The defendant was accused of the crime of an attempt to commit arson, the information alleging that the "defendant did, in the night-time of said day, willfully, maliciously, and feloniously attempt to burn, with intent then and there to destroy, a building," the property of, etc. No demurrer was interposed. The defendant was convicted of an attempt to commit arson in the second degree, and moved in arrest of judgment, on the ground that the information did not state facts sufficient to constitute a public offense, in that the information contained none of the definitions set forth in section 448, Pen. Code.

The offense was stated in accordance with the language of section 447, Pen. Code, and was sufficiently stated. As well might the provisions of sections 449 to 452 be held necessary to be stated, as those of 448. Section 447 declares the offense; and the following sections relate to circumstances of its commission.

There were circumstances tending to connect the defendant with the fire; and the question as to the sufficiency of those circumstances was with the jury. The court committed no error as to the instructions.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

(71 Cal. 491)

LANG *v.* SUPERIOR COURT.[1] (No. 11,367.)

(*Supreme Court of California.* December 11, 1886.)

APPEAL—FROM JUSTICE'S COURT—DEMURRER—REHEARING.

A demurrer to a complaint having been sustained in the superior court upon appeal from a justice's court, and a motion for a new trial made and denied, it is not competent for the court to afterwards set aside the ruling upon demurrer, and make another order in the case upon a rehearing or otherwise.

In bank. Writ of review.

F. J. Castlehun, for petitioner. *Carl T. Graef*, for respondent.

MORRISON, C. J. The following statement of facts in this case is admitted to be true and correct: On January 9, 1882, Holcomb *et al.* brought an action in the justice's court of the city and county of San Francisco against George Lang, the petitioner herein. He demurred to the complaint, and the demurrer was sustained. The plaintiff declined to amend, and judgment final was entered on the demurrer, whereupon an appeal was prosecuted by the plaintiffs in said action to the superior court, and on the eighth day of May, 1882, said superior court (Judge ALLEN, presiding) sustained the demurrer, without leave to amend. On September 29, 1884, plaintiffs in that action gave notice of a motion for a new trial, and on October 8, 1884, filed a proposed statement. On November 7, 1884, said motion was, on due notice given, stricken off the calendar. This was equivalent to a denial of the motion. *Voll* v. *Hollis*, 60 Cal. 569. On November 14, 1884, plaintiffs gave notice of a motion for a rehearing of the issue presented by the demurrer of defendant to the complaint of plaintiffs interposed in the justice's court in said action, and of the issue or question of law upon which plaintiffs rested the appeal in said action. On December 12, 1884, the motion was granted by Judge FINN, the successor of Judge ALLEN, whose term had expired. On March 26, 1885, the same judge made an order overruling the demurrer, and on April 1, 1885, the court made two additional orders in the case, reversing the judgment of the lower court, and also an order remanding the cause to the lower court for a new trial. An application is now made to this court for a writ of review on the facts hereinabove set forth.

In the first place, the demurrer to the complaint was sustained by the su-

[1] Modified. See *post*, 416.

perior court (Judge ALLEN, presiding) on the eighth day of May, 1882, and it "therefore became the duty of the clerk to enter the appropriate judgment in the records of the court." *Gallardo* v. *Reed*, 49 Cal. 346; *Barron* v. *Deleval*, 58 Cal. 95. This would have ended the case, but it appears that subsequently, on the eighth day of October, 1884, a proposed statement on motion for a new trial was filed in the case, which statement was afterwards, on due notice, stricken from the calendar. The next step in the case was taken on November 14, 1884, when notice was given of a motion for a rehearing of the demurrer to the complaint "upon which rested an appeal in the action," which rehearing was granted by Judge FINN, superior judge, who had succeeded Judge ALLEN. This was on December 12, 1884, more than two years after the demurrer was sustained, and the case stricken from the calendar, on motion for a new trial.

We are not familiar with the practice of rehearings in the superior court; and what right or power the superior court had, on the twelfth of December, 1884, to order a rehearing in the case, we are at a loss to conceive. The demurrer and the motion for a new trial had been disposed of, and then, on what is called a "rehearing," the case was again brought before the court, and a new order made. This is a new practice with which we are not familiar, and we know of no statute authorizing it. When a motion for a new trial is made and passed upon,—either granted or denied,—it is not competent for the court afterwards to set its ruling aside, and make another order in the case. *People* v. *Center*, 61 Cal. 194; *Coombs* v. *Hibberd*, 43 Cal. 453. The subsequent orders in the case were equally unauthorized by law.

It follows from what has been said that the order of the court below, made December 12, 1884, granting the so-called "rehearing," and the subsequent orders in the case, must be set aside and annulled; and it is so ordered.

We concur: MCKEE, J.; THORNTON, J.; SHARPSTEIN, J

71 Cal. 400

BABCOCK *v.* WELSH. (No. 11,546.)

(*Supreme Court of California.* December 13, 1886.)

WAYS—ALTERATION—MISTAKE IN VIEW AND SURVEY—ESTABLISHMENT BY PRESCRIPTION—POWERS OF COUNTY SUPERVISORS—INJUNCTION—POL. CODE CAL. §§ 2618, 2681–2692.

The board of supervisors of a county in California has no authority to correct a mistake in the view and survey of a public road which has become a highway, without proceedings had under sections 2681–2692, Pol. Code Cal., to change or alter such road; and when, by mistake, a road is laid out on a line other than that intended, and used by the public for more than 10 years, it becomes a highway, (section 2618, Pol. Code,) and the road overseer, acting under orders from the board of supervisors of his county, without such proceedings had, will be restrained from opening the road on the line on which it was originally intended it should run.[1]

In bank. Appeal from superior court, Butte county.

H. V. Reardan, for appellant. *Hundley & Gale* and *John C. Gray*, for respondent.

MCKEE, J. This action was brought by the plaintiff, as owner in fee, and in the actual possession, of a tract of inclosed land in Butte county, to enjoin the defendant from taking down his inclosure, and entering upon the land for the purpose of opening upon it a public road. By his answer to the complaint the defendant admits that he claims the right to enter upon the plaintiff's land for that purpose; and that, unless enjoined by the court, he will enter upon it, in pursuance of an order made by the board of supervisors of Butte county on the eleventh day of April, 1885, which commands him, as road overseer of the district in which the land of plaintiff is situated, "to remove all obstructions on a road as originally established and declared a public highway, and to open the same."

It is found as a fact that, on the third day of November, 1875, a strip of land 30 feet wide, within the inclosure of the plaintiff, was condemned for a public road; that the condemnation was made in a proceeding commenced for that purpose by the plaintiff himself and other real property owners; and that compensation was duly awarded and paid to the plaintiff for the land which was to be taken from him for the road. In law, payment of the compensation awarded vested in the public the right of way over the land; and, under the law, the public, acting by its authorized agents, had the right to proceed to locate and open the road upon the land, and, in the execution of that right, to remove any obstructions which might be upon it. Section 2631, Pol. Code. But the road was never, in fact, located and opened upon the land. The fact is, as the court finds, that the strip of land, within the plaintiff's inclosure, which was intended to be taken for the road, was situate south of a line "between sections 6 and 7 and 5 and 8, to the north-east corner of the north-west quarter of the north-west quarter of section eight, in township seventeen north, range four east, M. D. M.," and "has never been opened, used, worked, or traveled as a highway, except at a point on the east terminus of said line." The reason why the road was not opened and located upon the land is that the viewers appointed in the condemnatory proceedings laid out and opened the road on a strip of land 30 feet wide, from "a point on the township line between ranges 3 and 4 east, about 9 rods north of the line of road petitioned for, and thence running east, inclining south until it intersected the section line between 5 and 8, in said township and range;" and it is contended that the location was a mistake.

But the road, as laid out and opened by the viewers, has been used and traveled by the public as the true road since November, 1875, and has been graded and kept in repair by the road overseer of the district in which it is

[1] See Kripp v. Curtis, (Cal.) 11 Pac. Rep. 879, and note; McKay v. Doty, (Mich.) 30 N. W. Rep. 591; Howard v. State, (Ark.) 2 S. W. Rep. —.

situated, as part of the public highway. No objections have ever been made by the owners of the land over which the road runs, to the public use; and, as it has been used and traveled by the public for more than 10 years, the legal presumption is that the owners abandoned the possession of the land for the road, and therefore the road established upon the land is *the* public highway. "Public highways," as defined by the Code law, are "roads, streets, alleys, lanes, * * * land laid out or erected as such by the public, or, if laid out and erected by others, dedicated or abandoned to the public." Section 2618, Pol. Code.

A highway thus created continues to exist until it is vacated or abandoned by order of the board of supervisors of the county in which it is situated, or by operation of law, or judgment of a court of competent jurisdiction, (sections 2619, 2621, Pol. Code,) or it may be changed, altered, or discontinued in the mode prescribed by article 6, *c.* 2, of that part of the Political Code which regulates the subject of highways in the counties of the state. Sections 2681-2692, Id. But there was no proceeding commenced under that law for changing, altering, or discontinuing the road. After discovering by a survey of the line of the road, made in 1885, that the road, as it has been used and traveled for over 10 years, was originally located and opened by mistake of the road viewers, it was attempted to have the supposed mistake corrected by having the road relocated and reopened upon the true line, as disclosed by the survey.

But boards of supervisors have no jurisdiction of a proceeding to correct a mistake in the view and survey of a public road which has become a highway. They have only such jurisdiction and general supervision over roads within their respective counties as are given them by section 2643, Pol. Code. The order of the eleventh of April, 1885, by which the board of supervisors commanded the defendant, as road overseer, to open said road to the public on its true line, was therefore an excess of the jurisdiction of the board, and conferred no authority on the defendant to enter upon the plaintiff's inclosure for the purpose of locating and opening upon the plaintiff's land a new road in place of the road which has been opened and used for 10 years as the highway.

Judgment reversed, and cause remanded.

We concur: MORRISON, C. J.; MYRICK, J.; MCKINSTRY, J.; SHARPSTEIN, J.

LEVINS *v.* ROVEGNO and others. (No. 9,055.)

(*Supreme Court of California.* December 15, 1886.)

In bank.

Amendment of judgment. See, for original report of case, *ante*, 161.

BY THE COURT. In the above-entitled cause it is hereby ordered that the judgment heretofore rendered therein be so amended as to direct the court below to enter judgment in favor of plaintiff for the recovery of the one undivided one-half of the land and premises described therein, and for the rents and profits thereof, as found by the court.

2 Cal. Unrep. 718

RIDGWAY *v.* BOGAN. (No. 9,654.)

(*Supreme Court of California.* September 30, 1886.)

PLEADING—AMENDMENT OF COMPLAINT AFTER DEMURRER.

If a demurrer to the complaint is sustained, the plaintiff is entitled to leave to amend, unless the complaint is so defective that it cannot be made good by any amendment.

Department 1. Appeal from superior court, Mariposa county.

Action to recover the proceeds of a note claimed to have belonged to plaintiff's decedent, and to have been wrongfully disposed of by defendant. Defendant demurred to the complaint, (1) because it did not state a cause of action; (2) because of defect or misjoinder of parties; and (3) because of ambiguity and uncertainty. The demurrer was sustained. Plaintiff moved for leave to amend, which motion was denied, whereupon plaintiff appealed, on the ground that he was entitled to leave to amend unless his complaint was so defective that it could not be made good by any amendment.

J. W. Congdon and *G. G. Goucher*, for plaintiff and appellant. *L. F. Jones*, for defendant and respondent.

BY THE COURT. We are of opinion the court should have granted plaintiff's motion to set aside the judgment, and for leave to file an amended complaint. The order appealed from is reversed, and the cause remanded, with directions that the motion of plaintiff be granted.

2 Cal. Unrep. 722

ALHAMBRA ADDITION WATER CO. *v.* RICHARDSON and others. (No. 11,509.)

(*Supreme Court of California.* November 30, 1886.)

WATERS AND WATER-COURSES—IRRIGATING DITCH—INJUNCTION—ESTOPPEL.

Plaintiffs derive title to the water of a canon from W., who, while owner, represented to one of the defendants, who he knew was thinking of purchasing certain

land, that the right to use water from said canon therefor was appurtenant thereto. Defendant therefore purchased the land. Subsequently plaintiff's grantors, in order to save waste, proposed to run a pipe across defendant's land. Defendant assented on condition that the pipe should be so laid that he should be enabled to use therefrom the quantity of water to which he had theretofore been entitled. This was done, and defendants used the same until the bringing of this action. *Held*, that the plaintiff was estopped from interfering with the rights acquired by the defendants to the use of the pipe, and its appurtenances, as long as the same remain as conduit of the water over their land.[1]

Commissioners decision.

Department 2. Appeal from superior court, Los Angeles county.

The court below adopted findings of the jury, and made findings of its own, to the following effect: That plaintiff is the owner of all the water rising and flowing in that canon, in the county of Los Angeles, known as the "Kewen Mill" or "Lake Vineyard Canon," as alleged in the complaint, and of the right to use and appropriate the same, except that portion thereof belonging to the defendants; and, further, is the owner of the dams, ditches, reservoirs, and pipes that convey said water, subject to the right of the defendants to use the same for the purpose of taking the waters belonging to them; that the principal aqueduct used by plaintiff for conveying the water is an iron pipe passing through defendants' land; that J. H. Carpenter, a prior occupant of the Richardson place, asserted a right to use water from Kewen canon, and had a license from B. D. Wilson, under whom plaintiff claims; that Richardson used the water from 1867, uninterruptedly, under a claim of right, peaceably, adversely, exclusively, and continuously; that plaintiff and its grantor have known of defendants' claim, and have acquiesced therein; that defendant Richardson, before purchasing his lands, inquired of B. D. Wilson whether the water-right claimed by defendant was appurtenant to the land, for the purpose of determining whether he would buy the premises; that Wilson, knowing that such was Richardson's purpose, and being then the owner of all the rights claimed by plaintiff, stated that such water-right was appurtenant to said land, and Richardson, because of that admission, purchased the land, and made valuable improvements thereon; that but for that statement he would not have made the purchase; that defendants, since 1870, used the water in question for the purpose of irrigation, and for domestic and stock purposes; that the quantity requisite therefor is two and one-third inches, under a pressure of four inches; and that defendants' claim has been asserted and maintained by defendants, and their predecessors, openly, notoriously, under a claim of right, and adversely to all the world, for 20 years.

On which findings of facts the court found this conclusion of law: That "the plaintiff is the owner of all the water-rights set out and claimed in the complaint herein, and also of all pipes, ditches, aqueducts, and reservoirs appertaining thereto, as described in the complaint, except a constant flow of the waters of said canon of two and one-third inches, measured under a four-inch pressure, on defendants' said premises, which said quantity of water belongs to defendants for uses upon the lands belonging to them, as hereinbefore found; and that defendants are entitled to the use of said pipes, ditches, aqueducts, and reservoirs for the purpose of storing, preserving, and conducting the same upon their said land, for the purposes aforesaid, and the right to take said water from said pipe, as now constructed, at any point upon their said land;" and directed a decree accordingly.

The appellants, on their appeal, relied on the following points:

(1) The findings did not cover all the issues, since defendants, in their answer, claim under an agreement made in 1875, when the pipe was put through defendants' land, that defendants might tap the pipe, and use the

[1] See Johnson v. Connecticut Fire Ins. Co., (Ky.) 2 S. W. Rep. 151, and note.

water; and also that plaintiff is barred by section 318, Code Civil Proc. Cal.

(2) The findings were not justified by the pleadings, since defendants' utmost claim was that plaintiff's grantors agreed that defendants might tap the pipe, and use water therefrom, while the findings make plaintiff's ownership subordinate to defendants' right to use the dams, etc., for the purpose of taking water from Kewen canon.

(3) The findings are contradictory since at one place it is found that defendants' grantors used the water under a license from B. D. Wilson, and at another that defendants and their grantors, for more than 20 years, (which carries us back to a time anterior to Carpenter's selling out to Richardson,) have had the open, notorious use of the water, under a claim of right, and adversely to the whole world.

(4) The judgment is not warranted by the findings, nor the pleadings. It adjudges ownership of the waters and dams, etc., used in diverting the same, excepting that defendants own two and one-third inches of water, and are entitled to use the plaintiff's dams, etc., for the purpose of conducting, storing, and preserving the same, while the prayer of the answer asks for no such judgment; and the answer sets up the agreement that defendants might use the water, made at the time the pipe was laid, which was simply a license. The judgment is not warranted by the findings, because the court does not find that defendants owned the pipe, dam, etc.

(5) The findings are not supported by the evidence, which is discussed at great length.

(6) Errors of law at the trial, excepted to by plaintiff. Defendants Richardson and Hutchinson claimed that they had a right to the water, under Mr. Wilson's deed to Hutchinson, as appurtenant to the land conveyed. Plaintiff offered to prove declarations of Mr. Wilson concerning the water-right of the place prior to the making of the deed. Defendants objected, and the objection was sustained.

Chapman & Hendrick, *Glassell*, *Smith & Patton*, and *T. B. Bishop*, for appellant. *Wells*, *Van Dyke & Lee* and *Bicknell & White*, for respondents.

FOOTE, C. This action was brought with a view of obtaining a judgment affirming to the plaintiff the whole of the right, title, and interest in and to certain waters mentioned in the complaint, as well as to the pipe which conducted said waters over the defendants' land, as also to the water-works and appurtenances thereto belonging. An injunction was prayed for, restraining the defendants from tapping the pipe and taking water therefrom, or in any other manner interfering with or diverting the same.

The defendants' demurrer to the complaint was overruled, and then they answered, stating substantially that they owned a certain tract of land over which the pipe was conducted, and were entitled to take a sufficient amount of water therefrom to irrigate said land, and that such privilege they have exercised for more than 16 years, adversely, openly, notoriously, and uninterruptedly, under a claim of right. And with a view, evidently, to show an estoppel *in pais* as to the plaintiff's right to dispute the defendants' claim as aforesaid, the answer sets forth, in brief, this state of facts:

That before Richardson, one of the defendants, purchased the land upon which he claims the right to the use of said water, he asked Mr. Wilson, upon whose land the spring was situated from which the water took its rise and naturally flowed, whether that land, now called the "Richardson Place," was entitled to sufficient of that water for the purposes of its irrigation, and for the domestic uses of its occupants, and that Mr. Wilson, with a knowledge and understanding of the object of the inquiry and of the surroundings, stated that such land was entitled to such water, and that, relying upon this statement of Wilson, Richardson purchased from Hutchinson, his co-defendant, an interest in the "place" in good faith, and put thereon various valua-

ble improvements; that for many years after that time, and up to the year 1875, the water in question flowed to the said premises in and through an open ditch; that this resulted in a waste of water; hence, for the purpose of preventing such waste, the plaintiff's predecessors in interest, who were entitled to all the waters flowing from said source on Wilson's land, except that acquired by defendants as aforesaid, concluded to dispense with the exposed conduit, and to run the water through an iron pipe; to this desire, expressed to them on the part of the plaintiff, the defendants assented, upon condition that the pipe should be so laid as that the latter would be enabled to use therefrom a quantity of water sufficient to irrigate their lands, which was the portion thereof to which they had theretofore been entitled; that upon this agreement the pipe was put down in 1875, and hydrants attached thereto for the defendants' use; and that such hydrants have ever since been used by them for the taking from the pipe the amount of water which they then, and for many years before had, claimed as their own.

The issues thus raised were submitted to a jury, and were passed upon by them favorably to the defendant. The trial court adopted such findings, and added others as to matters not fully covered by the interrogatories upon the subject submitted to the jury.

Upon all the findings, judgment was rendered for the defendants, upholding their claim to a certain portion of the water in dispute, and, as an incident thereto, the use, and an interest in it, (so long as the pipe should remain as constructed; that is, so long as it should remain as a conduit of the water over and through their land, and to the water-works, which were necessary to its being run through said pipe,) sufficient to enable the defendants to take from the pipe, and make use of it, at any point on their land, the quantity of water which of right belonged to them. At least, such is the proper construction of the language of that judgment as it appears to us.

The evidence, conflicting as it is, does not warrant a disregard of those findings. From the record, it appears in evidence, on the part of the defendants, that, under an agreement between the parties to this action, the defendants consented to discontinue the wasteful use of the water through the ditch, and allow the same to be conducted over their land by the plaintiff in a pipe, upon condition that the former might tap the pipe, and take the water which they then were, and had for many years been, the owners of, at any point on their said land, that this agreement was executed by both parties thereto, and that such execution has been continuous and uninterrupted for many years.

The findings of the court, as we think, are sufficient at least to show that it passed upon the issue raised, and believed such facts to be true. Hence it would appear that, as a matter of law, the plaintiff should be *estopped* from any interference with the rights acquired by the defendants to the use of the pipe, and its appurtenances, as long as the former remains a conduit for the water over the defendants' land, and that the defendants are entitled to tap said pipe, and use the water, which they are declared to be owners of, so long as said pipe remains, with its appurtenances, as "now constructed." It therefore becomes unnecessary to pass upon any of the other questions arising upon the record, as the issue thus properly made by the pleadings, and found in favor of the defendants, entitles them to the judgment, as we understand its meaning.

The judgment and order denying a new trial should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 418

McComb *v.* Spangler. (No. 9,813.)

(*Supreme Court of California.* December 18, 1886.)

1. Mortgage—Foreclosure—Decree, and Its Effect—Adverse Title—Community Property—Civil Code Cal. § 170.

 A title adverse to that of the mortgagor cannot be litigated in an action to foreclose the mortgage; and therefore a decree foreclosing a mortgage given by a wife does not estop one claiming under her husband from showing that the lands mortgaged were community property, and an adverse title in the husband under section 170, Civil Code Cal., although he was a party defendant in the foreclosure proceeding, and the decree bars and forecloses all rights of the defendants, and those claiming under either of them, to the mortgaged premises.

2. Husband and Wife—Community Property—Deed of Lands for Wife's Separate Estate—Prima Facie Title.

 The fact that a deed of lands was made to a wife "for her separate estate," even if construed to mean that the consideration money was paid from her separate property only, creates a separate estate in her *prima facie*, and does not preclude one claiming under her husband from showing that the purchase money was paid from community funds.[1]

3. Same—Separate Property of the Wife—Lands Mortgaged by Her While Living Apart from Husband—Civil Code Cal. § 169.

 "The earnings and accumulations" of the wife living separate from her husband are her separate property, (Civil Code Cal. § 169;) but the fact that a note and mortgage were given by a wife while living apart from her husband does not, of itself, prove that the lands described in the mortgage were her separate property.

Department 1. Appeal from supreme court, Alameda county.

This is an action of ejectment for certain lands in Alameda county, California. Plaintiff claims title by deed from John W. Brumagim to trustees, in 1872; from the trustees to Elizabeth McComb, wife of John McComb, and mother of plaintiff, July 19, 1878; from John McComb and Elizabeth, his wife, to William G. Hamilton, March 10, 1883; and from William G. Hamilton to plaintiff, March 16, 1883. Defendant claims under a foreclosure and sale under a mortgage on the premises executed by Elizabeth McComb, Sr., on October 12, 1878, and pleads the decree in that action in estoppel. Defendant introduced in evidence a deed from John W. Brumagim to Elizabeth McComb, Sr., dated July 2, 1878, which purports to convey the lands in question to her for her separate estate.

Chapman & Slack, for appellant. *J. C. Plunkett*, for respondent.

McKinstry, J. The plaintiff deraigned title, through mesne conveyances, from John McComb and Elizabeth, his wife; the defendant, through purchase at a sale under a decree foreclosing a mortgage executed by Elizabeth McComb, his wife. The mortgage was executed prior to the deed by John McComb and wife, under which plaintiff claims.

The principal question to be considered on this appeal, and the question on which, apparently, the decision turned in the court below is whether the plaintiff is estopped from asserting herein that the demanded premises were community property of John McComb and his wife, Elizabeth, when the mortgage was executed by *her*, which was foreclosed in the action, *Reid, Adm'r, etc.*, v. *Elizabeth McComb and John McComb.* The complaint in that action contained no averment either that the defendant John McComb had or asserted any claim adverse to the title of the mortgagor, or that any claim he had was subject or subordinate to the lien of the plaintiff's mortgage. It alleged him to be the husband of Elizabeth, and that she mortgaged property which was her separate property. But he was not called on to take issue on either of these averments. He could not, to any purpose, assert his adverse legal title in that action, since its validity could not properly be determined therein; and he was not required, for the protection of his rights, to make an issue

[1] See Harris v. Harris, (Cal.) 12 Pac. Rep. 274, and note.

which the court of equity would have refused to try in the suit for foreclosure. Nor could he say, as against the mortgagee, that the mortgage did not operate a lien on her estate, if she had any. The question whether she had any interest or estate, as between herself and the mortgagee, or whether she could or could not deny, as against the mortgages, an interest or estate, was one with which John McComb personally had no concern, inasmuch as his paramount title would not be affected by the decree.

The husband has the management and control of the community property, with the like absolute power of disposition, (other than testamentary,) as he has of his separate estate. Civil Code, 170. The community title, if it exists, is adverse and paramount to the asserted or pretended claim of separate property in the wife. For convenience, and we think acurately, the community title may be designated as his title, since the estate of the wife in any portion of the community property is but contingent,—an estate which never becomes absolute until she ceases to be wife by reason of the dissolution of the marriage. The default of the defendant, John McComb, did not admit any fact on which could be based a judgment or decree adjudicating the invalidity of the community title.

In an action to foreclose a mortgage, a person who sets up a claim to the land adverse and paramount to that of the mortgagor, and who, therefore, denies the efficacy of the mortgage as a lien on his own title, cannot properly be joined as a co-defendant. Such an adverse claim to the land, in opposition to the mortgage, cannot be tried in the equitable action to foreclose. So far as the mere legal rights are concerned in such an action, the only proper parties are the mortgagor and mortgagee, and those who have acquired rights under them subsequent to the mortgage. The mortgagee, or holder of the mortgage, cannot make one who claims prior and adversely to the title of the mortgagor a defendant for the purpose of trying his adverse claim. Pom. Rem. § 334.

The object of a suit to foreclose a mortgage, under our law, is to obtain the sale of the estate which the mortgagor held at the time he executed the mortgage. All persons beneficially interested in the estate mortgaged are proper parties to the suit. Titles adverse to that of the mortgagor are not the proper subject of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. *San Francisco* v. *Lawton*, 18 Cal. 474. "Where a party has a right under the mortgage, and also a right prior to it, he is not precluded, in respect to the prior right, by a judgment of foreclosure, though the terms of it are broad enough to cover both rights. Only the rights and interests under the mortgage, and subsequent to it, can properly be litigated upon a bill of foreclosure. One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. If he has a claim under the mortgage also, his claim prior to it cannot be divested by the decree. This prior claim is not a subject-matter of litigation in the foreclosure suit, and remains unaffected by it. The decree is final only within the proper scope of the suit, which is to bar interests in the equity of redemption." Jones, Mortg. § 1589; *Rathbone* v. *Hooney*, 58 N. Y. 463.

The decree can have no effect upon the rights of persons having priority, *whether they are made parties to the action or not.* Jones, Mortg. 1439, and decisions cited. In the exceptional cases, where prior mortgagees are made parties, this is done that the court may order a sale of the whole estate, and thus make a complete title in the purchaser. Id. In such cases the complaint may be treated as in the nature of a bill to foreclose, and to redeem from the prior mortgage. If the debt secured by the prior mortgage is past due, it would seem that the prior mortgagee may be compelled to accept the full amount of his claim from the proceeds of the sale of the mortgaged premises, without any interference with the obligation of his contract.

Moreover the decree in *Reid* v. *McComb*, does not purport to adjudicate any title of John adverse to that of Elizabeth McComb, nor does the decree, in terms, adjudicate that the mortgage is a lien on the lands. The only clause which can be claimed to affect the right of John McComb is "that the defendants, and all persons claiming by, from, or under either of them, * * * be forever barred and foreclosed of and from all equity of redemption, and claim of, in, and to said mortgaged premises," etc. It may be conceded (although the complaint did not aver that he had any claim subject to the mortgage) that the defendant, John McComb, would have been barred of his equity of redemption, if he ever had had any. But it would be giving a meaning to the expression "mortgaged premises" which the scope and purpose of the action, and of the judgment taken as a whole, do not contemplate, to say that the decree by its terms bars John McComb of and from any claim based on a title adverse and paramount to that of the mortgagor. That which was mortgaged was the estate of the mortgagor, and as the purpose of the action was to secure the sale of that estate, and the foreclosure of all claims subsequently derived from the mortgagor, the portion of the decree which bars and forecloses all claims of, in, or to the "mortgaged premises," refers to the subject of the instrument of mortgage, to-wit, the interest of the mortgagor. It bars any claim in or to the estate mortgaged.

It is insisted that John McComb was a proper party to the foreclosure suit under section 370 of the Code of Civil Procedure. But, although he was a proper and necesssary party under that section, he was such only because his wife was a party, and for the purpose of aiding in the protection of her rights. It was his duty, *as husband*, to prove on her behalf that the mortgage was never executed, or that the debt, to secure which it was given, had been paid, or to establish any other fact which would constitute a defense for her. In face of the default, we must assume that *she* had no defense to the suit. He was a party, made such by virtue of the provisions of the Code that he should have notice of the suit against her, with an opportunity to make a defense on her behalf. He would have the right to make such defense in her name if the law did not require him to be made a defendant for that purpose. Sued simply in his capacity of husband, and for the purpose referred to, he could not be compelled, in that suit, to litigate the independent legal title of the community.

It is suggested by respondent that if the judgment in *Reid* v. *McComb* fails to establish that the demanded premises were the separate property of Elizabeth McComb, such separate property was hers, because she and her husband were living separate and apart when she made her note, and the mortgage to secure its payment. We find no evidence of the fact in the record, but, had it been proved, it would not, of itself, have shown separate property in the wife. "The earnings and accumulations" of the wife, living separate from her husband, are her separate property. Civil Code, 169.

It is contended by respondent that we must hold the title to have been in Elizabeth McComb, as her separate property, when she executed the mortgage, for the reason that the deed from John W. Brummagim, in which she is named as grantee, contains the *habendum* clause: "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns forever, *for her separate estate*, and her sole and separate use, benefit, and behoof." All the cases hold, the deed being silent as to the source of the consideration, that when property is conveyed for a valuable consideration to either spouse, the presumption is that it belongs to the community. The claim of respondent is that, by reason of the clause in the deed above quoted, not only was the presumption of community property overcome, and a presumption created that the property was hers separately, but that the clause established indisputably a separate property in her.

Even if it should be conceded to the respondent (conceded for the purposes of this decision only) that the legal title was acquired—by the community or by Elizabeth, as the case may be—through the deed from Brummagim, and not through the deed from the trustees, to whom Brummagim had conveyed it, and if it should further be conceded that the clause in the deed from Brummagim, whereby, it would seem, the grantor attempted to limit the estate conveyed to the separate use of the wife, is the equivalent of a recital that the consideration money was paid out of funds which were the separate property of the wife, (*Morrison* v. *Wilson*, 13 Cal. 500,) the clause in the deed, giving to it the very greatest effect which can be claimed for it, only creates a separate estate in Elizabeth McComb, *prima facie*.

In *Peck* v. *Brummagim*, 31 Cal. 448, it is said: "The question presents the same features as it would if it arose between husband and wife, and related to a deed that recited that the purchase money was paid out of the separate estate of the husband or of the wife, and must receive the same solution. Neither the husband nor the wife is estopped from showing, against the other, the true nature of the consideration of the deed, or from whom it proceeded. Between them, or between one of them and the heirs of the other, no question of notice can arise."

In *Ramsdell* v. *Fuller*, 28 Cal. 38, it was decided that parties purchasing of the husband real estate deeded to the wife, for a money consideration, during coverture, do so at their peril. The record of the deed to the wife is notice to all the world that the land *may be* the separate property of the wife, and is sufficient to put purchasers on inquiry; and this, notwithstanding the presumption that the land is community property. By parity of reason, parties purchasing from the wife real estate deeded to her for a money consideration do so at their peril, notwithstanding the presumption arising from a clause like that in the deed from Brummagim, that the land is her separate property, —if, indeed, the clause creates any such presumption,—since they take with notice that the land may be community property.

At the very most, then, the clause in the Brummagim deed established *prima facie* only a separate estate in the wife, and the court below erred in refusing to permit the plaintiff to prove that the land was paid for out of community funds. Whether the clause in the deed from Brummagim was *any* evidence of separate property in the wife is a question which the exigencies of the present case do not demand of us to decide. We remark, however, that what was said in *Morrison* v. *Wilson*, with respect to the effect of a recital in a deed that the consideration was paid by a third party for the exclusive benefit of the wife, was *dictum*. See opinion on rehearing in the same case, 30 Cal. 344. In *Peck* v. *Brummagim* the deed contained no such recital. It may be that the consent of the husband to a deed containing a clause like that from Brummagim, indicated by his knowledge of it, and his failure to object to it when it was made, is some evidence of an intended *gift* by the husband to the wife of the community funds paid for the conveyance. But whatever its effect, if any, the clause in the deed, disconnected from other evidence, cannot be *more* than evidence *prima facie* that the land conveyed became the separate property of the wife, and it was clearly error to sustain an objection to evidence offered to prove "the true nature of the consideration," and that it proceeded from the community.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRICK, J.; THORNTON, J.

2 Cal. Unrep. 728

PARTRIDGE *v.* SHEPARD and others. (No. 9,403.)

(*Supreme Court of California.* December 15, 1886.)

EJECTMENT—DEFENDANT NOT IN POSSESSION.

Ejectment will not lie against one not in possession of the land sought to be recovered.

In bank. Appeal from superior court, city and county of San Francisco.
E. A. & G. E. Lawrence, for appellant. *Daniel Rogers*, for respondent.

BY THE COURT. In this cause, which is ejectment, the court found that defendants were not in possession when the action was commenced. This finding is sustained by the evidence. Judgment passed for defendants. The finding above mentioned is conclusive of the cause, and no other point need be determined.

Judgment and order affirmed.

71 Cal. 404

SMITH *v.* TREFRY. (No. 11,876.)

(*Supreme Court of California.* December 15, 1886.)

APPEAL—TRANSCRIPT NOT FILED IN TIME—PENDING OF MOTION FOR NEW TRIAL AND SETTLEMENT OF BILL OF EXCEPTION IN COURT BELOW.

When no transcript on appeal is filed within the prescribed time, but it appears that a motion for a new trial, and the settlement of a bill of exceptions to be used on the hearing of that motion, are pending in the court below, the effect of such proceedings will be considered, if an appeal is taken from the ruling on the motion; but the appeal from the judgment will be dismissed without prejudice.

In bank. Appeal from superior court, Sacramento county.
J. T. Carey, for appellant. *C. T. Jones*, for respondent.

MYRICK, J. Motion to dismiss appeal. Judgment was rendered in favor of plaintiff, November 7, 1885. Notice of appeal from the judgment was filed and served June 18, 1886. No transcript on appeal has been filed, and we have the certificate of the clerk of the court below that the appellant has not requested the clerk to certify to any transcript. Under such circumstances, the motion must be granted. If, as is stated in a subsequent certificate of the clerk, a motion for new trial is pending in the court below, together with a settlement of a bill of exceptions to be used on such motion, the effect of such proceedings will be considered, if an appeal should hereafter be taken from the ruling, when made, on the motion for new trial. Until then we must regard the appeal, as the appellant has characterized it, an appeal from the judgment; and, no transcript having been filed or prepared within the time prescribed therefor, the appeal is dismissed, but without prejudice.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKEE, J.; THORNTON, J.

70 Cal. 482

HEILBRON and others *v.* HEINLEN. (No. 11,433.)

(*Supreme Court of California.* August 27, 1886.)

1. ANIMALS—TRESPASS BY—LIMITATION OF ACTION—CALIFORNIA ACT FEBRUARY 4, 1874, § 8.

 The eighth section of the California act of February 4, 1874, entitled "An act to protect agriculture, and to prevent the trespassing of animals upon private property in Fresno and other counties in California," does not limit the right of a plaintiff suing for damages for the trespass of animals upon his land to the 60 days limited in that statute; but, where the complaint is not expressly brought under that statute, plaintiff may commence action for such trespass at any time within three years from the date of the trespass.

2. NEW TRIAL—MOTION FOR—TIME—NOTICE OF INTENTION TO MOVE—DISMISSAL.

 Where, in an action for trespass, plaintiffs except to the ruling of the court refusing to admit certain evidence, and judgment is given for defendant, and plaintiffs file their bill of exceptions, of which defendant accepts service, and file their notice of intention to move to set aside the judgment, and for a new trial, of which defendant accepts service, and plaintiffs do not call up their motion till 20 months have elapsed, the court is not justified in dismissing plaintiffs' notice of intention to move for a new trial.

Department 1. Appeal from superior court, Fresno county.

Action to recover damages for the trespass of the defendant's cattle on plaintiffs' lands. At the trial, in January, plaintiffs' attorneys offered testimony to prove the trespass within two years prior to the commencement of the action. Defendant objected to any testimony showing any trespass for a period more than 60 days prior to the commencement of the action, on the ground that by the California act passed February 4, 1874, § 8, relative to trespass of animals in Fresno and other counties in California, plaintiffs' recovery was limited to trespass committed within 60 days next before the filing of the complaint. The court sustained the objection, and refused to al-

low plaintiffs to show any trespass taking place prior to the period so limited by the statute; to which ruling plaintiffs duly excepted. After the conclusion of plaintiffs' evidence the defendant declined to introduce any evidence, and the jury, after being instructed by the court, returned a verdict for defendant, and the court gave judgment in his favor. Plaintiffs filed notice of intention to move for an order setting aside the judgment, and for a new trial, service of which was accepted by defendant's attorneys, February 4, 1884. Plaintiffs made up their bill of exceptions, specifying as errors the exclusion of evidence as to any trespass prior to the 60 days before the commencement of the action, service of which was accepted by defendant's attorneys, February 12, 1884: On October 7, 1885, defendant, on notice, moved to dismiss plaintiffs' notice of intention to move for a new trial, whereupon plaintiffs called up their motion for a new trial. The court granted defendant's motion to strike out plaintiffs' notice of intention to move for a new trial, and denied plaintiffs' motion for a new trial. The plaintiffs appeal.

Ferry & Ferry, for appellants. *G. A. Heinlen* and *Sayle & Harris*, for respondent.

MYRICK, J. Judgment was entered in favor of defendant, January 30, 1884. Plaintiffs gave notice of intention to move for a new trial, the motion to be made on bill of exceptions. The bill was served February 12, and settled April 24, 1884. Nothing further was done in the case until October 7, 1885, when the defendant, on notice, moved the court to dismiss plaintiffs' notice of intention, on the grounds, among others, of negligence and delay on the part of plaintiffs in not prosecuting the intention to move for a new trial, and that the same had been abandoned by lapse of time. On the same day plaintiffs submitted their motion for a new trial. On the twenty-second of October, 1885, the court granted defendant's motion to strike out plaintiffs' notice of intention, and denied the motion for new trial. From this order an appeal was taken.

Whatever would have been within the discretion of the court in ruling on a motion (if made) to dismiss the plaintiffs' motion for a new trial, on the ground of laches or failure to prosecute, the court was not justified in striking out their notice of intention. The motion for a new trial should have been granted, on the authority of *Trescony* v. *Brandenstein*, 6 Pac. Rep. 384. The court erred in confining the proof by plaintiffs of trespasses committed by defendant's cattle to the period of 60 days next preceding the commencement of the action.

The appeal from the judgment has been heretofore dismissed, because not taken in time. The order appealed from—viz., the order granting defendant's motion to strike out plaintiffs' notice of intention, and denying plaintiffs' motion for new trial—is reversed, and the cause is remanded.

We concur: MORRISON, C. J.; MCKINSTRY, J.

2 Cal. Unrep. 692

ARNOT and others *v.* BAIRD. (No. 11,200.)

(*Supreme Court of California.* August 27, 1886.)

MORTGAGE—FORECLOSURE—PLEADING—EXECUTION AND DELIVERY OF NOTES—ABSOLUTE DEED.

In an action to declare a deed absolute in form a mortgage, and sell the property conveyed thereby to satisfy certain notes described in the complaint, where the complaint states that the notes were made payable to parties named, and that a subsequent deed of trust reciting the former deed was made to secure the payment of the amount thereof, and the deed, which is set out in the complaint, states that it was given to secure the payment thereof, the allegations as to the making and delivery of the notes are sufficient to sustain a decree of foreclosure and sale.[1]

[1] See note at end of case.

Department 1. Appeal from superior court, Sierre county.

Action to have an absolute deed declared a mortgage, and have the property sold to satisfy certain notes described in the complaint.

Van Clief & Wehe, for respondents, Arnot and others. *Cross & Simonds*, for appellant, Baird.

By the Court. Appeal from judgment. If the recital of facts contained in the decree is not to be treated as a finding of facts, it will be deemed that findings were waived. If the recital is to be treated as a finding of facts, the facts were therein sufficiently found to sustain the decree. There is no bill of exceptions; and it does not in any manner appear that findings of fact were not waived. It may be that findings were waived, and therefore the statement of facts in the decree may be treated as a useless statement. If findings were waived, the statement of facts in the decree would not necessarily show error.

The complaint states that the notes were made by the defendant, and were made to the parties respectively; and that the deed of trust was made to secure the payment of the amounts thereof; also the deed of trust (set out in the complaint) states that it was given to secure the payment of the amounts of the various notes. We think there are sufficient allegations as to the making and delivery of the notes. *Hook* v. *White*, 36 Cal. 300.

Judgment affirmed.

NOTE.

Mortgage—Absolute Deed. As to the facts necessary to render an absolute conveyance a mortgage, see Buse v. Page, (Minn.) 19 N. W. Rep. 736; S. C. 20 N. W. Rep. 95. As to evidence sufficient to establish such facts, see Jackson v. Lawrence, 6 Sup. Ct. Rep. 915; McMillan v. Bissell, (Mich.) 29 N. W. Rep. 737; Allen v. Fogg, (Iowa,) 23 N. W. Rep. 643; Manufacturers' Bank of Milwaukee v. Rugee, (Wis.) 18 N. W. Rep. 251; Madigan v. Mead, (Minn.) 16 N. W. Rep. 539; Hurst v. Beaver, (Mich.) 16 N. W. Rep. 165; Rockwell v. Humphrey, (Wis.) 15 N. W. Rep. 394; Ingalls v. Atwood, (Iowa,) 5 N. W. Rep. 160; Bailey v. Bailey, (Ill.) 4 N. E. Rep. 394; Workman v. Greening, (Ill.) 4 N. E. Rep. 385; facts insufficient, Cadman v. Peter, 6 Sup. Ct. Rep. 957; S. C. 12 Fed. Rep. 363; Coyle v. Davis, 6 Sup. Ct. Rep. 314; Parish v. Reeve, (Wis.) 23 N. W. Rep. 568; Tilden v. Streeter, (Mich.) 8 N. W. Rep. 502; Smith v. Crosby, (Wis.) 2 N. W. Rep. 104; Butler v. Butler, (Wis.) 1 N. W. Rep. 70; Pioneer Min. Co. v. Baker, 23 Fed. Rep. 258; S. C. 20 Fed. Rep. 4; Null v. Fries, (Pa.) 1 Atl. Rep. 551; Greig v. Russell, (Ill.) 4 N. E. Rep. 780; Freer v. Lake, (Ill.) 4 N. E. Rep. 512.

2 Cal. Unrep. 695

Weidekind *v.* Tuolumne Co. Water Co. (No. 11,446.)

(*Supreme Court of California.* August 31, 1886.)

Waters and Water-Courses—Negligence of Water Company in Repairing Dam. The evidence in this case failed to show that defendant, a water company, had not used proper care in repairing its dam, the breaking of which injured plaintiff's mining claim, and washed away his tools; and the judgment in plaintiff's favor for damages was reversed, and a new trial ordered.

Department 2. Appeal from superior court, Tuolumne county.

Action against a water company to recover damages for the filling up plaintiff's mining claim, and the washing away of his tools, etc., by the breaking of the company's dam, owing to its negligence in not keeping it in proper repair. Verdict and judgment for plaintiff. Defendant appeals.

Frank W. Street, for appellant. *E. A. Rodgers*, for respondent.

By the Court. The verdict is not sustained by the evidence. The instructions given show no error.

Judgment and order reversed, and cause remanded for a new trial.

2 Cal. Unrep. 704

STATE *v.* FOLSOM WATER CO. (No. 11,174.)

(*Supreme Court of California.* September 15, 1886.)

DEED—CONSTRUCTION—CONDITION—CANAL—WATER COMPANY.

Deed construed, and *held* not to impose on defendant water company the obligation to complete a certain canal named therein.

Department 1. Appeal from superior court, Sacramento county.

Action by the state of California to compel the Folsom Water Company, as assignee of the Natoma Water & Mining Company, to construct a certain canal according to the terms and conditions of a deed executed by the latter company to the state, in words as follows:

"This indenture, made this thirtieth day of June, Anno Domini eighteen hundred and sixty-eight, between the Natoma Water & Mining Company, a corporation, duly incorporated under and by virtue of the laws of the state of California, and having its principal place of business in the village of Folsom, in said state, party of the first part, and the state of California, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States, to it in hand paid by the second party, receipt whereof is hereby acknowledged, and in further consideration of fifteen thousand dollars ($15,000) in convict labor, rated at fifty cents *per diem*, to be furnished to said first party in aid of its water-power canal enterprise, by said party of the second part, but only at the convenience of the state, and whenever it may be deemed advisable and judicious by the board of state prison directors of said state, has granted, bargained, sold, conveyed, and confirmed, and by these presents does grant, bargain, sell, convey, and confirm, unto the said state of California, forever, all that certain piece or parcel of land situate, lying, and being in Granite township, Sacramento county, state of California, and being a portion of the larger tract patented by the United States government under the name of 'Rancho Rio de los Americanos;' the portion thereof herein conveyed being particularly and specifically described as follows, to-wit: Beginning at a point on the east boundary line of said *rancho*, fifteen feet from where said line, projected northwardly, intersects the American river at high-water mark; thence, along said east boundary of said *rancho*, south seventy-five (75) chains and fifty (50) links, to a point; thence, at a right angle west, to a point within ten feet of the eastern line of the water canal of the Natoma Water & Mining Company, which said canal is near the eastern bank of the American river; thence northerly, along said canal and ten feet from the eastern line thereof, to a point ten feet above the dam across said American river constructed by and belonging to said Natoma Water & Mining Company; thence, at a right angle westerly, to a point fifteen (15) feet above the American river at high-water mark; thence, along said river, north-easterly, following its meanderings on a line fifteen feet above high-water mark, to the place of beginning,—containing three hundred and fifty (350) acres of land; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, with the timber standing thereon, and the granite quarries contained therein, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; also the exclusive right forever to the use of the first fall five feet perpendicular of the whole water of the canal at the upper end of that place on the canal known as 'Prison Yard,' with all rights, privileges, and easements necessary for the taking and enjoyment of power from said fall; it being understood that the said party of the first part reserves

to itself the subsequent power resulting from the flow of water in said canal after the first fall as aforesaid, and that this instrument is not to be construed as granting unto said state the right to divert said water, or any material quantity thereof, permanently from said canal. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said state of California, forever. And the said party of the first part warrants the said premises to be free from all and every incumbrance of any kind, character, or description, and against any and all incumbrances now existing upon said premises, created or suffered by said party, or by any other party, will forever warrant and defend. But, in accordance with the resolutions upon the branch state prison location passed by the board of state prison directors on the eighteenth day of June, A. D. 1868, the above grant of water-power is upon condition always that said board of state prison directors do furnish and supply, at such times and in such manner as it may deem advisable and judicious, fifteen thousand dollars in convict labor, rated at fifty cents *per diem* for each convict employed, unto said first party, in aid and construction of its water-power canal and adjuncts now partially completed along the western line of the lands heretofore described, or so much of the same as may suffice for the completion of dam and canal down to the point of delivering the said water-power, at the upper part of prison yard, as already mentioned.

"In witness whereof, the president and secretary of the said Natoma Water & Mining Company, acting for said company under and by virtue of a resolution passed by the board of trustees of said company, at a regular meeting thereof holden at Folsom on the thirtieth day of April, A. D. eighteen hundred and sixty-eight, which said resolution is in the following words, to-wit: 'Resolved, that the committee on prison site be also authorized to make all arrangements with the board of state prison directors for the location of a branch prison upon the company's property; and the president and secretary are hereby empowered and directed to execute, on behalf of this company, any and all deeds and agreements to and with said board of state prison directors on behalf of the state of California, as shall be agreed to between the said board and this company's committee on prison site,'—which resolution still stands as an order of said board of trustees upon the books of said company, unrevoked and unrepealed,—have hereunto set their hands and seals, the said Natoma Water & Mining Company having no corporation seal, on the day and year first above written.

"The word 'Rio' is interlined between the fourth and fifth lines of the second page, before signing.

[Seal.] "HORATIO G. LIVERMORE,
"President of the Natoma Water & Mining Co.

[Seal.] "ROGER S. DAY,
"Secretary of the Natoma Water & Mining Co."

Defendant demurred to the complaint; and, the demurrer being sustained, the state appealed.

E. C. Marshall, Atty. Gen., and *W. B. Treadwell*, for appellant. *A. P. Catlin*, for respondent.

BY THE COURT. We are of opinion that the deed from the Natoma Water & Mining Company to the state did not impose an obligation upon the company to proceed to the completion of the canal. Therefore the ruling of the court below on the demurrer was correct. Judgment affirmed.

71 Cal. 113

In re LUKES. (No. 9,468.)

(*Supreme Court of California.* September 27, 1886.)

INSOLVENCY—DISCHARGE—BOOKS OF ACCOUNT—CALIFORNIA ACT OF APRIL 16, 1880.

In section 49 of the California act of April 16, 1880, prohibiting the discharge of an insolvent merchant or tradesman who has not kept proper books of account, the words "subsequently to the passage of this act" are a limitation upon the general prohibition of the discharge of a merchant or tradesman who has not kept proper books of account, and authorize the discharge of a merchant or tradesman who was engaged in business as such, but who did not keep proper books, prior to the date referred to.

Department 1. Appeal from superior court, Santa Cruz county

Ferdinand J. McCann, (*Tyler & Tyler* and *Underwood McCann*, of counsel,) for appellant. *Lesser & Hall* and *J. M. Lesser*, for respondent.

MCKINSTRY, J The motion to dismiss the appeal has been heretofore denied. Oppositions were filed to the discharge of Luke Lukes from his debts under the insolvent law. The issues made by the oppositions, and the answers thereto, were submitted to a jury, who found against the opponents upon all the issues submitted save one.

Among the objections to the discharge was this: "That said Luke Lukes, being a merchant and tradesman, did not, since the sixteenth June, 1880, keep proper books of account." The petitioner denied in his answer that "since the sixteenth day of June, 1883, he did not keep proper books of account," and averred that "he kept proper books of account during all the time he was engaged in business." The jury found that Luke Lukes had not kept proper books of account "since the sixteenth of June, 1880." The petition for discharge alleges that "your petitioner is, and for more than six months next preceding the filing of this petition has been, a resident of the county," etc., "and has since the twentieth day of July, 1881, been engaged in the business of milling and manufacturing flour at the county of Santa Cruz," etc. The petition was filed January, 1883.

Section 49 of the act of April 16, 1880, provides: "No discharge shall be granted * * * if the debtor, * * * being a merchant or tradesman, has not, subsequently to the passage of this act, kept proper books of account." It is manifest that the clause relates to merchants or tradesmen. The words "subsequently to the passage of this act" are a limitation upon the general prohibition of the discharge of a merchant or tradesman who has not kept proper books, and authorize the discharge of a merchant or tradesman who was engaged in business as such, but who did not keep proper books, prior to the date referred to.

There is nothing in the case tending to show that the petitioner was a merchant or tradesman, or that he was engaged in any business prior to July 20, 1881, and the uncontradicted testimony proved that he had been engaged in "milling grain, and selling the products thereof," since that date. There was no express finding that he had ever been a "merchant or tradesman." When the issues to be submitted to the jury were being settled, the petitioner asked the court to submit the issue, "Did Luke Lukes keep proper books of account since the twentieth day of July, 1881?" But the court adopted—and the same was subsequently submitted to the jury—the issue, "Did Luke Lukes keep proper books of account since the sixteenth day of June, 1880?" the same being the date when the insolvent law took effect. The petitioner objected to the settlement and submission of the issue last recited, upon the grounds—*First*, that the time specified is not within any of the issues made by the pleadings herein; *second*, that the same is immaterial. The court overruled the objections, and petitioner duly excepted.

If it be conceded that the petitioner was a "merchant or tradesman" from and after the date when he commenced the business of milling and selling

flour and other products of the mill, the court below erred in submitting the issue to the jury; and, as the judgment refusing the discharge was based on the special verdict of the jury, the judgment is erroneous. As the case was presented, it was immaterial whether the petitioner kept any books prior to July 20, 1881. For aught that appears from the findings of the jury, he kept proper books after that date.

Judgment reversed, and cause remanded for further proceedings.

We concur: MYRICK, J.; ROSS, J.

71 Cal. 149

TAIT v. HALL. (No. 11,259.)

(*Supreme Court of California.* September 28, 1886.)

1. APPEAL—EVIDENCE CONFLICTING—FINDINGS.
Where there is a substantial conflict in the testimony, the supreme court will not disturb the findings of the trial court.

2. EVIDENCE—RES GESTÆ—DECLARATIONS AS TO INTENT IN PERFORMING ACT.
The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence.

Commissioners' decision.

Department 2. Appeal from superior court, Tehama county.

Chipman & Garter, for respondent, Tait. *John F. Ellison*, for appellee, Hall.

SEARLS, C. This is an action to restrain the defendant, as road overseer of Tehama road-district, in the county of Tehama, from opening a road for public use across the land of plaintiff. The cause was tried by the court without a jury. Written findings were filed, upon which a decree was entered in favor of the plaintiff, perpetually enjoining the defendant from entering upon, laying out, constructing, opening, or keeping open a road for public use through the land of the plaintiff, which is properly described.

From this decree, and from an order denying a motion for a new trial, defendant appeals. Under the pleadings and evidence the case turned upon the question whether a strip of land 60 feet in width on the east side of the premises described in the complaint, and running across the same from north to south, was in fact a public road.

The findings on this branch of the case are as follows:

"(6) That the said strip of land, above described, has never been laid out or erected as a road or public highway by order of the board of supervisors, and has never become a public road by use or dedication by any owner of said land, or otherwise; nor has any part or portion of plaintiff's land described in his complaint in this action, and in the findings, become a public road by order of the board of supervisors, or by use or by dedication, or otherwise.

"(7) That the said defendant will carry out and perform the acts so threatened by him, unless restrained by the process of this court, and plaintiff will be irreparably injured thereby.

"(8) That A. G. Toomes, mentioned in defendant's answer, never, as owner or otherwise, on or about the year 1873, or at any other time, dedicated said strip of land, or any part thereof, to the public and for a public highway, either by spoken words of said A. G. Toomes, or by his conduct.

"(9) That the said strip of land was never accepted by the public as a highway, and the public, since 1873, or since any other date, have not traveled upon or over said strip of land, or any part thereof, or used the same continuously or at all as a public highway."

Appellant attacks these findings numbered 6, 7, 8, and 9, upon the ground that they are not supported by the evidence, and are contrary thereto.

There is a substantial conflict in the testimony, and, upon well-settled prin-

ciples, we are not at liberty to disturb the findings under such circumstances. The findings cover all the issues in the cause necessary to a determination of the case. The allegation of the answer that A. G. Toomes was the owner of the land in 1870 was wholly immaterial, except as a predicate for showing that, as such owner, he dedicated the land to the purposes of a highway; and the eighth finding negatives the fact of such dedication.

The court having found that no highway ever existed over the land, and that plaintiff was the owner thereof, the further allegation of the answer, that plaintiff built a fence thereon, and across the highway, became immaterial. Manifestly, if he owned the land, and the public had no easement in it or right to it, he could build as many fences as he chose upon it, without incurring any liability thereby. So, too, if it was never a highway, there was no right in the public to be abandoned. The question of highway or no highway was one of fact, to be passed upon as such by the court, and was properly determined as such. *Harding* v. *Jasper*, 14 Cal. 642.

There was no error in permitting the witness A. J. Clark to testify as to the declarations of Toomes, deceased, made while he was having the land surveyed, to the effect that he was not going to have a road on the west line of the land he was suveying. The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence. The evidence was admissible in rebuttal of the declarations introduced by defendant tending to show that Toomes had said, about the same time, that he would open a road at the point indicated.

The action of the court in ruling out the testimony of the witness Healy, so far as he proposed to give *his impressions*, was proper. The witness had stated that, in surveying off the west line of the land sold to Simpson by Toomes, he had run the western boundary on a line with the east side of Second street. The witness was then asked if he knew what the object of Toomes was in making the lines thus correspond, to which he replied that he did not recollect what Toomes said about it, and then was about to give his impression as to the object. The inference to be drawn from the acts of Toomes was for the court to draw from his acts, and the impressions or opinions of the witness were not admissible as aids to the deductions to be made by the court.

We find no error in the record calling for a reversal, and are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 424

SMITH *v.* FURNISH. (No. 11,300.)

(*Supreme Court of California.* August 23, 1886.)

1. EXECUTORS AND ADMINISTRATORS — CLAIM BY MARRIED WOMAN FOR NURSING DECEDENT—HOW PRESENTED.

 A claim by a married woman for services rendered a decedent as nurse constitutes community property, and should be presented to the executors of the estate in the name of the husband; but when a claim, verified by the wife, is presented in her name by the husband, and rejected, a judgment in an action by husband and wife to recover for such services will not be reversed simply because the claim was not properly presented.

2. ELECTION—BEQUEST IN PAYMENT FOR SERVICES—ACTION.

 Where a certain sum of money is bequeathed to a nurse by the testator in payment for her care and attention to him, an action against the estate to recover the value of such services will be considered an election not to claim the bequest, and it will not be a bar to the suit.

Department 1. Appeal from superior court, Sacramento county.

W. H. Beatty and *S. C. Denson*, for appellants. *Grove L. Johnson*, for respondents.

Ross, J. The plaintiff Emma L. Smith, and her co-plaintiff, A. J. Smith, are husband and wife, and as such resided together in the house of the deceased, William Hicks, during which time Mrs. Smith rendered Hicks services as nurse, for the value of which this suit was brought. It is contended, on behalf of the appellants, that the claim for the services was not properly presented to the executors of the estate of Hicks. It was verified by Mrs. Smith, and presented in her name by her husband to the executors, and by them rejected. They claim that it should have been verified by the husband, and presented in his name; that the debt due by Hicks was due to A. J. Smith; and that it is indispensable to an action upon it that a claim for the amount should have been duly presented to the executors in *his* name.

It does not admit of doubt, we think, that the amounts due for the services rendered constituted community property. It is provided by section 162 of the Civil Code that "all property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property;" and, by the next section, that "all property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." By section 164 it is declared that "all other property acquired after marriage, by either husband or wife, or both, is community property." An exception to this last general provision is made in favor of the earnings and accumulations of the wife while she is living separate from her husband, by virtue of section 169 of the Civil Code, which reads: "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."

It would be clearly contrary to these provisions of the Code to hold that *all* earnings and accumulations of the wife are her separate property. The exception cannot be extended by the courts beyond its fair scope. The provision that the earnings and accumulations of the wife *while she is living separate from her husband* are her separate property, plainly assumes that such earnings and accumulations as are not so acquired do not constitute the separate property of the wife, but are embraced by the general provisions of section 164, and constitute community property. It is true that, by section 168 of the same Code, it is provided that "the earnings of the wife are not liable for the debts of the husband;" but what should be considered earnings of the wife, and what debts of the husband, within the true meaning of that section, are questions that do not arise in this case.

The debt due from the deceased, Hicks, for the services rendered him by Mrs. Smith, being the community property of Mr. and Mrs. Smith, was there such a presentation of the claim for the amount to the executors of the estate of Hicks as would authorize a suit upon its rejection?

As has been seen, it was verified by the wife, and presented in her name by the husband. That the claim was sworn to by the person best acquainted with the facts surely cannot be good ground of objection to its verification. Undoubtedly it ought to have been presented in the name of the husband, since the amount due constituted community property, but it was presented by the husband in the name of his wife. Had the claim been allowed by the executors, he would have been estopped from presenting another claim in his own name for the same services; and having, with his wife, brought this suit upon the rejected claim, a recovery thereon would equally estop him. A claim for the services, properly verified, was presented to the executors, who rejected it, but without objection to the manner of its presentation. Suit hav-

ing been brought thereon, plaintiffs proved the rendition of the services and their value, and recovered judgment. Ought the judgment to be reversed only because the claim was presented to the executors by the husband in his wife's name instead of his own? Under the circumstances of the case, we think not. The substantial rights of the estate have not been affected by the manner of its presentation, and we do not think a just judgment against it ought to be reversed on that ground.

The only other points relied on by the appellants for a reversal grows out of the fact that the deceased in his will made a bequest to Mrs. Smith, of $3,000, "in consideration and in payment for her kind care and attention during my last sickness." It is said that the bequest was intended as full compensation for the services rendered by Mrs. Smith, and that it has not been renounced. The answer to this is that her action in respect to the claim was an election on her part not to rely upon the bequest; and upon the distribution of the estate the rights of the executors, and of all interested therein, can be properly and appropriately protected.

Judgment and order affirmed.

We concur: MYRICK, J.; MCKINSTRY, J.

71 Cal. 407

HUSCHEON *v.* HUSCHEON. (No. 9,832.)

(*Supreme Court of California.* December 18, 1886.)

1. MORTGAGE—ABSOLUTE DEED—CIVIL CODE CAL. §§ 2924, 2925.
 Under the law of California (Civil Code, §§ 2924, 2925) every transfer of an interest in land, other than in trust, made only as a security for the performance of another act, is a mortgage; and the fact that the transfer was made subject to a defeasance may be proved, though it does not appear by the terms of the instrument.[1]
2. SAME—WHEN DECLARED A MORTGAGE—INADEQUATE CONSIDERATION—PREPONDERANCE OF EVIDENCE.
 A deed, absolute on its face, of land worth $4,000, by an ignorant man, made, under the pressure of debt and impending litigation, to a brother, in whom he

[1] See note at end of case.

placed great confidence, will be declared a mortgage, where it appears that the deed was given in consideration of the brother's settling the mortgagor's debts, present and prospective, and that the debts so paid amounted to only $1,500, and where the preponderance of evidence shows that, at the time the deed was made, a contemporaneous contract was executed which was subsequently lost, and by the terms of which the grantor was to be allowed to redeem the land so conveyed at the end of six years.[1]

3. SAME—STATEMENT OF ACCOUNT.

An absolute deed having been declared a mortgage, the account should be so stated between the parties as to credit the mortgagee with all sums of money paid out by him for the mortgage, and for taxes and improvements upon the property, and also with his expenses and a reasonable compensation for his time in attending to the mortgagor's business, and with interest on the several sums at 10 per cent. The mortgagee should be charged with the value of the rents and profits of the land while he held possession of it, with the amount of a mortgage which he had placed upon the land and had not paid, and with the value of certain labor which the mortgagor had performed for the mortgagee.

Commissioners' decision.

Department 1. Appeal from superior court, Humboldt county.

S. M. Buck, for respondent. *J. D. H. Chamberlain* and *P. F. Hart* for appellant.

BELCHER, C. C. By this action the plaintiff seeks to have a deed, executed by him to defendant, adjudged to be a mortgage; and the facts of the case, as found by the court below, are substantially as follows:

On the fifteenth day of July, 1876, plaintiff was the owner of 760 acres of land in Humboldt county, of the value of $4,000. He was indebted to one Margaret Fitzgerald in the sum of about $500, for which an action had been commenced against him, and his property attached. He had been a partner with one Comise in the dairying business, and Comise was claiming that a considerable amount was due him on partnership account, and was threatening to commence an action to settle up the partnership affairs. Plaintiff had no money, but it was necessary for him to be prepared to meet and settle these demands.

Under these circumstances he applied to the defendant, who was his brother, and in whom he placed great confidence, for assistance. Defendant agreed to pay the Fitzgerald note, and also to defend any action that might be commenced by Comise, and to pay all the cost and expense of such action, and any judgment that might be recovered therein, provided plaintiff would execute to him a conveyance of all his lands. Thereupon plaintiff executed and delivered to defendant a deed of his lands, which was absolute in form. On the same day another paper was executed by the parties, which is now lost, but is called by some of the witnesses a lease, and by others a "back paper." By this paper it was, in effect, agreed that defendant should take and hold possession of the lands for six years, and that, at the expiration of that time, they should be reconveyed to the plaintiff, upon his paying to the defendant such sum or sums of money as might then be found due him. Under the agreement defendant took possession, and has ever since held it. A few days after receiving the deed he paid the Fitzgerald claim, amounting to the sum of $540, and thereafter, at divers times, paid out sums aggregating about $800, for costs and expenses incurred in the litigation between Comise and plaintiff, and to satisfy the judgment obtained by Comise in that litigation. After the expiration of the six years provided for in the agreement, plaintiff demanded from defendant an account of the rents, issues, and profits of the land, and of all sums of money due defendant, if any, and offered to pay him whatever sum might be found due; but defendant refused to account to or with plaintiff in any manner, and claimed to own all of said property absolutely. At that time the land had largely increased in value.

[1] See note at end of case.

The action was commenced in January, 1883, plaintiff alleging in his complaint that the deed executed by him to defendant was intended to be, and was given and accepted as, security for the money to be paid for him by defendant, and praying that it be adjudged a mortgage; that an account of the dealings between them be taken; and that he be permitted to redeem the property so conveyed upon paying to defendant all sums of money found due him, if any, and for a reconveyance of the lands to him by defendant. Upon these facts, the court, by its judgment, granted to the plaintiff the relief demanded. The defendant then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

In support of the appeal, it is now earnestly contended that the deed in question was an absolute conveyance in fact as well as in form, and that the finding of the court that it was only a mortgage is not justified by the evidence. In this state every transfer of an interest in real property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage; and the fact that the transfer was made subject to a defeasance may be proved, though it does not appear by the terms of the instruments. Sections 2924, 2925, Civil Code. Whether a deed absolute in form be a mortgage or not is a mixed question of law and fact, to be determined from all the evidence, written and parol; and, in determining it, all the facts and circumstances attending the transaction should be considered. If it were given as a security for a loan of money, a court of equity will treat it as a mortgage; and whether it was so given or not is the test by which its character must be judged. *Farmer* v. *Grose*, 42 Cal. 169; *Montgomery* v. *Spect*, 55 Cal. 352; *Peugh* v. *Davis*, 96 U. S. 332.

In the last-named case, FIELD, J., delivering the opinion, it is said: "It is an established doctrine that a court of equity will treat a deed absolute in form as a mortgage, when it is executed as a security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible."

The debt to secure which the deed is given, may be an antecedent debt, or one created at the time, or it may be advances to be thereafter made by the mortgagee to or for the mortgagor, and no accompanying written promise on the part of the mortgagor to pay the debt is necessary. *Pioneer G. M. Co.* v. *Baker*, 10 Sawy. 539; S. C. 23 Fed. Rep. 258; *Campbell* v. *Dearborn*, 109 Mass. 130; *Russell* v. *Southard*, 12 How. 139; 4 Wait, Act. & Def. 541, 542; *Horn* v. *Keteltas*, 46 N. Y. 605. One of the circumstances tending strongly to show that a deed absolute in form was only a mortgage, is the fact when it appears that there was great inequality between the value of the property conveyed and the price alleged to have been paid for it. As said in *Russell* v. *Southard*, *supra*: "In examining this question, it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practiced, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject, great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold;" citing *Conway* v. *Alexander*, 7 Cranch, 241; *Morris* v. *Nixon*, 1 How. 126; *Vernon* v. *Bethell*, 2 Eden, 110; *Oldham* v. *Halley*, 2 J. J. Marsh. 114; *Edrington* v. *Harper*, 3 J. J. Marsh. 354.

Tested by the foregoing rules of law, was the deed in question an absolute conveyance or a mortgage?

It is not pretended that the value of the property, when the deed was made, was less than $4,000, nor that there was any consideration for its execution

except an agreement on the part of defendant to pay all of plaintiff's debts, including all claims then in litigation, or that might be brought against him. The amount to be paid on the Fitzgerald note was known to be only a little more than $500. The only other debt was the Comise claim, which was uncertain in amount; it might be nothing, or might be several hundred dollars. Taking both of the claims together, we are unable to see how it could have been anticipated that the defendant would be called upon to pay more than a thousand or twelve hundred dollars. The consideration for the deed was, then, altogether inadequate, and it seems quite incredible that plaintiff would be willing to sell out all his property, even to his brother, for about one-fourth of its value.

Upon the question whether a paper in the nature of a defeasance was executed by the parties or not, the testimony was conflicting, and upon that subject we quote and adopt what was said by the court below, in deciding the case: "Aside from the consideration of inadequacy of price, I am entirely satisfied from the evidence that, at the time of the execution of the conveyance, it was not only agreed and understood between the parties that plaintiff should have the right to redeem upon the payment to defendant of all sums which he had paid for plaintiff, but I am also satisfied that there was at the same time executed by the parties an agreement to that effect. This writing has not been produced in court, and diligent search and inquiry have failed to discover it. It is lost or destroyed. The defendant denies most emphatically that such an instrument was ever executed. He admits that there was some talk about it; that plaintiff wanted such a writing, but that he, the defendant, positively refused to execute it. In my opinion, the evidence as to the execution of this paper is so overwhelming as to place it beyond all doubt. The plaintiff swears positively to it, gave his reasons why he wanted it, testifies circumstantially to the reading of it by Watson in the presence of Walsh, himself, and defendant, of his signing it, and defendant attaching his mark, being unable to write; also as to the controversy between them as to the duration of the lease, as it was called, or the time within which he should be allowed to redeem, and finally, at the suggestion of Walsh, fixing the term at six years. Incidently, it appears that he spoke of it to a number of parties at various times; sometimes calling it a bond for a deed, sometimes a lease, and sometimes using the homely but expressive term, a 'back paper.' The testimony of Walsh as to the execution of the paper is clearer and more satisfactory than that of the plaintiff. He was the mutual friend of the parties, and they consulted and advised with him, and discussed the matter in his presence, and adopted his suggestion in fixing the duration of the lease at six years. He heard it read by Watson to the parties, heard them express their satisfaction at its contents, saw plaintiff sign his name, and defendant make his mark; before this having sent them to Watson to get him to write it. He subsequently read it over himself, and kept it for about a year in his safe. He is quite certain that some one obtained it from him pending the Comise and Huscheon litigation. Watson remembers distinctly of writing two papers in which the parties were interested, and that Walsh had something to do with the negotiations, but fails to remember the contents or purpose. Walsh cannot testify minutely to all the terms of this lease, as he terms it, but does remember clearly that the purpose and object was to allow the defendant to use the land and stock for six years, the rents and profits to be applied in payment of plaintiff's indebtedness to him, and at the expiration of that time he was to deed back to plaintiff, upon the payment by him of the money expended in his behalf, if any should be due."

This is a fair review of the evidence, and, in our opinion, it correctly states its scope and meaning. It is true, it appeared that plaintiff had often spoken of the business relation existing between himself and defendant as that of a partnership, and that in a suit against the defendant, which involved the

right to the personal property transferred, and was tried before a justice of the peace in 1877, he was a witness, and testified that he had no interest in the personal property, and incidentally that he had none in the land. But we do not consider these facts of any particular importance. Plaintiff was an ignorant man, and may well have supposed that the transaction established some kind of a partnership relation. So as to the testimony before the justice. If plaintiff testified just as it is claimed he did, it may have been done honestly. He knew that he had deeded the land to defendant, and that defendant was in possession of it, and had a right to retain that possession for several years. Under the circumstances he may have supposed that he had no interest in the land then, and would have none until he had settled with defendant, and paid back to him all sums of money which had been or should be advanced for his benefit.

Looking, then, at all the testimony, we agree with the court below that it clearly and satisfactorily appears that the deed in question was given as a security for the repayment of moneys to be thereafter advanced by defendant, and that it should be held and treated as a mortgage.

It is also argued for the appellant that the deed was made to hinder and delay the creditors of plaintiff, and therefore he is entitled to and can obtain no relief from the courts against it. On looking through the record we are unable to find anything to support this claim. In his very able and exhaustive brief, counsel for appellant says that, as the consideration for the deed, "defendant agreed to pay all plaintiff's debts, including all claims then in litigation, or that might be brought against him." If this be so, how can there be any plausible pretense that in making the deed plaintiff intended to hinder, delay, or defraud his creditors? We, at least, are unable to see how a needy debtor can be said to have violated any rule of law or good morals, because, to raise money to pay his just debts, he has turned over all his property, as security, to some one, who has the ability, and has undertaken honestly and in good faith, to pay them.

Among other defenses interposed, defendant pleaded nearly all of the sections of the Code providing for the limitation of actions, and it is claimed that, under some one or more of these sections, plaintiff's cause of action is barred. If it be true, as found by the court, that defendant took and held possession of the land under a written agreement, which was executed by the parties, and provided, in effect, that plaintiff should have the right to redeem at the expiration of six years upon paying to defendant whatever should then be found due him, it is quite clear that there could have been no adverse holding of the land, and that defendant cannot now avail himself of any of the sections of the Code which provide bars against the recovery of real property. So, too, it is equally clear that the paper constituted a written recognition of the debt from plaintiff to defendant, and a promise to pay it when the right to redeem should accrue, and consequently that, if defendant had instituted an action to foreclose, plaintiff could not have availed himself of any of the sections of the Code which provide bars against the recovery of money. It must follow, therefore, that the rights of the parties were reciprocal and commensurable, and that the court properly held that the action was not barred.

In stating the account between the parties the court credited defendant with all sums of money paid out by him for the plaintiff, and for taxes and improvements upon the property, and also with his expenses and a reasonable compensation for his time while attending to plaintiff's business, with interest on the said several sums at the rate of 10 per cent. per annum, but it refused to credit him with the money paid out for expenses in the lawsuit before the justice of the peace hereinbefore referred to; and it charged him with the value of the rents and profits of the land while he held possession of it, with the amount of a mortgage he had placed upon the land and not paid,

and with the value of certain work and labor performed by plaintiff on another farm owned by defendant. As the accounts were thus stated it was found that the defendant had been fully paid, and that a balance of $217.30 was due the plaintiff, for which judgment was also entered in his favor.

It is now objected that the court erred in refusing to credit defendant with his expenses in the justice's court case, and in charging him with the rents and profits of the land, and for the work and labor of plaintiff. But in the rulings of the court upon these matters we see no material error. The action before the justice of the peace was brought by a third party against the defendant to recover the personal property, and it had no connection with the transaction in hand. The defendant was a mortgagee in possession, and chargeable with the rents and profits of the mortgaged premises, (*Ruckman* v. *Astor*, 9 Paige, Ch. 517; *Strang* v. *Allen*, 44 Ill. 428; 4 Wait, Act. & Def. 566, 577;) and there was testimony tending to show that the value of the rents and profits was even greater than the amount allowed. The court, in effect, found that the services of plaintiff were rendered in part payment of the sums advanced by defendant under the original agreement; and the testimony of plaintiff that he never made any separate contract about the work, and never expected defendant to pay him $25 per month in money for his work, but supposed he was working in the interest of the general partnership between them, is in support, we think, of the court's view of the matter.

The plaintiff seems to have thought that the transaction between himself and defendant created a partnership between them, and that he was working to discharge the duty cast upon him by that relation. He was mistaken about the partnership, but his work was nevertheless performed to release him from the burden of debt which the transaction had imposed upon him.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

MORTGAGE—DEED GIVEN AS SECURITY. A deed given merely as security, with an understanding that the land is redeemable by the payment of the money or the performance of the obligation, is, between the parties, a mortgage, Scheiber v. Le Claire, (Wis.) 29 N. W. Rep. 570; Jeffrey v. Hursh, (Mich.) 25 N. W. Rep. 176; Niggeler v. Maurin, (Minn.) 24 N. W. Rep. 369; Hulin v. Stevens, (Mich.) 18 N. W. Rep. 569; Madigan v. Mead, (Minn.) 16 N. W. Rep. 539; Hurst v. Beaver, (Mich.) 16 N. W. Rep. 165; Butler v. Butler, (Wis.) 1 N. W. Rep. 70; Jackson v. Lawrence, 6 Sup. Ct. Rep. 915; Cox v. Ratcliffe, (Ind.) 5 N. E. Rep. 5; Workman v. Greening, (Ill.) 4 N. E. Rep. 385; and a bill of sale will, under like circumstances, be construed as a chattel mortgage, Winner v. Hoyt, (Wis.) 28 N. W. Rep. 380; Manufacturers' Bank of Milwaukee v. Rugee, (Wis.) 18 N. W. Rep. 251, Rockwell v. Humphrey, (Wis.) 15 N. W. Rep. 394; McAnulty v. Seick, (Iowa,) 13 N. W. Rep. 743.

The intent of the parties may be shown by parol evidence. Winner v. Hoyt, (Wis.) 28 N. W. Rep. 380; Parish v. Reeve, (Wis.) 23 N. W. Rep. 568; Manufacturers' Bank of Milwaukee v. Rugee, (Wis.) 18 N. W. Rep. 251; Madigan v. Mead, (Minn.) 16 N. W. Rep. 539; Rockwell v. Humphrey, (Wis.) 15 N. W. 394; Barber v. Milner, (Mich.) 5 N. W. Rep. 92; Butler v. Butler, (Wis.) 1 N. W. Rep. 70, Jackson v. Lawrence, 6 Sup. Ct. Rep. 915; Pioneer Gold Min. Co. v. Baker, 23 Fed. Rep. 258; S. C. 20 Fed. Rep. 4; Cox v. Ratcliffe, (Ind.) 5 N. E. Rep. 5; Workman v. Greening, (Ill.) 4 N. E. Rep. 385.

As to the facts necessary to convert an absolute deed into a mortgage, see Arnot v. Baird, (Cal.) *ante*, 386.

70 Cal. 423

PETERSEN *v.* WEISSBEIN. (No. 11,544.)

(*Supreme Court of California.* August 23, 1886.)

INJUNCTION—CROSS-COMPLAINT—DEMURRER—MOTION—AFFIDAVITS.

In an action of ejectment, where defendant files a cross-complaint, and seeks to enjoin plaintiff from asserting any title to the property, pending the decision of a demurrer to the cross-complaint, defendant cannot, upon motion, on affidavits, obtain a perpetual injunction, but must await the result of the proceedings.

Department 1. Appeal from superior court, Nevada county.
Cross & Simonds and *E. H. Gaylord*, for appellant. *A. Burrows*, for respondent.

Ross, J. The complaint in this case is in the usual form of complaints in an action of ejectment. To it the defendants filed an answer, putting in issue its averments, and also pleading in bar of the action judgments in certain other actions, which, it is claimed, determined adversely to the plaintiff the title to the property in controversy. The defendants also filed a cross-complaint, by means of which they sought to have the plaintiff perpetually enjoined from asserting any right to the property, on the ground that his action was vexatious, to which cross-complaint the plaintiff filed a demurrer. Subsequently, and during the pendency of the demurrer, defendants moved the court, upon affidavits and the judgment rolls in the suits pleaded in bar, for an order perpetually enjoining the plaintiff from further prosecuting the action. The motion was granted, and the action of the court in that particular constitutes the ground of the present appeal.

It is not necessary in this case to determine whether, under any circumstances, it is competent to try, upon affidavits, the question whether or not the title claimed by plaintiff in an action of ejectment is the same title adjudicated against him in some other action, nor to determine the sufficiency of the cross-complaint in the present case to obtain the relief sought thereby. It is enough to say that defendants could not anticipate the result of the proceedings under the cross-complaint by the motion in question.

Order reversed, and cause remanded for further proceedings.

We concur: MYRICK, J.; MCKINSTRY, J.

71 Cal. 491

LANG *v.* SUPERIOR COURT. (No. 11,367.)

(*Supreme Court of California.* December 30, 1886.)

A petition for rehearing was filed, and, upon the denial thereof, the opinion formerly filed in this case, and reported *ante*, 306, was, by order of the court, modified by striking out the following words on page 307:

"We are not familiar with the practice of rehearings in the superior court; and what right or power the superior court had, on the twelfth of December, 1884, to order a rehearing in the case, we are at a loss to conceive. The demurrer and the motion for a new trial had been disposed of, and then, on what is called a 'rehearing,' the case was again brought before the court, and a new order made. This is a new practice with which we are not familiar, and we know of no statute authorizing it."

Also, by striking out the words "Judge FINN" on page 306; and also changing the words "Judge FINN, superior judge, who had succeeded," on page 307, by inserting in lieu thereof the words "the successor of."

TRUCKS *v.* BAGLEY. (No. 11,224.)

(*Supreme Court of California.* August 23, 1886.)

APPEAL—EVIDENCE—FINDINGS.

Where the evidence is conflicting, the findings of the lower court will be sustained, and the judgment affirmed.

Department 1. Appeal from superior court, Nevada county.
Action to quiet title. Judgment for plaintiff. Defendant appeals.
Chas. W. Kitts, for appellant. *Cross & Simonds*, for respondent.

By the Court. Under the rule prevailing here, we do not think we would be justified in holding the findings unsupported by the evidence. And, unless that can be done, it is clear that the judgment of the court below must be affirmed.

Judgment and order affirmed.

2 Cal. Unrep. 687

PORTER *v.* MURRAY. (No. 9,384.)

(*Supreme Court of California.* August 24, 1886.)

1. FORCIBLE ENTRY AND DETAINER—COMPLAINT—CAUSE OF ACTION—JOINING WIFE OF PRINCIPAL DEFENDANT—DESCRIBING PREMISES.

A complaint in an action of forcible entry and detainer is not obnoxious to a demurrer as not stating facts sufficient to constitute a cause of action which sets up the plaintiff's ownership of certain described premises, his possession thereof on a day named, the unlawful entry of the defendants thereon on that day, and their forcible detainer thereof up to the time of bringing the action. Nor is it demurrable for joining the wife of the principal defendant as a party defendant, nor because it sets out one cause of action in several distinct counts, and only describes the premises in the first one.

2. SAME—MOTION FOR NONSUIT—STRANGER ENTERING BETWEEN GOING OUT OF TENANT AND ENTRY OF LANDLORD.

In an action of forcible entry and detainer, where the testimony for plaintiff tends to show that on a certain day the plaintiff's agent received notice that plaintiff's tenant would vacate the premises on the following day; that on that day at 8:30 A. M., the agent was on hand to take charge of the premises, and was told by the tenant's wife that the tenant would not go out until 1:30 P. M. of that day; that at 12:30 P. M. the agent returned and found one of the defendants in the house, with the windows and doors barricaded, and threatening to shoot the agent if he attempted to enter,—a motion for a nonsuit was properly denied.

3. SAME—FINDINGS—COMPLAINT—ALLEGED BY PLAINTIFF.

Where, in such an action, the findings show that, on the day mentioned in the complaint, the plaintiff was in the peaceable possession of the premises; that on that day the defendants wrongfully entered thereon, and have ever since forcibly detained possession thereof from the plaintiff; and the facts thus found, together with the admissions contained in defendants' answer, make out a cause of action alleged in favor of the plaintiff,—it is no cause of complaint on the part of defendants that the court did not find the facts in as many ways as they were set out in the complaint.

Department 1. Appeal from superior court of San Francisco.

Forcible entry and detainer.

This action was brought under the provisions of the California Code of Civil Procedure respecting forcible entries and unlawful detainers. Section 1159 *et seq.* The property is a small lot in San Francisco, California, and is the same property that was involved in the case of *Murray* v. *Green*, 64 Cal. 363. The complaint set out the one cause of action in four separate counts, to each of which a demurrer was interposed. One ground of demurrer to each count was that it did not state facts sufficient to constitute a cause of action. The second, third, and fourth counts were demurred to for uncertainty in not repeating the description of the land given in the first count. Each count was demurred to for the misjoinder of Mrs. Lawler as a defendant. The demurrer was overruled. Defendants answered, and a trial was had. Defendants' counsel made motions for a nonsuit on behalf of each defendant, which were all denied. Findings were filed, and judgment went for plaintiff. Defendants appealed from the judgment. Objection is made to the findings, because, of the four causes of action stated separately in the complaint, there are no findings as to any one of them, but the findings are a medley of some parts of them all.

A. L. Rhodes, for plaintiff and respondent. *Matt. I. Sullivan* and *E. A. Lawrence*, for defendants and appellants.

Ross, J. The demurrer was properly overruled. The findings show that, on the day mentioned in the complaint, the plaintiff was in the peaceable possession of the property, and that on that day, during his absence, Murray wrongfully entered thereon, and has ever since forcibly detained possession thereof from the plaintiff. As there was no omission to find upon any material fact set up by the defendants, and as the facts found by the court, together with the admissions contained in the answer, sustain a cause of action alleged in favor of the plaintiff, defendants have no just ground of complaint because the court did not find the facts in as many different forms as the plaintiff, out of abundant caution, thought it best to employ in the statement of his cause of action.

In respect to the defendants Lawler and wife, it appears from the pleadings that they entered under Murray, and, together with him, detain the possession of the property from the plaintiff.

The motion for nonsuit was properly refused. The testimony on the part of the plaintiff tended to show that on the afternoon of the fourteenth of August, plaintiff's agent received notice that the tenant of the plaintiff, who had occupied the premises for many months, would vacate the premises the following day; that plaintiff's agent went to the premises at 8:30 A. M. on

the 15th, and was informed by the wife of the tenant that they would not move out before 1:30 that day; whereupon she was informed by the agent that at 12:30 he would be there to take charge of the premises, and promptly at that hour he was on hand, when he found Murray in the house, with the windows and doors barricaded, and threatening to shoot the agent if he attempted to enter. Manifestly, when the tenant quit, the landlord was restored to the possession. It would be a monstrous doctrine to affirm that the landlord does not get possession of the premises upon the expiration of his tenant's lease if some third party can slip in between the moving out of the tenant and the moving in of the landlord. Judgment affirmed.

We concur: MYRICK, J.; MCKINSTRY, J.

70 Cal. 604

In re Estate of CAHALAN, Deceased.

(*Supreme Court of California.* September 3, 1886.)

1. APPEAL—WHAT REVIEWABLE—INTERMEDIATE ORDER—EXECUTOR'S ACCOUNT.
 Where a decree settling an executor's final account is afterwards set aside by the court making it, and the executor is required to render a new account, upon appeal from the decree settling the latter account the order setting aside the former settlement will be reviewed; and, if erroneous, the appeal will be sustained.
2. EXECUTORS AND ADMINISTRATORS—ACCOUNT—DECREE—SETTING ASIDE—CODE CIVIL PROC. CAL. § 473.
 After the statutory period prescribed by Code Civil Proc. Cal. § 473, for obtaining relief against a decree settling an executor's account has elapsed, such decree cannot be set aside upon the petition of children of a deceased child of testator who were omitted from the will, alleging that they were omitted therefrom unintentionally, and that the order discharging the executor was made inadvertently.

Commissioners' decision.

Department 2. Appeal from superior court, Santa Clara county.

The final account of M. M. Cahalan, as executor of Michael Cahalan, was rendered and allowed in the probate court of said county, of which said superior court was the succcessor, August 7, 1875. April 30, 1880, the children of a deceased child of testator who had been omitted from the will filed a petition alleging that they had been omitted unintentionally, and that the order discharging the executor was made inadvertently, and praying that said order be set aside. June 11, 1880, an order was made in accordance with the prayer of the petition. From this order the executor appealed to the supreme court, which dismissed the appeal, on the ground that the order was not appealable. *In re Estate of Calahan*, 60 Cal. 232. Another account was afterwards ordered to be filed in the court below, and was filed and settled, and thereupon the executor brought this appeal.

John Reynolds, for appellant. *W. P. Veuve* and *J. J. Burt*, for respondents.

FOOTE, C. An appeal from an order of the superior court of Santa Clara county, settling a final account of an executor, and distributing the decedent's estate.

Michael Cahalan, the deceased, departed this life on the sixteenth day of December, A. D. 1874, leaving a will dated February 13, 1872, in which the petitioners, (respondents,) the children of a deceased daughter of the testator, were not mentioned, and by which M. M. Cahalan (the appellant) was constituted executor and residuary legatee. The will was duly admitted to probate, and letters testamentary issued to the appellant on the ninth day of January, A. D. 1875. Notice to creditors to exhibit their claims was given February 7, 1875.

A final account was rendered and filed by M. M. Cahalan on the twenty-sixth of June, 1875. Accompanying that account was a petition setting forth

that all debts had been paid, and all other directions of his testator's will had been faithfully carried out, and asking that a day be appointed for the settlement of his account, and for his discharge. It is recited in the decree ordering the allowance of that account, and the discharge of the executor, which order was made on the seventh day of August, 1875, that it had been proven to the satisfaction of the court (then the probate court) that due and legal notice had been given of the settlement of said final account; that the executor had paid all the expenses and just claims against the estate of his testator, and all legacies and bequests in said will mentioned; that he had fully and completely discharged the trust mentioned in the eighth subdivision of the will, paid over all the money, and delivered all the property, as provided in said will; that it fully appeared to the court, by documentary evidence and other good and sufficient proof, that said executor had fully and completely done, performed, and carried out the provisions of said last will of said deceased; that he had fully complied with all the orders of the court in the premises; that he had honestly and faithfully discharged all of his duties as such executor; that no other property remained in his hands belonging to the estate; that no further acts remained to be performed by him as executor of said decedent; that he be wholly and absolutely discharged from all further duties and responsibilities as such executor. His letters testamentary were declared vacated, the estate adjudged fully distributed, and the trust settled and closed.

Upon its face that decree was valid, (*Dean* v. *Superior Court*, 63 Cal. 473,) and, as the statutory period for obtaining relief against it, as prescribed in section 473, Code Civil Proc., had long since elapsed, it could only be attacked and set aside, on the ground alleged in the petition therefor, by a proceeding in equity, (*In re Estate of Hudson*, 63 Cal. 454; *Dean* v. *Superior Court*, *supra*.)

But it is said that this court cannot, upon the present appeal, review the order made on the eleventh of June, 1880, setting that decree aside. The order thus made was declared by this court to be one from which an appeal cannot be prosecuted. *In re Estate of Calahan*, 60 Cal. 232. It was clearly intermediate, and necessarily affects the judgment from which this appeal is prosecuted, and is reviewable on such appeal. Section 956, Code Civil Proc. For if the decree which the order set aside was valid on its face, and could not be, as it was, summarily held for naught, then that now appealed from was affected to the extent that it was utterly void, and no basis existed for the action of the court in making it, unless it had first swept away the former decree, and thereby made a starting-point for its jurisdiction and procedure in the premises.

As a result it follows that the order appealed from was erroneous, and should be reversed, and the cause remanded, to be proceeded with in accordance with the views herein expressed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is reversed, and cause remanded, to be proceeded with in accordance with the views expressed in said opinion.

71 Cal. 209

MCKENZIE *v.* BRANDON and others. (No. 11,037.)

(*Supreme Court of California.* October 26, 1886.)

1. PUBLIC LAND—STATE LANDS—AFFIDAVIT OF PURCHASER.
When one seeks to purchase land from the state, he must state in his affidavit, and state truly, all the facts required to be stated therein.

2. SAME—ADVERSE OCCUPATION.
Where, at the time of an application to purchase from the state the west half of a certain thirty-sixth section of land, a previous applicant had 18 acres of the half

section inclosed with adjoining land owned by him, cultivated a part of this eighteen acres, and pastured his stock on the balance of the half section, *held*, that he was in such adverse occupation as contradicted the applicant's affidavit that there was no occupation adverse to his.

Commissioners' decision.

Department 2. Appeal from superior court, El Dorado county.

Plaintiff and defendant were contestants as to the right to purchase lands. The decision of the court below was in favor of plaintiff, but a new trial was granted upon defendant's application, and from the order granting it plaintiff appealed.

Irwin & Irwin, for appellant. *Blanchard & Swisler*, for respondents.

BELCHER, C. C. In June, 1876, the defendant Brandon made application to purchase from the state the west half of a certain thirty-sixth section of land in El Dorado county. At that time he owned the south-east quarter of the section, and had that quarter and 18 acres of the south-west quarter inclosed by a fence, which he has since kept up. He has never resided on the west half of the section, but has usually, in connection with the cultivation of the south-east quarter, cultivated about seven acres of the south-west quarter, lying within his inclosure, and has used the balance of the half section to pasture his stock.

While the 18 acres were so inclosed, and a portion of it cultivated, by the defendant, the plaintiff, in February, 1884, made application to purchase from the state the same half section. In the affidavit on which his application was based he stated, among other things, "that there is no occupation of said lands adverse to any he has." The contest between the parties as to which had the right to purchase the land was referred by the surveyor general to the court below for determination, and, after a trial of the case, judgment was entered that plaintiff was, and the defendant was not, entitled to purchase it. The defendant moved for a new trial, and his motion was granted upon the ground "that the affidavit filed by the plaintiff, McKenzie, in the surveyor general's office, failed to show the adverse occupation of the defendant Brandon of a portion of the land." From the order granting a new trial this appeal is prosecuted, and the only question to be determined is, what constitutes an adverse occupation, within the meaning of the law, as it stood when the affidavit was filed?

It is argued for the appellant that, to constitute an adverse occupation, within the meaning of section 3495 of the Political Code, the adverse occupant must be an actual settler on the land; or, in other words, must himself be in such a position as would entitle him to purchase from the state. It is well settled that, when one seeks to purchase land from the state, he must state in his affidavit, and state truly, all the facts required to be stated therein. *Woods* v. *Sawtelle*, 46 Cal. 389; *McCoy* v. *Byrd*, 65 Cal. 92; S. C. 3 Pac. Rep. 121; *Millidge* v. *Hyde*, 6 Pac. Rep. 852; *Plummer* v. *Woodruff*, 11 Pac. Rep. 871, (opinion filed September 28, 1886.) And, when the case is brought into court for determination, each party must set forth his pleadings, and show by his proofs that he has strictly complied with the law. *Gibson* v. *Robinson*, 10 Pac. Rep. 193.

The land sought to be purchased in *Woods* v. *Sawtelle*, *supra*, was within Woods' inclosure, and had been so for several years. Sawtelle made the first application to purchase it, and in his affidavit stated "that there is no occupation of said land adverse to that he now holds." Woods, by reason of his delay, had lost all preference right to purchase the land; but it was held that the affidavit made by Sawtelle was not the one required by the statute in such a case, and so he had acquired no rights. The statute then, in reference to the sale of the sixteenth and thirty-sixth sections, was substantially the same

as in 1884, except that, after the amendment of 1880, the applicant was required to further state that he was himself an actual settler upon the land.

"The word 'occupation' may be so used, in connection with other expressions, or under peculiar facts of a case, as to signify a residence; but, ordinarily, the expressions 'occupation,' '*possessio pedis*,' 'subjection to the will and control,' are employed as synonymous terms, and as signifying actual possession." *Lawrence* v. *Fulton*, 19 Cal. 690.

In *Woods* v. *Sawtelle* the word "occupation" was evidently treated as having its ordinary meaning, and we are unable to see anything in the constitution, or statutes since passed, tending to show that its meaning has been changed.

It follows that when the plaintiff made his affidavit he, in effect, stated that there was no actual possession of the lands adverse to any he had. This was not true in fact, and the affidavit was not the one required by the Code in such a case.

The order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

71 Cal. 318

MOSELY *v.* TORRENCE. (No. 9,580.)

(*Supreme Court of California.* November 2, 1886.)

PUBLIC LANDS — CALIFORNIA STATE LANDS — ACTUAL SETTLERS — FALSE AFFIDAVITS — CONST. CAL. 1879, ART. 17, § 3.

In June, 1879, T. made application to purchase from the state of California a piece of land in Sonoma county, and M., in August, 1882, filed an application to purchase the same. Each was duly qualified to make the purchase. T.'s application was in proper form, and at the time of making it, he had all the land inclosed except a small piece on which M. afterwards made his settlement. T. never personally resided on the land, but occupied and managed it by servants and employes, and before August, 1882, had cultivated parts of it, and placed valuable improvements upon it. Before making his application M. settled upon the small piece outside of T.'s inclosure, and has ever since resided there, with his family. In the affidavit on which his application was made he stated, among other things, "that there is no occupation of said lands adverse to any he has." In an action brought by M. to settle the contest between himself and T. in respect to the land, *held*, (1) that T., under Const. Cal. 1879, art. 17, § 3, was not, and never had been, an actual settler on said land; (2) that the application of M. was defective, because he falsely stated that there was no occupation of said lands adverse to him; (3) that neither of said parties were entitled to purchase said land from the state.

Commissioners' decision.

Department 2. Appeal from superior court, Sonoma county.

Action to determine a contest in respect to land purchased from the state of California. Case tried, and judgment entered that neither party was entitled to purchase the land, whereupon both parties appealed. The facts are sufficiently stated in the opinion.

G. A. Johnson, for appellant Mosely. *John Brown*, for appellant Torrence.

BELCHER, C. C. This action was commenced to determine a contest between the parties about the right to purchase from the state a part of a sixteenth section of land in Sonoma county. The case was tried, and judgment entered that neither party was entitled to purchase the land, and thereupon both parties appealed from the judgment.

It appears from the findings that the defendant made application to purchase the land in question in June, 1879, and the plaintiff in August, 1882, and that, at the time of making his application, each party possessed the quali-

fications required by law to entitle him to purchase school land from the state. The defendant's application was in proper form, and, at the time of making it, he had all the land inclosed, except a small piece on which plaintiff afterwards made his settlement. He has ever since kept up his inclosure, and has cultivated portions of the land, and been in the actual occupation of all of it, except the small piece before mentioned. Prior to August, 1882, he had placed improvements on the land of the value of $3,000, consisting of a good house and barn, and a half mile of picket fence, and had planted a vineyard of eight acres. He has never personally resided on the land, but has occupied and managed it by servants and employes. Before making his application the plaintiff settled upon the small piece outside of the defendant's inclosure, and has ever since been residing there with his family. In the affidavit on which his application was made, he stated, among other things, "that there is no occupation of said lands adverse to any he has." Upon these facts the court below found, as conclusions of law—"*First*, the said Torrence is not, and never has been, an actual settler on said land; *second*, the said application of Mosely is defective, because he falsely states that there is no occupation of said lands adverse to him; *third*, that neither of said parties were entitled to purchase said land from the state of California."

1. Under the provisions of the new constitution, adopted in 1879, lands belonging to the state, which are suitable for cultivation, can only be granted to actual settlers thereon, (article 17, § 3;) and the restriction operates as well on applications made before as after the constitution took effect, (*Johnson* v. *Squires*, 55 Cal. 103; *Dillon* v. *Saloude*, 9 Pac. Rep. 162.) Actual settlement means actual residence; and, as the defendant never had any actual residence on the land in question, it is clear that the judgment, so far as it affected him, was the proper one to be entered.

2. It is claimed for the plaintiff that his affidavit was not false or defective in any respect, because, as the defendant was not an actual settler on the land, and therefore not entitled to purchase it himself, his occupation of it was not an adverse occupation within the meaning of section 3495 of the Political Code. The same point was made in *McKenzie* v. *Brandon*, *ante*, 428, (decided October 26, 1886.) In that case, McKenzie sought to purchase land, a part of which was in the possession of Brandon, and made an affidavit like that made by the plaintiff here. Brandon was not himself entitled to purchase the land, but it was held that McKenzie's affidavit was not such a one as was required to give him a right to purchase, and that he therefore acquired no rights by making it. We are satisfied with the conclusions reached in that case, and the judgment here, as to both parties, should be affirmed.

We concur: SEARLS, C; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 405

MILLER and others *v.* REA and others. (No. 9,847.)

(*Supreme Court of California.* December 17, 1886.)

APPEAL—SERVICE OF NOTICE—PARTITION—INTERLOCUTORY DECREE.

The notice of appeal from an interlocutory decree in partition need not be served on all adverse parties to the proceeding where the appeal is from specific parts of the decree only. A service on parties, or their attorneys, interested adversely in so much of the land as is involved in the appeal, is sufficient.

In bank. Appeal from superior court, Santa Clara county.

On motion to dismiss.

Partition by Henry Miller, Thomas Rea, and Johanna Fitzgerald against Massey Thomas and some 1,200 other defendants. The land in question is

the Rancho Las Animas, in Santa Clara county, California. The *rancho* was a Spanish grant to one Mariano Castro, who died in 1828, leaving a wife and eight children surviving him. Maria Lugardo Castro de Doak, one of his daughters, became the owner by inheritance of an undivided one-sixteenth of the *rancho*. The respective interests of the parties to this appeal are confined to this tract.

Page & Ells, for appellant. *John Reynolds*, for respondents.

MYRICK, J. A motion was made to dismiss this appeal on the ground that the appellant had not served the notice of appeal on all the adverse parties, or their attorneys. The appeal is from specific parts of the interlocutory decree only, viz., the parts relating to certain portions of an undivided one-sixteenth of the Rancho Las Animas. The decree as to the remainder of the *rancho* is not involved in the appeal. The notice was served on the parties (or their attorneys) interested adversely to the appellant in so much of the undivided one-sixteenth as is involved in the appeal. The motion is denied.

We concur. MORRISON, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

71 Cal. 406

MILLER *v.* THOMAS and others. (No. 9,933.)

(*Supreme Court of California.* December 17, 1886.)

APPEAL—SERVICE OF NOTICE—PARTITION—INTERLOCUTORY DECREE.

It is no ground for dismissing an appeal from an interlocutory decree in partition that the notice of appeal was not served on all the adverse parties, or their attorneys, where it appears from the transcript that the decree may be modified, if necessary or proper, without affecting the rights of the parties not served.

In bank. Appeal from superior court, Santa Clara county.

On motion to dismiss.

For the facts in this case, see *Miller* v. *Rea*, *ante*, 431.

A. W. Crandall, for appellants. *John Reynolds*, for respondents.

MYRICK, J. Partition. Appeal by Pablo Doak and Isaac Doak. The attorneys for some of the respondents moved to dismiss this appeal on the ground that the notice of appeal was not served on all the adverse parties, or their attorneys.

The appeal was taken from so much of the interlocutory decree as directed the allotment of one-sixteenth of the *rancho* to Henry Miller and others, [not named in the notice.] In the decree specific tracts were allotted to said Miller, and other specific tracts were allotted to others. The claim made by appellants (denied by the court below) was to a specific tract of land. The notice was served on various parties.

So far as appears to us from the transcript, the decree might be modified (if necessary or proper) without affecting the rights of any party not served. If, however, it should appear on the final hearing that the necessary parties are not before the court on this appeal, the appeal will then be held ineffectual. Motion denied.

We concur: MORRISON, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

71 Cal. 183

REYNOLDS *v.* LINCOLN and others. (No. 9,628.)

(*Supreme Court of California.* September 29, 1886.)

1. EXECUTION—SALE—JUDGMENT BY CONFESSION—EVIDENCE.
A judgment by confession on a statement not signed by the party personally is void, and a sheriff's deed under execution thereon is not admissible in evidence as to the title of the land sold.

2. SAME—SATISFIED JUDGMENT.
A sale of land under a satisfied judgment is a nullity, and does not affect the title.

3. EVIDENCE—COPY OF DOCUMENT, WHERE NO ORIGINAL PROVED.
Where there is no proof that the original of articles of association of a company ever existed, it is not error to exclude that which purports to be a copy.

4. TAXATION—SALE—TO HIGHEST BIDDER—ST. CAL. 1861, PAGE 120, § 5, ST. CAL. 1862, PAGE 520—TAX DEED—EVIDENCE.
Under St. Cal. 1861, p. 120, § 5, and St. Cal. 1862, p. 520, requiring lands at tax sale to be sold "for the smallest quantity that the purchaser would take and pay the judgment, and all costs," a sale to the highest bidder simply, is void, and the tax deed is not admissible as evidence.

5. ESTOPPEL—JUDGMENT IN EJECTMENT—SUIT TO QUIET TITLE.
Where one brings ejectment on an equity, and the judgment is adverse for the reason that the equity cannot be considered in the action of ejectment, such judgment is not a bar to a suit on the same equity, by one in possession, to quiet title.[1]

6. EQUITY—SUIT TO QUIET TITLE—JOINDER OF PARTIES.
In an action to quiet title by one holding an equity, one holding the legal title, without any beneficial interest, may be joined as co-defendant.

7. APPEAL—MISJONDER OF CAUSES OF ACTION NOT AFFECTING SUBSTANTIAL RIGHTS.
Whether or not a cause of action to quiet title is improperly joined with one against a trustee of real estate having no beneficial interest, if the plaintiff is entitled to a conveyance from the trustee, and the trustee could have recovered from the other defendant in the cause of action to quiet title, the substantial rights of the parties are not affected, and judgment will not be reversed for such error.

In bank. Appeal from superior court, Sacramento county.

This action was originally brought to quiet title to the premises described in the complaint. Plaintiff applied to the court for leave to file an amended complaint, in which Francis E. Lynch was made a party defendant, and in which another and separate cause of action was set out in addition to that in the original complaint. This leave was granted. The first count of the

[1] See note at end of case.

amended complaint avers, in the usual form, that defendants Lincoln and Lynch "claim some estate or interest in the said premises adverse to the * * *, but which plaintiff avers is unfounded; and that said defendants have no estate, right, or title, either at law or in equity, in or to said premises. The second cause of action is that, in 1863, all the parties owning or claiming any interest in the premises conveyed the same to Martin and defendant Lynch, as trustees; that the object of the trial has failed; that Martin has died; that plaintiff holds the entire estates of all the beneficiaries under the trust deed, and asks that Lynch, the surviving trustee, convey to him. Defendant Lincoln excepted to the order making Lynch a party, and demurred to the amended complaint upon the grounds of a misjoinder of parties defendant, and an improper joinder of causes of action.

John Reynolds, for respondent. *J. H. McKune* and *A. C. Freeman*, for appellants.

THORNTON, J. There was no error in excluding the sheriff's deed to Milliken. The judgment on which the sale was made, and upon which the deed was executed, was void. The judgment was one by confession, and was made under the act of 1850. See St. 1850, p. 454, § 293.

The statement was not signed by the parties personally, as required by the statute. Cheever's name was signed to the statement by his attorneys, Kewen & Morrison. This was not sufficient. *Chapin* v. *Thompson*, 20 Cal. 687, 688. See, also, *French* v. *Edwards*, 2 Pac. Coast Law J. 149, where this judgment and deed were passed on, and held void. Further, it appears that an execution was issued on this judgment, and satisfied, on the first of October, 1850. Some six months afterwards, this judgment so satisfied was assigned to one of the defendants, and another execution was afterwards issued, on which the sale was made to Milliken. This sale under a satisfied judgment could not affect the title. *French* v. *Edwards*, *supra*.

We see no error in excluding the paper purporting to be a copy of the articles of association of the Sutter Land Company. There was no proof that the original of such articles ever existed.

The court did not err in excluding the tax deed to Lincoln. The return shows that the sale was made to the highest bidder, and not, as required by the statute, "for the smallest quantity that the purchaser would take, and pay the judgment and all costs." See St. 1861, p. 120, § 5; St. 1862, p. 520. The sale was not made as required by the law, and was void. The recitals to the contrary in the deed cannot be regarded. The deed does not follow the return, (see *French* v. *Edwards*, 13 Wall. 506,) and must be held void.

The judgment in *Vance* v. *Lincoln* was not a bar. Vance did not hold at that time the legal title. It was outstanding in the trustees Martin and Lynch. His title, at most, was an equity, which could not be considered in his action of ejectment against Lincoln. On this equity Reynolds sues here, and the judgment in *Vance* v. *Lincoln* could not bar the consideration of such equity. The court did not err, therefore, in ruling out the judgment roll in *Vance* v. *Lincoln*.

The evidence in this cause did not disclose an adverse possession in Lincoln sufficient to vest him with title. The court was correct in refusing to sustain such a position.

As Reynolds, under the judgment in this case, is entitled to a conveyance from the trustee, who has not appealed, and the trustee could have recovered of Lincoln, no injustice is done the latter in holding Reynolds clothed with the legal title of the trustee, and, on that title, adjudged to recover the whole tract against Lincoln.

There was no misjoinder of parties here. On that point we concur in the opinion of the commissioners (9 Pac. Rep. 176,) and adopt that portion of their opinion. Conceding that there is a misjoinder of causes of action, still

this does not affect the substantial rights of the parties, and the judgment should not be reversed for such error. Code Civil Proc. § 475.

Judgment and order affirmed.

We concur: MORRISON, C. J.; ROSS, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J.; MYRICK, J.

NOTE

A judgment in an action of forcible entry and detainer is not a bar to an action in ejectment for the same premises, between the same parties, Riverside Co. v. Townsend, (Ill.) 9 N. E. Rep. 65; nor is one in trespass, Keyser v. Sutherland, (Mich.) 26 N. W. Rep. 865; nor the dismissal of a bill for partition Bigley v. Jones, (Pa.) 7 Atl. Rep. 54. See, also, Fish v. Benson, (Cal.) *post*, 454.

As to what is necessary to constitute an estoppel by judgment, see Riverside Co. v. Townsend, (Ill.) 9 N. E. Rep. 65, and note.

70 Cal. 553

MAGEE v. MCMANUS. (No. 9,411.)

(*Supreme Court of California.* August 31, 1886.)

1. SPECIFIC PERFORMANCE—CERTAINTY—BURDEN OF PROOF.

A court of equity will not decree specific performance of a contract unless the thing agreed to be done is definite and certain in its terms and in itself; and the party asking for performance must make out, by clear and satisfactory proof, the existence of the contract as he alleges it.

2. SAME—AGREEMENT OF MARRIED WOMAN TO MAKE NOTE AND MORTGAGE.

A verbal agreement between a married woman and a person who was her accommodation indorser, to the effect that, in consideration of his indorsing another note for her, she would execute a note and mortgage in his favor in *such amount* as to secure him against loss, her note to be made payable at the same time as the accommodation note, and to bear the same rate of interest, is not such a contract as can be specifically enforced; the agreement not being final, and being indefinite and uncertain in its terms.

3. SAME—DILIGENCE ON PART OF PLAINTIFF—STATUTE OF FRAUDS—CIVIL CODE CAL. §§ 2772, 2794, SUBD. 2.

A verbal agreement between a married woman and her accommodation indorser, whereby, in consideration of further indorsement, she agrees to execute her note and mortgage in his favor, is not within the California statute of frauds, (Civil Code, §§ 2772, 2794, subd. 2;) and the surety, after making such indorsement, has the right, at any time within which the promise can be fulfilled, to call for performance. But a failure to do so, until after she is brought under liability by the accommodation note falling due, will operate as a waiver of the right, when, at that time, the verbal contract in its original shape cannot be performed.

4. SAME—REMEDY AT LAW.

An accommodation indorser who pays the note of his principal is entitled to be subrogated to the rights of the creditor whose claim against the principal he pays; and although, in a suit in equity by the surety for the specific performance of a contract of indemnity by his principal, the court finds that the principal is insolvent, yet it appears that she has homestead property, and does not appear that she is a married woman, or the head of a family, or that the homestead is not of the value of $1,000 upon lands worth several thousands of dollars, there is nothing shown to prevent the enforcement of a judgment at law, and therefore the surety is not entitled to relief in equity.

Department 2. Appeal from superior court, Marin county.

Specific performance.

Bowers & Crowley, for plaintiff and respondent. *Thos. F. Barry*, for defendant and appellant.

MCKEE, J. In this case the defendant was required, by the judgment of the court below, "forthwith to execute and deliver to plaintiff a note and mortgage, to-wit, her promissory note in the sum of $1,664.40, payable to plaintiff on demand, and bearing interest at the rate of 7 per cent. per annum from the fourth day of October, 1882, secured by her mortgage on the lands and premises described in plaintiff's amended complaint,—the same being a certain lot of land and premises situate, lying, and being in the township of

Nicasio, county of Marin, state of California;" and from the judgment and an order denying a motion for a new trial the defendant appealed.

The judgment was rendered in an action to compel specific performance of a contract to execute a note and mortgage.

By the allegations of the complaint it appears that the plaintiff had become liable to the Bank of Sonoma County upon two promissory notes, one for $500 and the other for $300, which had been executed by him as an accommodation surety for the defendant. Each of the notes bore interest at 1¼ per cent. per month, payable quarterly, or to be compounded. On the twenty-third of June, 1881, both notes were past due and unpaid. As principal debtor, the defendant had paid the interest upon them as it became due, but failed to pay any part of the principal. She had not at that time the means to pay any part of it; and she wanted to negotiate with the bank for a fresh loan. To enable her to do so, she applied to the plaintiff to become surety for her upon a new note to the bank; promising him that, if he would join her in the execution of a note payable six months after date to the bank in the sum of $600, with interest at the rate of 1 per cent. per month, payable every six months, or to compound,—upon which she could get the money from the bank,—she would, on demand, secure him against liability for her upon the three notes by giving him her individual note secured by mortgage upon her homestead property; the note to be made payable to him "at the same time as the $600 note, * * * in a sum equal to the whole amount then due, and for which he was liable on the first two notes, and also upon the $600 note, * * * with accruing interest," and "to bear the same rate of interest," and the mortgage to be made "in such amount as to secure plaintiff against any liability by reason of his becoming her surety as aforesaid." The plaintiff consented, and upon the faith of the promise made by the defendant he joined her in the execution of a note payable to the bank for $600, upon which she procured the money from the bank; but she failed and refused to keep her promise, made default in the payment of any part of the principal and interest of the three notes; and, when the $600 note became due, the plaintiff was compelled by the bank to pay $1,664.40, in satisfaction of the three notes which he had signed as the accommodation surety of the defendant. The payment was made on the fourth of October, 1882.

The finding of the court states that, at the time and under the circumstances set forth in the complaint, the plaintiff, as the accommodation surety of the defendant, did join the defendant in the execution of a note for $600, which she had discounted by the Bank of Sonoma County; and that, in consideration of the execution of the note by the plaintiff, she verbally promised and agreed to secure him against liability already incurred upon the two notes, and to be incurred upon the $600 note, by her individual note, payable to himself, as stated in the complaint, and secured by a mortgage to be made "in such amount and terms to secure him against any liability by reason of his becoming her security as aforesaid." It is also found by the court that the plaintiff performed his part of the contract; that the defendant refused to execute and deliver to the plaintiff her note and mortgage according to her promise; that, after the twenty-first June, 1881, she made default in the payment of any part of the principal or interest of the three notes; that, after the $600 note became due, the plaintiff, on the fourth of October, 1882, had to pay to the bank for the defendant, in satisfaction of the three notes, the sum of $1,664.40, and that the defendant is insolvent.

It is a cardinal principle of natural justice that a person shall perform his agreement. Upon that principle a court of equity, in the exercise of well-regulated and judicial discretion, enforces the actual accomplishment of a thing stipulated for, on the ground that what is lawfully agreed to be done ought to be done. But the thing agreed to be done must be definite and certain in its terms and in itself; and the party who claims performance must

make out, by clear and satisfactory proof, the existence of the contract as he alleges it. That has not been done in this case. The contract as it is stated in the finding of the court is not the contract as it is alleged in the complaint. Instead of a contract founded upon a consideration to become surety for the defendant upon a promissory note payable "six months after date," as alleged in the complaint, the court finds it was a contract made in consideration of becoming surety upon a note payable "one year after date." The consideration of a contract is a material part thereof. Two similar contracts, founded upon different considerations, cannot be regarded as one and the same. However, whether the true contract be that which the court finds, or that which the plaintiff alleges, it is indefinite and uncertain, not only as to the time of the payment of the note and mortgage to be executed, but as to the amount for which the mortgage was to be given, and the rate of interest upon the debt. It appears that these things were to be the subject of future ascertainment and agreement, so that the mortgage, when executed, would be sufficient security for the plaintiff. As, therefore, the agreement was not final, and it was indefinite and uncertain in its terms and in itself, specific performance of it could not be enforced in equity. *Morrison* v. *Rossignol*, 5 Cal. 64; *Los Angeles, etc., Co.* v. *Phillips*, 56 Cal. 539; *Potts* v. *Whitehead*, 20 N. J. Eq. 55.

Irvine v. *Armstrong*, 17 N. W. Rep. 343, cited in argument by respondent's counsel, does not conflict with these views. In that case "the terms of the notes and mortgage were definitely agreed upon."

Besides, the contract as it is alleged in the complaint was not a parol contract for the sale of real property, or any interest therein. In its nature it was a purely mercantile contract, whereby the defendant undertook to indemnify the plaintiff, in a particular mode, against any loss or damage on account of becoming surety for her. The undertaking was not within the statute of frauds, (sections 2772, 2794, subd. 2, Civil Code; *Lerch* v. *Gallop*, 8 Pac. Rep. 322;) and the person to whom the promise was made, after complying with it on his part by becoming surety for the promisor, had the right, at any time within which the promise could be fulfilled according to its terms, to call for performance. But such a right may be waived, (*Price* v. *Dyer*, 17 Ves. 356;) and, if it be waived by delay to call for performance until performance becomes impracticable in the mode prescribed by the promise, specific performance will not be decreed. Equity only enforces performance of a contract as it is made by the parties themselves. It has no power to make a contract for them. *Grey* v. *Tubbs*, 43 Cal. 359.

We think the plaintiff waived his right to call for a specific performance of the contract of indemnity in its original shape. The case shows that there was no subsequent ascertainment or agreement as to the amount and terms of the mortgage to be executed as security. There was no demand made for its execution within "six months" or "one year" after the date of the contract. It is alleged in the complaint "that on the thirtieth of August, 1882, plaintiff demanded of defendant execution of a note and mortgage in accordance with her agreement." The court finds "that the plaintiff demanded performance prior to the commencement of the action," and the action was commenced in October, 1882. So that, in fact, there was no demand made for performance until after the plaintiff was brought under liability by the debt falling due, and at that time the verbal contract in its original shape could not be performed. Yet, as a surety brought under liability to pay the debt of his principal, the plaintiff had the right, upon the doctrine of exoneration, if the principal was insolvent, to be substituted to any subsisting securities for the payment of the debt, and to be subrogated to the benefit of such securities. In case of the insolvency of the principal this right attaches and may be enforced *before* payment, and also *after* payment, whether the principal be solvent or insolvent.

In *McConnell* v. *Scott*, 15 Ohio, 401, a surety, after a judgment taken against himself and his principal, and *before* payment of the judgment, was held entitled to any credits of the principal, and to have them appropriated in payment of the judgment. And a like right was enforced in favor of a surety in *York* v. *Landis*, 65 N. C. 536, after payment of the debt of the principal. 1 Story, Eq. 322; 2 Story, Eq. § 730.

The cases of *McCorkle* v. *Brown*, 9 Smedes & M. 167, and *Pratt* v. *Carroll*, 8 Cranch, 471, have no application. Both cases involved rights arising out of contracts for the sale of real property by vendors who claimed enforceable vendors' liens upon the lands for the payment of unpaid portions of the purchase money. In neither was there any question of rights arising out of the contract to indemnity.

It is alleged in the complaint, and the court finds, that the defendant *is* insolvent. But, as there were no subsisting liens or securities for the payment of the debt to the creditor, no question of subrogation to securities could arise either *before* or *after* payment of the debt. When the plaintiff paid the debt to the creditor, he acquired all the rights of the creditor for the purpose of obtaining reimbursement. Section 779, Code Civil Proc. The only right which he acquired was an action at law to recover what he had paid, and his remedy for the enforcement of that right was ample and adequate; for, while it is alleged that the defendant is insolvent, it is admitted that she is the owner of certain land and premises which she claimed as her homestead. Although it is not alleged, it may be inferred, that the defendant is an unmarried woman; but it nowhere appears, in any way, whether she was or is the head of a family, or whether the value of the homestead exceeds or falls short of the statutory limitation. There is no allegation at all as to value. If it was a $1,000 homestead upon premises which were worth several thousand dollars, there is nothing to prevent the plaintiff from enforcing by execution any judgment which he may recover. Sections 1241 and 1245, Civil Code. Where a party has an adequate remedy at law, he is not entitled to relief in equity.

Judgment and order reversed, and cause remanded for further proceedings.

We concur: SHARPSTEIN, J.; THORNTON, J.

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FISH and others *v.* BENSON and Wife. (No. 9,451.

(*Supreme Court of California.* December 18, 1886.)

1. APPEAL—MOTION TO DISMISS.
 If notice of the motion for the new trial was not given, or the bill of exceptions was not filed in time, and these facts appear in the record, they may constitute a reason for affirming the order denying the new trial, but are no ground for dismissing the appeal from the order.
2. SAME—RECORD—AFFIDAVITS NOT IDENTIFIED, NOT LEGALLY PART OF.
 Affidavits, copies of which are contained in the transcript, but not in any way authenticated or identified as having been used in the motion for a new trial, constitute no part of the record which can be considered upon appeal.
3. SAME—INSUFFICIENT IDENTIFICATION.
 The fact that the court, in its order overruling a motion for a new trial, referred to certain affidavits of A., B., and C., and that there are found in the record affidavits of A., B., and C., is not a sufficient identification of the affidavits.
4. JURY—RIGHT TO TRIAL BY—EQUITABLE DEFENSE TO COMMON-LAW ACTION.
 Where, in an action of ejectment, the cross-complaint of defendant sets up the defense, and makes a case involving the application of equitable doctrines, and seeks relief that only a court of equity can give, the defendant is not entitled to a jury trial.
5. ESTOPPEL—JUDGMENT—FORCIBLE ENTRY AND DETAINER—EJECTMENT.
 A judgment roll, in an action of forcible entry and detainer of real property, is not admissible in an action between the same parties, involving the title to the same property, since the title to real property cannot be tried in that action.[1]

[1]See Reynolds v. Lincoln, (Cal.) *ante*, 449.

6. Vendor and Vendee—Bona Fide Purchaser—Adequacy of Consideration.
Plaintiff, claiming to be a *bona fide* purchaser of real property, paid $9,000 for property which, with a clear title, would have been worth $30,000. But action pending, involving the title to part, rendered it of no value, though for the purposes of this transaction it might fairly be considered worth $18,000. *Held*, that the consideration was not so small as to be notice to the purchaser of his grantor's fraud.

7. Same—Fraud—When Deed Voidable and not Void.
Where a party who is not incompetent to execute a conveyance by reason of mental incapacity or unsoundness of mind is induced to execute and deliver a conveyance by fraud, the deed is not void, but voidable; and a *bona fide* purchaser for value from the grantee acquires title free from the equities against his grantor.

8. Same—Notice of Contract not Notice of Non-Performance of Its Terms.
A contract for sale of real estate, duly recorded, is notice of its conditions; but if it provides that, when the deed shall be delivered, the trade shall be ended, a purchaser is not bound by notice of the contract after the deed is delivered; and if the party waives the conditions precedent of the contract, and delivers his deed, he cannot be heard to assert the non-performance of the conditions as against a *bona fide* purchaser of his grantee.

9. Trial—By Court—Findings—Whether Contradicting or not the Pleadings of Prevailing Party.
The court having found for plaintiffs, a finding that B., one of the plaintiffs, acting for himself, and F., another plaintiff, purchased the land in question, was objected to as contrary to plaintiffs' answer to defendants' cross-complaint. The cross-complaint had averred conveyance to B. and F., which the answer admitted. The answer further avers that defendant S. and F. and B. were purchasers for fair value without notice, and that plaintiffs purchased the property in question by deed to said F. and B. *Held*, that the answer does not state that S. bought jointly with F. and B., but indicate the opposite, and therefore there is no contradiction.

Commissioners' decision.

In bank. Appeal from superior court, Contra Costa county.

Flournoy, Mhoon & Flournoy, for appellants. *Edward P. Cole*, for respondent.

Searls, C. This is an action of ejectment to recover certain premises situate in Contra Costa county. Plaintiffs had judgment, from which, and from an order denying a new trial, the defendants appeal.

Respondents move to dismiss the appeal, so far as it relates to the order denying a new trial. The appeal was taken within the 60 days, provided by statute therefor, after entry of the order denying the new trial. If the notice of the motion was not given, or the bill of exceptions not filed, in time, and this is made to properly appear in the record, the fact may constitute a reason for affirming the order denying the new trial, but is no ground for dismissing the appeal from the order. In other words, an appeal is given, as matter of right, from an order granting or denying a new trial. If the proceedings on the motion, anterior to the order, are irregular or defective, such irregularity or defect is not cause for dismissing the appeal, but may, upon a proper showing, be passed upon in determining the same. In the view we have taken, it may be conceded to the appellants that the proceedings on motion for new trial were had in time, and that the bill of exceptions is properly before us.

To the consideration of the affidavits found in the record, objection is made by respondents upon the ground that they are not identified as having been used on the motion for a new trial. These affidavits are marked as filed by the clerk of the court in which the action is pending, but are not contained in and form no part of the bill of exceptions and statement certified by the judge, and are not identified by him in any way as having been used on the motion, unless a reference, in the order denying a new trial, to the affidavits of certain persons in such order named, whose names are appended to some

of the affidavits in the record, can be deemed to identify them, or a portion of them.

In *Johnson* v. *Muir*, 43 Cal. 542, the court, in referring to affidavits on motion for a new trial, said: "But in such a case it is required that the affidavits should be identified by the indorsement of the judge or clerk, made at the time of hearing, that they were read or referred to on the hearing. It is evident that a mere ordinary indorsement of filing is not sufficient to identify the papers as having been used upon the hearing of the motion. They may have been deposited with the clerk for other and quite different purposes."

In *Pieper* v. *Centinela L. Co.*, 56 Cal. 173, it was held that papers used upon a motion in the court below, and certified by the judge as having been so used, were properly authenticated.

In *Walsh* v. *Hutchings*, 60 Cal. 228, papers appeared in the transcript as printed, purporting to be an affidavit of defendant and a counter-affidavit of the plaintiff, but not embodied in a bill of exceptions, and not certified or identified by the judge who heard the motion as having been used on such motion; and, although certified by the clerk as true and correct copies of the papers used on the hearing of the motion, this court held that "it is not for the clerk to determine what papers or evidence the court acted upon," and discarded the affidavits.

In *Nash* v. *Harris*, 57 Cal. 242, this court said: "We cannot indulge in presumptions of papers which were used in the court below on the hearing of a motion. To be considered, they must be made a part of the record of the case by a bill of exceptions, or to be authenticated by the judge who tried the case in such a way as to leave no doubt, when found in the transcript, that they are the papers which were before him when he acted, and upon which he decided. Unauthenticated papers in a transcript, in which there is no bill of exceptions, constitute no part of a record which can be considered upon appeal."

Tested by the rules thus established by this court for the verification of its records, the affidavits, copies of which are contained in the transcript, but not in any way authenticated or identified as having been used on the motion for a new trial, constitute no part of the record which can be considered on this appeal.

If it be urged that the court below, in its order overruling the motion, referred to the affidavits of A., B., and C.; that there is found in the record affidavits of A., B., and C., and therefore as to such affidavits the identification is sufficient,—the response must be *non constat* that the affidavits found in the transcript are those referred to in the order. The court or judge not having designated those in the transcript as having been used on the motion, to presume from the evidence afforded that they were in fact used on the motion would lead to a loose system, under which abuses would be most certain to occur. The practice under which the judge who heard a motion certifies to a bill of exceptions or statement containing the papers used at the hearing, or identifies the papers considered on the hearing, in such manner as to leave no doubt of the fact of their having been so used, is simple and efficacious, and cannot with safety be departed from. We are therefore of opinion that none of the affidavits set out in the transcript as a foundation or in support of the motion for new trial can be considered on this appeal.

This view disposes of so much of the motion for a new trial as is based upon accident and surprise, and newly-discovered evidence. We say disposes of that branch of the motion, for the reason that the record, aside from the affidavits, affords no sufficient showing to warrant a new trial on such grounds.

Defendant's right to a trial by jury. The action, as hereinbefore stated, is ejectment. Defendants filed a cross-complaint in which they show, in substance, that defendant H. A. Benson, in 1881, was seized in fee of the de-

manded premises, then worth $50,000, and certain personal property worth $6,000; that he was 63 years of age, and, in consequence of sickness and trouble, had become weak, debilitated, and deranged; all of which facts were well known to J. C. Beatty, C. F. Jones, and J. C. Fisk, who, with a view and intent to defraud him, wrongfully combined and conspired to mislead and cheat him, induced him to sell and convey his property to Jones, and to receive in payment therefor certain Texas land-warrants, represented to be of great value, though, in fact, of trifling value. Numerous other fraudulent acts on the part of Jones, Beatty, and Fisk are set out in apt language, whereby Benson was imposed upon, cheated, and defrauded in the transaction; avers an offer to return the land-warrants and a demand of a reconveyance of the property, and prays that it may be adjudged and decreed that Jones, Beatty, and Fisk were guilty of fraud and undue influence in the purchase of the property; that plaintiffs became purchasers with notice of such fraud; and that the conveyances from Benson to Jones, and by said Jones to the plaintiffs Fish and Blum be canceled and annulled, and that Benson be reinvested with the real property, and that the plaintiffs be compelled to reconvey to him the demanded premises, and that, if they refuse so to do, commissioners be appointed by the court to make, execute, and deliver such reconveyance.

The cross-complaint states facts which, if true, constitute a cause of action of which a court of equity has jurisdiction, and the relief sought is such as can only be obtained in equity. It was entirely distinct from the action of ejectment; and, if successful, would result in divesting the plaintiffs of their legal title. Being an action cognizable in equity, and distinct from the legal action, it was the duty of the court below to first determine the issues involved under the cross-complaint; for the reason that, if the defendants succeeded on these issues, it would defeat the right of plaintiffs to recover in their action at law, however perfect their legal right. *Lestrade* v. *Barth*, 19 Cal. 660; *Weber* v. *Marshall*, Id. 447.

The fact that the cross-complaint charged fraud did not entitle defendants to a jury trial. Both courts of law and of equity, in proper cases, have jurisdiction in cases of fraud; and, when the facts constituting a fraud and the relief sought are such as are cognizable in a court of law, the parties are entitled to a jury trial; but where the case, as made by the pleadings, involves the application of the doctrines of equity, and the granting of relief which can be obtained in a court of equity, and not elsewhere, the parties are not entitled to a jury trial. *Societe Francaise* v. *Selheimer*, 57 Cal. 623; *Jones* v. *Gardner*, Id. 641; *Lorenz* v. *Jacobs*, 59 Cal. 262; *McLaughlin* v. *Del Re*, 64 Cal. 472; S. C. 2 Pac. Rep. 244; *Cahoon* v. *Levy*, 5 Cal. 294, *Koppikus* v. *State Capitol Com'rs*, 16 Cal. 248.

The court did not, therefore, err in separating the two causes of action, and trying the issues under the cross-complaint without the interposition of a jury, except as to the three special issues which were submitted to and tried by a jury; and, as the court might have tried all of these issues, it follows there was no error in refusing to submit the 16 additional issues to the jury, as requested by counsel for defendants.

A jury trial was not denied by the court upon the issues made on the common-law side of the case, but was expressly waived by the parties, and the case on those issues was submitted to the court upon the testimony previously taken upon the trial of the equitable action.

At the trial defendants offered in evidence a judgment roll in the case of *Fish et al.* v. *Benson et al.*, (No. 236,) to the introduction of which plaintiffs objected, and their objection was sustained by the court. To this ruling an exception was taken, and the action of the court assigned as error. The judgment-roll in question is the record of an action of unlawful detainer, instituted September 12, 1881, by Fish, Blum, and Stovell, who are plaintiffs in

this action, as plaintiffs, against I. J. Truman, Henry Johnston, Henry A. Benson, and Emeline Benson as defendants.

The complaint avers that on the fifth day of May, 1881, C. J. Jones, the grantor of plaintiffs, leased and demised the demanded premises to I. J. Truman for a term which expired September 1, 1881; that said Truman entered into possession under the lease; that the other defendants are subtenants under Truman; that the lease has expired; and that defendants refuse to yield up possession to plaintiffs, although duly notified so to do, and demands possession, with treble damages. A demurrer was interposed to the complaint, which was sustained under the doctrine of *Martin* v. *Splivalo*, 56 Cal. 128, upon the ground that no sufficient notice to defendants was averred, whereupon the complaint was amended.

Defendants Benson and wife answered, denying the leasing of the premises to Truman by Jones, and the ownership of either Jones or plaintiffs; deny that they are the subtenants of Truman, or that Truman is in possession through them; and set up that they are, and for many years have been, in possession and the owners in fee of the premises. They also plead the pendency of this action.

Defendant Truman answered, setting out a copy of the alleged lease, which specifies that Truman is to harvest certain crops upon the land, and divide the same between the parties as therein specified, to gather and sell the fruit growing thereon, and divide the proceeds; and that for such purpose he may have charge of the orchard, and remove the fruit up to November, 1881, and may enter and remove hay and barley which may be upon the ranch after September 1st, the date of the expiration of the lease. It is also provided that, if Jones shall sell the ranch prior to September 1st, he shall have the right to place the purchaser in possession, etc. Truman denies that the other defendants are or ever were his subtenants, or that he continues in possession, or that he failed to surrender possession, or that he has been in possession since September 1, 1881, and denies, as do Benson and wife by an amendment to their answer, that three days' notice in writing was given them, or any or either of them, to quit or deliver or surrender the premises.

Johnston answered, denying substantially the allegations of the complaint.

A trial was had, verdict for defendants, and judgment in their favor for costs was entered thereon November 18, 1881.

The judgment in the action of forcible detainer did not involve the question of title to the demanded premises, and was no bar to the action of ejectment. *Kirsch* v. *Smith*, 64 Cal. 13.

"Judgments in actions of forcible entry and unlawful detainer are, to the same extent as judgments in other actions, conclusive upon the questions within the issues, and determined by the court or confessed by the parties. The title to the property is never in issue in these actions; and therefore the judgment, whether for the plaintiff or defendant, cannot affect the title." Freem. Judgm. § 302.

The whole issues in the action of unlawful detainer related to the possession of defendants as tenants or subtenants of the plaintiffs subsequent to May 5, 1881, and to their holding over as such tenants after the expiration of the lease and notice to quit; and whether defendants had or had not title or possession except under the lease was not a question to be determined in the cause; and the judgment roll was not, therefore, evidence of title in the defendants, or of possession, except as the tenants of the plaintiffs; and, as no issue of that character is made on either the law or equity side of this case, the judgment was not evidence for any purpose. Freem. Judgm. § 257.

Findings. The facts as deduced by the court from the evidence establish the formation and consummation of a deliberate scheme on the part of Jones, Beatty, and Fisk to defraud Benson of his property, in the execution of which scheme they exercised energy and perseverance worthy of a better cause. The

record is replete with evidence in support of the findings on this branch of the case. It unfolds a series of acts most reprehensible, and which it is the duty of courts of equity to condemn. We must not, however, in our zeal to punish the guilty, make our condemnation so broad as to involve the innocent.

The court below has found that plaintiffs were innocent purchasers of the demanded property for a valuable consideration, without notice of the fraud of their grantor, and without such knowledge as would reasonably put them upon inquiry. After a careful review and analysis of the testimony, we are of opinion that there is not only a substantial conflict in the evidence on this question of notice to plaintiffs, but that the proofs predominate in their favor.

Upon the question of inadequacy of the price, the court found that the demanded property with the title assured would be worth $30,000, but that a suit for the partition of the San Pablo *rancho*, of which the upland of the demanded premises were parcel, had been pending since 1867, was hotly contested, and is still pending and undetermined, in which action an interlocutory decree had been entered adverse to the claimants Benson; that a receiver had been appointed, and his appointment affirmed by this court, who claimed possession of the land, and the right to lease the same, as well as $3,000 back rent, etc.; also that a portion of the land designated as overflowed or salt marsh was claimed adversely to Benson by the owners of the Rancho Sobrante, which claim was pending on final survey before the United States land department, and the commissioner of the general land-office had rendered his decision sustaining said adverse claim,—in consequence of all of which, the right, title, and interest of Benson in and to the land was not worth and would not sell for what the land itself with a clear title was worth; that, in fact, the land had no market value, but that the real estate might reasonably be allowed to represent, so far as the transactions involved in this suit are concerned, a purchasing power equivalent to $18,000.

It is a fact open to observation that most men of means do not deal in and pay their money for property, the title to which is subject to the vicissitudes attending that of the demanded premises; and of the limited number who are willing to purchase under such circumstances it is not too much to say that the purchase price will be reduced to such sum, compared with the intrinsic value of the property, as to make the chances of gain commensurate with the risk taken. We are not, therefore, under the surroundings, surprised that the property sold for no more than $9,000 in cash, and find nothing in that fact to warrant an inference of notice to the purchasers of the fraud of Jones, their grantor; nor do we deem it sufficient, under the circumstances, to have put a reasonable man upon inquiry.

Appellants attack the findings as insufficient to warrant the conclusion that Benson conveyed the property, upon the grounds that his deed of conveyance to Jones was deposited in escrow with Haven; that the dispatch which he sent to Haven, from Texas, where he and Jones then were, under which the deed was delivered to the agent of Jones, was procured to be sent by the fraud of Jones, and by the exercise of undue influence on his part over Benson; and therefore that the deed thus procured did not vest title in the grantee; and *Harding* v. *Handy*, 11 Wheat. 125, and *Allore* v. *Jewell*, 94 U. S. 506, are cited in support of these positions.

A reference to these cases shows that in each of them the grantors were so incapacitated by age and disease as to be, if not insane, at least incapable of comprehending fully the nature and effect of the transactions in which they were engaged, when they executed the deeds; and, as against the grantees, they were set aside, although in one of the cases more than six years had elapsed between the delivery of the deed and suit brought.

In the present case the findings are against the incompetency of Benson,

and established (1) the fraud practiced upon him by Jones, Beatty, and Fisk, whereby he was induced to convey his property and order the deed to be delivered to the grantee; and (2) that plaintiffs are innocent purchasers, etc.

Whatever the rule may be as to vesting of title in the grantee, or in an innocent purchaser, etc., under the latter, in cases where the grantor is incompetent to execute a conveyance of his property by reason of mental incapacity or unsoundness of mind,—questions which do not arise here,—we are clearly of opinion that where, as in the present case, there were parties competent to contract, and where a deed was executed and delivered through the fraudulent devices of the grantee, the conveyance was not *void*, but *voidable*, and liable as between the parties to be rescinded. Civil Code, §§ 1566, 1567, 1689. The title, in such cases, vests in the grantee, subject to be divested by a rescission of the sale. But where the grantee has, in turn, conveyed the property to an innocent purchaser for a valuable consideration without notice, the right of the defrauded grantor to recover his property ceases.

Pomeroy in his work on Equity Jurisprudence, (volume 2, § 777,) states the rule thus: "Where a conveyance has been obtained by the grantee's fraud, so that it would be set aside at the suit of the defrauded grantor, but the fraudulent grantee has in turn conveyed to a *bona fide* purchaser for value and without notice, the latter will take and hold the property free from all these equities, protected against the equitable remedies of the original defrauded owner."

We see nothing in the contention of appellants that the contract of March 1, 1881, between Benson and Jones, was notice to plaintiffs of certain conditions precedent to the delivery of the deed which can render them liable. That contract was properly recorded, and imparted notice of its terms and conditions to all the world; but it provided that when the deed was delivered the trade should be fully completed and ended, and neither party should have any claim upon the other. According to the cross-complaint, a new agreement was made between the parties after they arrived in Texas, and, through the fraudulent practices of Jones, Benson was induced to and did, as the evidence and findings show, on the fourteenth day of May, direct the delivery of the deed, which was accordingly done.

Plaintiffs, at the date of their purchase, were informed the deed had been delivered by direction of Benson, and, in corroboration of the statement, the agent and attorney in fact of Jones produced and delivered it to them as a muniment of their title. That Benson was entirely willing to deliver the deed, and ordered it to be delivered, there can be no doubt. If the purchasers, Blum and Fish, were bound to take notice of anything by virtue of the contract, it was of its contents as it existed and remained in force; and Benson cannot be heard to say he waived the conditions precedent to the delivery of the deed and delivered it, and at the same time hold Blum and Fish to a responsibility based upon the non-performance of the conditions which he had thus waived.

The nineteenth finding, or so much thereof as finds "that Blum, acting for himself and his copartner Fish, purchased the land described in the cross-complaint from Jones," etc., is objected to as being contrary to the sworn answer to the cross-complaint. The cross-complaint avers that "Walter Stowell claims some interest in said land, the nature and extent of which the defendants are ignorant, but that said Stowell took and obtained said interest and claim in said land with full knowledge and notice of said fraud and undue influence aforesaid, and that his grantors were not innocent purchasers of said land for value." The cross-complaint had previously charged that the land was conveyed by Beatty and Fisk, as attorneys in fact for Jones, to "L. J. Fish and Simon Blum for the alleged sum of nine thousand, five hundred dollars," and the prayer of the cross-complaint asks that the deed be set aside and canceled.

The answer to the cross-complaint admits the purchase from Jones by Fish and Blum; avers that it was without notice of fraud on the part of their grantor, etc.; says the deed to them was executed and delivered on the seventeenth day of May, 1881; and subsequently, after denying that Stowell took or obtained his interest or claim in said land with notice, etc., avers that the said Stowell and the said Blum and Fish were each and all of them purchasers for fair value of all said land, without any knowledge, notice, or suspicion of any of the alleged frauds and evil practices set forth in the bill. * * * They deny that said Stowell has paid no part of any sum of money or other consideration for said land, or any interest therein; but they allege that he paid his proportion of the purchase money, which was one-half, at the date and delivery of the deed to him, which was on the ——— day of May, 1881. So, too, the answer states that "plaintiffs, further answering, say that they purchased the said real estate from the said C. J. Jones, by deed bearing date the seventeenth day of May, 1881, for the consideration of $9,000. The said deed was duly executed and delivered on said day, * * * and said deed * * * grants, bargains, sells, and conveys unto the said Lafayette J. Fish and Simon Blum and to their assigns, forever," etc.

The term here used at the outset would indicate that all the plaintiffs were meant; but, when it proceeds to describe the deed, it clearly appears that it is the conveyance to Fish and Blum, which is being referred to.

We fail to find in these pleadings any allegation that Stowell purchased jointly with Fish and Blum, but, on the contrary, the inference from the cross-complaint and answer is irresistible that he did not do so; and the fact that the answer, after stating the facts as to the several purchases by Stowell and the other plaintiffs, proceeds to aver that Stowell, Blum, and Fish were each and all of them purchasers for fair value, without notice, etc., does not modify this inference. No doubt, the pleadings might have been more specific and precise, but they were not calculated to mislead the defendants; and, indeed, so far as the answer sets up, the particulars of the conveyances were immaterial averments.

The cross-complaint charged the plaintiffs as purchasers with notice of the fraud of their grantors. The answer denied such notice, averred their good faith and a valuable consideration. Beyond this it was not necessary to go. It devolved upon defendants, under the allegations of their cross-complaint, to prove the conveyances (if denied) which they alleged to have been made. This they did by offering in evidence (1) the deed from Jones to Blum and Fish, dated May 17, 1881; (2) the deed from Blum and Fish for an undivided one-half of the premises, dated June 2, 1881. We are of opinion that the pleadings, taken together, do not show a joint purchase by Blum, Fish, and Stowell, and therefore that the nineteenth finding is not subject to the criticism of being contrary to the answer.

We deem it unnecessary to discuss the other objections made to the findings of the court, as, upon examination, we think them insufficient to warrant a reversal of the cause.

The judgment of the court below, and the order appealed from, should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 566

SWAMP LAND DIST. NO. 307 *v.* GWYNN and others. (No. 11,596.)

(*Supreme Court of California.* August 31, 1886.)

1. DRAINS AND DRAINAGE—ASSESSMENT—ASSESSORS NEED NOT ACT JOINTLY—SECTION 3456, POL. CODE CAL.
 Commissioners appointed to make an assessment for swamp-land purposes need not act jointly in viewing the lands.

2. SAME—VIEW OF LANDS—FINDING OF COURT.
 The lands being mostly covered with water, and the commissioners having been at a point where they could look over the whole area, and see every part except a few parcels along its eastern margin, hidden by trees, the finding of the court that they viewed all the lands, and each and every tract thereof, was not, as a matter of law, erroneous.

3. SAME—ASSESSMENT BOOKS—PRIMA FACIE EVIDENCE—CAN BE CONTRADICTED.
 The assessment books being merely *prima facie* evidence of the facts in them contained, evidence was competent to show that the assessment was not made according to law, and the exclusion of such evidence was error.

4. SAME—WARRANTS—TENDER.
 A tender of a warrant in payment of an assessment, which tender was only for the purpose of having the assessment indorsed upon it, and not to be given up and canceled, is not sufficient.

Commissioners' decision.

Department 2. Appeal from superior court, Yolo county.

Section 3465, Pol. Code Cal. provides, in regard to the payment of assessments for swamp-land purposes: "Where payment is made in the warrants of the district, legal interest must be computed thereon from the date thereof to the time of such payment, when said warrant must be surrendered to the treasurer, and by him canceled."

The opinion states the facts of the case.

W. H. Beatty and *S. C. Denson*, for appellants. *Armstrong & Hinkson*, for respondent.

BELCHER, C. C. This is an action to enforce payment of an assessment made for reclamation of swamp lands. The plaintiff recovered judgment, from which, and an order denying a new trial, the defendants appeal.

1. Under the provisions of the Code, when an assessment for swamp-land purposes is to be made, three commissioners must be appointed, who are disinterested persons and residents of the county, "and who must view and assess upon the lands situated within the district a charge proportionate to the whole expense, and to the benefits which will result from such works." Section 3456, Pol. Code. Under the statutes formerly in force, the commissioners were required to jointly view the land, and, failing to do that, their assessment was void. *People* v. *Coghill*, 47 Cal. 361; *People* v. *Hagar*, 49 Cal. 229. Now they are not required to act jointly in viewing the lands. It is sufficient if, as they did here, two go together, and the other alone, to view it.

But, if this be so, it is urged that they did not sufficiently view the land to enable them to make a valid assessment. The court found that they viewed all the lands in the district, and each and every tract thereof, and there was evidence, we think, tending to sustain the finding. It is true, the lands were mostly covered with water, but the commissioners were at a point where they could look over the whole area of the district, and see every part of it, with the exception of a few small parcels along its eastern margin, which were hidden from view by trees. Their duty was to make such an examination of the lands of the district as would enable them to form an intelligent judgment as to the benefits which each part would receive from the completed works of reclamation, and, as matter of law, we cannot say that they failed to perform their duty.

2. It is alleged in the complaint that the commissioners, after viewing each tract of land, assessed upon the same charges proportionate to the entire expense, and the benefits which would result to each tract from the works of reclamation, and on the same day made a list of the charges assessed by them, etc. The defendants, by their answer, denied that the commissioners assessed upon the several tracts of land charges proportionate to the entire expense, and to the benefits which would result to each tract from the works of reclamation. And they alleged that the commissioners did not make any examination, computation, or estimate as to the result or effect of the proposed work of reclamation upon each tract of land in the district, but arbitrarily assumed that each and every acre of land in the district should be assessed for an equal share of the entire sum to be raised; and, without considering whether some tracts would be benefited by the proposed work more or less than other tracts, arbitrarily assessed each tract at the same rate per acre, when in fact some tracts, if the proposed works should be carried out and completed, would be greatly benefited and enhanced in value, while other tracts would be benefited very little if at all. And they further alleged that the assessment was unfair, unequal, and unjust to the defendants, for that the lands described in the complaint would not be benefited to the same extent as other lands of other owners in the district.

At the trial the plaintiff, after introducing certain preliminary proofs, offered in evidence the assessment roll, with the certificate attached thereto, signed by the commissioners. Among other things the commissioners certify that "we did view said lands, and assess said sum of $39,000 as a charge upon the lands within said district, for the purpose of completing the reclamation of said district, which charge was and is made proportionate to the whole expense, and to the benefit which will result from such works of reclamation." The defendants objected to the assessment roll being received in evidence, and, in support of their objection, sought to prove by one of the commissioners that, in making the assessment, and apportioning the money to be raised among the several tracts of land in the district, the commissioners never considered, discussed, or in any way referred to the proportional benefits to be derived to each piece of land by reason of the work to be done for which the assessment was levied, but arbitrarily, and without considering the question of benefits to any piece of land in the district, assessed an equal sum upon each acre, in obedience to what they understood to be a by-law of the district; and, further, that some of the tracts of land in the district would be benefited very much more than other tracts by the work of reclamation. The plaintiff objected to each of the several questions asked, upon the ground that it was irrelevant, immaterial, and incompetent, and the court sustained the objection; the defendants reserving an exception. Thereupon the court overruled the objections to the assessment roll, and admitted it in evidence, and the defendants excepted to that ruling.

It was proved that, about 10 days after viewing the land, the commissioners met at the office of the attorney for plaintiff, and found the assessment roll there, and nearly written up; that the attorney then, under their instructions, computed the amount to be charged against each tract, and entered the same on the roll, and that thereupon they signed the certificate. It is argued for the respondent that, when the commissioners signed the certificate, the assessment roll became a record of official acts, and could not afterwards be impeached or questioned, except for fraud; and, in support of this contention, among other authorities, sections 1920 and 1926 of the Code of Civil Procedure are called to our attention. Those sections read as follows:

"Sec. 1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts stated therein."

"Sec. 1926. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated in such entry."

Conceding that, when the commissioners signed the certificate, it became an official record, and evidence of all the facts recited in it, still it was only *prima facie* evidence, and, as such, was subject to be contradicted.

"*Prima facie* evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. For example, the certificate of a recording officer is *prima facie* evidence of a record, but it may afterwards be rejected upon proof that there is no such record." Section 1833, Code Civil Proc.

The commissioners were required to assess upon the lands "a charge proportionate to the whole expense, and to the benefits which will result from such works." When special duties are enjoined upon commissioners, as in this case, the law must be strictly complied with, and any substantial departure from its requirements will render their acts void. *People* v. *Coghill*, 47 Cal. 361; *People* v. *Hagar*, 49 Cal. 229; *People* v. *Ahern*, 52 Cal. 208.

We think that, notwithstanding the certificate signed by the commissioners, the defendants were entitled to prove, if they could, that the assessment involved in this case was not made in conformity to the requirements of the law, and so was not binding upon them, and that the court erred in excluding the proper evidence.

3. Without expressing any opinion as to the validity of the warrant tendered in satisfaction of the assessments sued for, we think the court did not err in finding that the assessments were not in fact satisfied by the tender. As pleaded and proved, the warrant was for a larger sum than the aggregate amount of the assessments, and was owned by D. O. Mills & Co., a banking corporation doing business at Sacramento. Under some arrangements made with the defendants it was tendered to the county treasurer only for the purpose of having the assessments indorsed upon it, and not to be given up and canceled. This was not sufficient. Pol. Code, § 3465. Nor was the tender in court at the trial of any avail. Such a tender is not authorized by any statute that we are aware of.

For the error above noted the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

70 Cal. 544

PLUMMER *v.* BROWN. (No. 11,335.)

(*Supreme Court of California.* August 31, 1886.)

1. PUBLIC LANDS—LAND-OFFICERS—CONCLUSIVENESS OF JUDGMENTS—FRAUD—TRUST.

The land-officers of the United States, on the hearing and determination of a contest between two rival claimants, act judicially, and their judgment is conclusive at law.[1] But if the successful contestant has acquired, pursuant to the judgment, the legal title affected with any fraud or trust in relation to it, he will be regarded in equity as trustee of the true owner, who may, by proper proceedings in equity, compel a conveyance to himself of the legal title.

2. TRUST—ACTION TO MAKE PATENTEE OF PUBLIC LAND A TRUSTEE—FRAUD AND PERJURY—PLEADING.

In a complaint seeking that the patentee of United States lands be declared trustee for plaintiff on the ground that, in a contest regarding the land, the United States land-officers decided against plaintiff in consequence of the fraud and jury of the patentee, the allegations of fraud and perjury were in general terms.

[1] See note at end of case.

Held, bad, because no issue can be raised as to what was fraudulent and perjured. The complaint should have set forth the false and fraudulent act and statements with particularity.

Department 2. Appeal from superior court, Los Angeles county.

Edwin Baxter, for plaintiff and appellant. *Bicknell & White* and *C. Cabot*, for defendant and respondent.

McKEE, J. The only question for consideration on this appeal is whether the court below erred in sustaining a demurrer to the complaint upon the ground that it did not contain facts sufficient to constitute a cause of action. It appears from the allegations contained in the complaint that there was a contest between the plaintiff and John A. Brown before the register and receiver of the United States land-office about the right to purchase from the United States, under the pre-emption and homestead laws, a tract of public land in Los Angeles county, described as the S. E. $\frac{1}{4}$ of section 23, in township 1 S., range 14 W., San Bernardino meridian, the official plat and map of which had been filed in the year 1875 in the proper United States land-office. The commissioner affirmed the decision. Plummer then appealed to the secretary of the interior, and that officer also affirmed the decision; after which there was issued a patent, pursuant to the judgment, to Brown, confirmatory of his right to the land, under the provisions of the homestead law.

Notwithstanding the judgment, the plaintiff insists that the land ought to have been awarded to him, because, as it is alleged, he established his right to purchase it, under the laws of the United States, by satisfactory proof; and the register and receiver would have awarded it to him if he had not been imposed upon by "false and perjured testimony," which misled and deceived him, and biased him to decide in Brown's favor, upon facts which were found upon "the false and perjured testimony" and "incompetent and irrelevant evidence" given by Brown, by which, it is also alleged, the other officers of the land department were likewise fraudulently induced to affirm the judgment in Brown's favor. Upon these grounds the plaintiff asks for a decree declaring that Brown holds the legal title to the land in trust for the plaintiff, and that he be compelled to convey it to the plaintiff.

On the hearing and determination of a contest between two rival claimants of the right to purchase a tract of public land under the land laws of the United States, the register and receiver of the land department acts judicially; and his judgment, especially after it has been affirmed on appeal, is final and conclusive upon the contestants. So, also, is the patent issued upon the judgment. Neither can be collaterally assailed. *Garland* v. *Wynn*, 20 How. 6; *Lytle* v. *Arkansas*, 9 How. 328; *Cunningham* v. *Ashley*, 14 How. 382; *Barnard* v. *Ashley*, 18 How. 13. But, while the judgment is conclusive at law, there is no doubt of the equitable doctrine that if the successful contestant has acquired, pursuant to the judgment, the legal title, affected with any fraud or trust in relation to it, he will be regarded in equity as a trustee of the true owner, and the owner may, by a proper proceeding in equity, compel a conveyance to himself of the legal title. *Stark* v. *Starrs*, 6 Wall. 402; *Johnson* v. *Towsley*, 13 Wall. 72.

To entitle the alleged owner, however, to such equitable relief, he must show that he occupies such a *status* as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given, and that they were thereby induced to give judgment in his favor. These things must be distinctly alleged and clearly proven. *Payne* v. *Elliot*, 54 Cal. 339; *Kentfield* v. *Hayes*, 57 Cal. 409; *Chapman* v. *Quinn*, 56 Cal. 266; *Burrell* v. *Haw*, 48 Cal. 225; *Powers* v. *Leith*, 53 Cal. 711; *Hosmer* v. *Duggan*, 56 Cal. 257; *Aurrecoechea* v. *Sinclair*, 60 Cal. 532.

The complaint under consideration contains no sufficient allegations of such issuable facts, and it does show affirmatively that the plaintiff was not entitled to the relief which he demands; for it appears that in the contest as to the right to purchase the land, which was the subject of the controversy, there were three issues presented, namely: (1) Had Brown settled upon and occupied the land before the plaintiff entered upon it? (2) Did Brown abandon his occupation, or did the plaintiff invade it? (3) Was the plaintiff a qualified pre-emptor?—and that those issues were found against the plaintiff, and in favor of Brown. It follows, therefore, as the issues were decided against the plaintiff, that he was a trespasser upon Brown's possession, and was not a qualified pre-emptor; so that he had no right of entry upon the land, and he acquired no pre-emption right by his unlawful entry upon it by which he could control the legal title issued to Brown pursuant to the judgment in his favor. *Atherton* v. *Fowler*, 96 U. S. 513; *Hosmer* v. *Wallace*, 97 U. S. 580.

But it is contended that the judgment is not conclusive against the plaintiff, because it was rendered "upon the false and perjured testimony" and "incompetent and immaterial evidence" of Brown, which the register admitted, "notwithstanding Brown repeatedly refused to submit to cross-examination," and "was prevailed upon, by Brown and his attorneys, to give it weight and credence, notwithstanding it was shown by record to be false and perjured," and "notwithstanding it was clearly inadmissible under all rules of law and of courts, and clearly incompetent and irrelevant;" and thereby "said officers were misled and deceived, and their judgment biased, by said defendant and his attorneys, and, in consequence thereof, said land-officers, * * * contrary to the law and contrary to undisputed facts, thereupon ruled and decided erroneously, falsely, illegally, and inequitably that said defendant Brown was entitled to said land, and awarded the same to him."

In these allegations there is nothing of an issuable character as to what evidence was false or perjured, incompetent and irrelevant, upon which a court could judicially determine whether, as evidence, it was improperly admitted or illegally considered; nor is there in them anything which shows what was the evidence upon which the decision was made, or that it was evidence which did not justify the decision, or showed that the decision was contrary to law. The allegations are of a general nature, and wholly insufficient. A person against whom charges of fraud and perjury are made is entitled to specific averments of the acts of fraud of which he is accused, so that he may admit or deny the acts, and present issues which the court may hear and decide.

In *Vance* v. *Burbank*, 101 U. S. 519, the rule is thus stated: "Where fraud and misrepresentations are relied upon as ground of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegation of fraud and misrepresentations will not suffice." See, also, *Marquez* v. *Frisbie*, 101 U. S. 478; *Quinby* v. *Conlan*, 104 U. S. 426; *U. S.* v. *Atherton*, 102 U. S. 372; *Steel* v. *Smelting, etc., Co.*, 106 U. S. 453; S. C. 1 Sup. Ct. Rep. 389.

The demurrer to the complaint was properly sustained. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

NOTE.

The findings of the land department as to questions of fact, or of mixed questions of law and fact, properly before it, are conclusive on the courts. Jeffords v. Hine, (Ariz.) 11 Pac. Rep. 351; Van Sant v. Butler, (Neb.) 27 N. W. Rep. 299; and all facts essential to the validity of a patent granted by it will be conclusively presumed in a collateral proceeding, Ferry v. Street, (Utah,) 11 Pac. Rep. 571; Turner v. Donnelly, (Cal.) *post*, 469. But see Corbett v. Wood, (Minn.) 21 N. W. Rep. 734.

70 Cal. 560

KELLY, Ex'x, etc., v. MURPHY. (No. 11,543.)

(*Supreme Court of California.* August 31, 1886.)

1. EXCEPTIONS—BILL MUST CONTAIN FACTS ON WHICH EXCEPTION BASED.
Where a defendant excepts to the admission of testimony on the ground that no bill of particulars has been furnished in compliance with his demand therefor, the exception cannot be considered if the bill of exceptions does not show the demand. In order to make his exception available on appeal, he must embody the facts on which it was based in his bill of exceptions.

2. PARTNERSHIP—DISSOLUTION—NOTICE—EVIDENCE.
The notice of dissolution of a firm, and that one of the members would thereafter conduct the business, is evidence of the facts therein contained, and admissible on the question in whose possession the firm property remained after the dissolution.

3. EVIDENCE—MATERIALITY—WHETHER ONE DOES BUSINESS IN HIS OWN NAME OR FOR ANOTHER.
As evidence that a business was carried on by a deceased person in his own name, and not for another, evidence of parties who sold deceased goods in his own name, and their bills, are admissible.

4. SALE—NON-DELIVERY—VOID AS TO EXECUTOR OF VENDOR.
A sale without delivery or a continued change of possession is void as against vendor's executor, since he stands in the relation of trustee of the estate of deceased for the benefit of others.

5. HUSBAND AND WIFE—MARRIAGE—PLEADING.
In an action by an executrix for conversion of goods of deceased by the defendant, sued as Margaret Murphy, averments in the answer that defendant's true name is Margaret Murphy Wearman, (the name of the deceased being Wearman,) and that she owned the goods in question as her separate goods, independent of her husband, the said William Wearman, the deceased, are not sufficient allegations of coverture to support proof thereof.

Commissioners' decision.

Department 2. Appeal from superior court, Yuba county.

J. H. Craddock, for respondent. *E. G. Fuller*, (*S. M. Bliss*, of counsel,) for appellant.

SEARLS, C. This is an action by the plaintiff, as executrix of the last will of William Wearman, to recover from the defendant damages for the conversion of certain personal property belonging to the estate of deceased. Plaintiff had judgment for $2,000, and costs, from which judgment defendant appeals. At the outset of the trial, defendant objected to the introduction of any evidence in support of the claim of plaintiff, upon the ground that he had served upon plaintiff's attorney a notice calling for a bill of particulars, which had not been furnished as required by section 454 of the Code of Civil Procedure. The objection was overruled by the court, and an exception taken.

1. There is nothing in the bill of exceptions to show that any demand for a bill of particulars was ever made. If defendant desired to avail himself of the benefit of his exceptions, it was incumbent on him to so embody the facts upon which the ruling was based in his bill of exceptions that this court could, with all the facts before it, pass upon the question.

The complaint was defective, in that it did not describe with sufficient particularity the goods alleged to have been converted by defendant, and, in the face of a special demurrer for that cause, could have been held bad; but it stated a cause of action, and, no objection having been made on the ground indicated, it was sufficient.

The notice of dissolution of the firm of Wearman & Serrett, and that Wearman would thereafter conduct the business, etc., was properly admitted in evidence. As published in the newspaper, this notice was such a public declaration as may reasonably be supposed to have come to defendant, and was a circumstance proper to be considered in determining who was conducting

the saloon business, and in whose possession the disputed property remained after the dissolution.

Like considerations apply to the admission of the evidence of Marcuse and others tending to show that they sold goods to Wearman in his own name, and to introduce their bills for such goods to show they were charged to said Wearman individually, and not to defendant. As evidence that the business was conducted by Wearman ostensibly for himself and in his name, and not for or in the name of defendant, the evidence was proper.

The evidence as to the ownership of the property was conflicting, and we are not warranted in disturbing the findings on the ground that they are not supported by evidence.

There was evidence tending to show that, notwithstanding the sale of the property to the defendant, as claimed by her, such sale was not accompanied by an immediate delivery, and followed by a continued change of possession of the things transferred, and as a consequence of these facts, if they existed, the sale was void, not only as against creditors, but also as against any person on whom the estate of Wearman, the vendor, devolved in trust for the benefit of others than himself. Civil Code, § 3440. Plaintiff, as the executrix of the last will of William Wearman, deceased, the vendor of defendant, is a trustee, in whom the estate rests for the benefit of others, within the meaning of the Code.

There was not a delivery and continued change of possession of the property within the meaning of the rule enunciated in *Stevens* v. *Irvin*, 15 Cal. 503, which has been steadily adhered to in this state as a correct exposition of the law in numerous cases. *Dean* v. *Walkenhorst*, 64 Cal. 78; *Watson* v. *Rogders*, 53 Cal. 401; *Wideman* v. *Franks*, 3 Pac. Rep. 494; *Grum* v. *Barney*, 55 Cal. 254.

There was no error in excluding the evidence offered on behalf of the defendant to show that she and Wearman lived together as husband and wife. If she desired to show coverture, it was incumbent upon her to plead it. In her answer she avers—*First*, "that her true name is Margaret Murphy Wearman;" *second*, that she owned and possessed the goods and chattels in her own separate right, "and controlled the same as her separate property, independent of her husband, the said William Wearman, now deceased." Beyond these expressions there is nothing in the pleadings to show that the relation of husband and wife existed between defendant and plaintiff's testator. As allegations showing the relation of husband and wife, they are wholly insufficient.

Again, the offer to prove that defendant and plaintiff's testator lived together as man and wife was not an offer to prove marriage. *Letters* v. *Cady*, 10 Cal. 533. Marriage being properly averred, the evidence indicated would tend to prove the fact,—nothing more. Taking the pleadings with the proffered testimony, and the only inference we can draw from them is, not that defendant desired to show that she had intermarried with the deceased, but that they had lived together as man and wife.

We are of opinion the judgment should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 597

TURNER *v.* DONNELLY. (No. 8,383.)

(*Supreme Court of California.* September 2, 1886.)

1. PUBLIC LANDS—PATENT—AGREEMENT OF OWNERS TO CONVEY TO EACH OTHER SUCH PORTIONS OF LAND THEN HELD AS MIGHT BE EMBRACED IN THE PATENT TO EACH THEREAFTER—VALIDITY—REV. ST. U. S. §§ 2263, 2274.

Where parties who had purchased and improved land, without reference to the government subdivisions, entered into an agreement with each other that when the land was surveyed, and they obtained titles for the same from the government, that they would abide by their lines and subdivisions, as they then owned and possessed them, and would each of them deed to the other the parts of sections, or one-quarter sections, as they might purchase them of the United States, that was in possession of the party at that time, and bound themselves to convey to each other all the title they might obtain to lands of the United States, so as to give to each the land he then had in possession, according to each one's lines and fences then standing, *held* that, when they were not settlers upon the same legal subdivision, and did not have their improvements on the same subdivision, in the sense as contemplated by section 2274, Rev. St. U. S., and the lands patented to each, and referred to in their agreement, were not contiguous, but at least half a mile apart, and in two different sections, the agreement was void, under section 2263 of the Revised Statutes of the United States and the rulings of the supreme court of California in *Damrell* v. *Meyer*, 40 Cal. 166, 170, and *Hudson* v. *Johnson*, 45 Cal. 21, 25.

2. SAME—PATENT—ATTACK IN COLLATERAL PROCEEDING—EJECTMENT.

A patent once issued for public land remains good, as to all the world, until canceled for fraud, in an action brought by the United States government, and in a collateral proceeding, such as ejectment, cannot be successfully assailed.[1]

Department 2. Appeal from superior court, Santa Clara county.

Action of ejectment to recover possession of certain lands. Judgment for plaintiff. Defendant appealed.

Archer & Bowden, for appellant. *D. M. Delmas*, for respondent.

FOOTE, C. An action of ejectment for certain lands, in which the plaintiff obtained judgment, from which the defendant appealed. The former had a patent from the United States government to the land sued for, which was the basis of his claim. The defendant, in his cross-complaint, set out that, prior to the land sued for having been surveyed, pre-empted, or patented, an agreement in writing had been entered into between himself and the plaintiff that when they each should obtain title to the lands which they then occupied and claimed, that if the defendant's patent, thus obtained, contained any lands which the plaintiff then had in possession, that the plaintiff would abide by the lines and actual subdivisions as they then respectively owned and possessed them, so as to give to the defendant the land thus actually in his possession, and that he, the plaintiff, would execute to the defendant a conveyance to any portion of the land then in the defendant's possession to which he should thereafter obtain title; that the defendant has always been, since that agreement, in possession of the land sued for, and has remained in possession of it since the date of the patent issued to the plaintiff; that the plaintiff, although a patent has been issued to him of the land, refuses to convey it to the defendant, and prays that the plaintiff be held to be the defendant's trustee as to the land, and directed to convey it to the defendant, etc.

According to the findings of the court, the cause coming here on the judgment roll alone, it appears that—

"(1) At the time of the commencement of this action, and ever since the twentieth of August, 1878, the plaintiff, Thomas Turner, was, and still is, the owner of the real estate situate in the county of Santa Clara, state of California, described as follows, to-wit: The north-east quarter of the north-east quarter of section thirty-two, (32,) in township ten (10) S., range five (5) E., Mount Diablo meridian, and the south-east quarter of section twenty-nine,

[1] See Plummer v. Brown, (Cal.) *ante*, 464.

(29,) in township ten (10) S., of range five (5) E., Mount Diablo meridian, in the district of lands subject to sale at San Francisco, California.

"(2) Thereafter, on said twentieth day of August, 1878, and before the commencement of this action, said defendant, Peter Donnelly, against plaintiff's will, entered on said premises, and ousted the plaintiff therefrom, and from thence hitherto has, and still does, detain the possession thereof from said plaintiff.

"(3) On the twenty-eighth day of September, 1871, the plaintiff, Thomas Turner, and the defendant, Peter Donnelly, were severally in possession, as *bona fide* settlers and residents thereon, of certain unsurveyed lands of the United States, being in the township hereinabove mentioned, the plaintiff being in possession of a portion of the south-east quarter of section 29, and the said defendant of a large tract of about six hundred acres, including portions of section 29, and a portion of the south-east quarter thereof, and section 30. The house and residence of the plaintiff were on the south-east $\frac{1}{4}$ of section 29, and the house and residence of said defendant were on section 30. The lands so respectively occupied were contiguous to each other, each tract being inclosed by a fence. The fences were built without reference to any government surveys or subdivisions, the lands not having yet been surveyed or subdivided by the government.

"(4) On the day last aforesaid, the plaintiff and defendant, together with other parties, signed and executed a written agreement, which is in the following words:

"'CANADA VALLEY, September 28, 1871.

"'Whereas, we, the undersigned, citizens of Canada Valley, have purchased and improved our lands without reference to the government subdivisions, and as our lines and fences do not correspond with the government subdivisions, therefore we, and each of us, whose names are subscribed to this agreement, do severally and individually agree, each with the other, that when the land is surveyed, and we obtain titles for the same from the government, or of the railroad company, that we will abide by our lines and subdivisions as we now own and possess them, and will each of us deed to the other the parts of sections or one-quarter sections, as we may purchase them of the United States, or of the railroad company, that is in possession of said party at this time; and hereby binding ourselves to convey all the title we may obtain to lands of the United States, or railroad company, to each other, so as to give each man the land that he now has in possession, according to each and every man's lines and fences now standing.

"'PETER DONNELLY, MARY DONNELLY, THOS. KIRKHAM, PETER TURNER, THOMAS TURNER, JOHN KIRKHAM, E. K. ROBINSON, JAMES DONNELLY, MATHEW RAHEAL, PATRICK K. ROGART, DAVID N. NEEL, JAMES RAHEAL, JOSE B. GUTSWICK. Attest: WILLIAM ISAAC.'

"(5) In the year 1873 said township was surveyed and subdivided by the United States government. As thus surveyed, the south-east $\frac{1}{4}$ of section 29 lay mostly inside of plaintiff's inclosure; but about forty acres thereof were inside of defendant's inclosure.

"(6) On the twentieth of August, 1878, the United States issued its patent to Thomas Turner in the following words:

"'*The United States of America, to all Whom these Presents shall come, Greeting:*

"'(Certificate No. 6,014.)

"'Whereas, Thomas Turner of Santa Clara county, California, has deposited in the general land-office of the United States a certificate of the register of the land-office at San Francisco, whereby it appears that full payment has been made by the said Thomas Turner, according to the provisions of the act of congress of the twenty-fourth of April, 1820, entitled "An act making fur-

ther provision for the sale of the public lands," and the acts supplemental thereto, for the south-east quarter of section 29, in township 10 south, of range 5 east, Mount Diablo meridian, in the district of lands subject to sale at San Francisco, California, containing one hundred and sixty acres, according to the official plat of the survey of the said lands returned to the general land-office by the surveyor general, which said tract has been purchased by the said Thomas Turner: Now, know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Thomas Turner, and to his heirs, the said tract above described, to have and hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Thomas Turner, and to his heirs and assigns, forever; subject to any vested and accrued water-rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

" 'In testimony whereof, I, Rutherford B. Hayes, president of the United States of America, have caused these letters to be made patent, and the seal of the general land-office to be hereunto affixed.

" 'Given under my hand, at the city of Washington, the twentieth day of August, in the year of our Lord one thousand eight hundred and seventy-eight, and of the independence of the United States the one hundred and third.

[Seal.] " 'By the President, R. B. HAYES.

" 'By WM. H. CROOK, Secretary.

" 'Recorded vol. 10, page 243.

" 'S. W. CLARK, Recorder of the General Land-office.'

" And on the twentieth day of September, 1878, it issued its patent to Peter Donnelly in the following words:

" '*The United States of America, to all Whom these Presents shall come, Greeting:*

" '(Certificate No. 5,766.)

" 'Whereas, Peter Donnelly, of Santa Clara county, Cal., has deposited in the general land-office of the United States a certificate of the land-office at San Francisco, Cal., whereby it appears that full payment has been made by the said Peter Donnelly according to the provisions of the act of congress of the twenty-fourth of April, 1820, entitled "An act making further provisions for the sale of public lands," for the lot numbered two, and the south-east quarter of the north-west quarter, and the south half of the north-east quarter, of section 30, township 10 S., of range 5 E., Mount Diablo meridian, in the district of lands subject to sale at San Francisco, Cal., containing one hundred and sixty-two acres and fifty-five hundredths of an acre, according to the official plat of the survey of the said lands returned to the general land-office by the surveyor general, which said tract has been purchased by the said Peter Donnelly: now, know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Peter Donnelly, and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Peter Donnelly, and his heirs and assigns, forever; subject to any vested and accrued water-rights for mining, agricultural, man-

ufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and also subject to the rights of the proprietor to a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

" 'In testimony whereof, I, Ulysses S. Grant, president of the United States of America, have caused these letters to be made patent, and the seal of the general land-office to be hereunto affixed.

" 'Given under my hand, at the city of Washington, the twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the independence of the United States, the one hundred and first.

[Seal.] " 'By the President, U. S. GRANT.

" 'By WM. H. CROOK, Acting Secretary.

" 'Recorded vol. 9, page 440.

" 'S. W. CLARK, Recorder of the General Land-office.

" 'Recorded at the request of Jas. C. Zuck, the fourth day of December, 1876, at 55 minutes past 8 o'clock A. M.

" 'WM. B. HARDY, Recorder.

" 'By A. S. WILLIAMS, Deputy.'

"The lands thus patented to plaintiff and defendant, respectively, are not contiguous to each other, but are at least one-half mile apart, and the defendant has no title whatever to any lands in section 29."

The court below, in addition to the facts already found in said case, filed the following, its additional finding of fact therein:

"(6) That said plaintiff suffered no damages by reason of the said entry of defendant and ouster of plaintiff from the premises in controversy; that during the detention of said premises from plaintiff by defendant, as aforesaid, the rents, issues, and profits thereof were of no value, nor are they now of any value whatever."

Upon this state of facts, since the parties were not settlers upon the same legal subdivision, and did not have their improvements on the same subdivision, in the sense as contemplated by section 2274, Rev. St. U. S., and the lands patented to each, and referred to in the within contract, were not contiguous, but at least half a mile apart, and in two different sections, we are of opinion that the agreement under which the defendant claims an equitable title to the plaintiff's land was void, under section 2263, Rev. St. U. S., and the rulings of this court in *Damrell* v. *Meyer*, 40 Cal. 166, 170, and *Hudson* v. *Johnson*, 45 Cal. 21, 25, and authorities there cited. And the patent, once issued to the plaintiff, remained good as to all the world, until canceled for fraud, in an action brought by the United States government. Even granting that he, in making his application to pre-empt the land, had made a false oath, the defendant could not take advantage of this collateral matter to enforce his void agreement with the plaintiff. And the validity of the patent to the plaintiff, on account of his alleged false oath, could not be successfully assailed in such a collateral proceeding as the one resorted to by the defendant here. *Moore* v. *Wilkinson*, 13 Cal. 478, 488; *Yount* v. *Howell*, 14 Cal. 465–470. We are therefore of opinion that no prejudicial error is shown by the record to have been committed by the trial court, and that the judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 586

GULF OF CALIFORNIA NAV. & EXP. CO. *v.* STATE INVESTMENT & INS. CO.
(No. 9,111.)

(*Supreme Court of California.* September 2, 1886.)

1. MARINE INSURANCE—ACTION ON POLICY—BODY OF POLICY—INDORSEMENT—CONSTRUCTION.

A marine time policy, during its continuance, permitted a vessel insured to prosecute voyages anywhere upon the navigable waters of the globe, except that it was prohibited from using certain enumerated ports. But upon the back of the policy this indorsement was made: "Vessel to be employed on the Gulf of California and captain is privileged to act as his own pilot without prejudice to this insurance." *Held*, that the meaning of the indorsement was either that, while the vessel was employed in the Gulf of California, her captain might act as her pilot "without prejudice to the insurance," or that permission already granted in the body of the policy to navigate the Gulf of California was again given in the written indorsement, and that the captain might, while so navigating the ship, act as her pilot "without prejudice to the insurance."

2. TRIAL—ISSUE—EVIDENCE—INSTRUCTION.

Where no issue is made up upon a fact in a cause upon which evidence can be properly submitted, the court will refuse to instruct the jury upon it.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Action on a marine insurance policy. There was a trial to a jury, and a verdict and judgment rendered for the plaintiff. Defendant appealed.

Milton Andros and *Chas. Page*, for appellant. *Whittemore & McKee*, for respondent.

FOOTE, C. The plaintiff brought suit against the defendant on an insurance policy which the former had obtained from the latter upon a certain vessel. The cause being tried by a jury, the plaintiff had judgment for the amount of the policy, and from that, and an order denying a new trial, the defendant appeals. According to the terms of the policy as written, without the indorsement hereafter to be noticed, it was a time policy, which, during its continuance, permitted the vessel insured to prosecute voyages anywhere upon the navigable waters of the globe, except that it was prohibited from using certain enumerated ports. But upon the back of the policy, by agreement of the parties thereto, these words were written, and punctuated as follows: "Vessel to be employed on the Gulf of California and captain is privileged to act as his own pilot without prejudice to this insurance."

One allegation of the complaint is "that said vessel, while employed in the Gulf of California, was, on the ninth day of January, 1881, totally lost by the perils of the sea." The defendant meets this statement by the following language in its answer: "This defendant, on its information and belief, denies that said vessel, while employed in the Gulf of California, was, on the ninth day of January, 1881, or at any other time, totally lost by perils of the sea."

Upon the question of the sufficiency of the denial by the defendant of the plaintiff's allegation of "a total loss of the vessel by the perils of the sea," the defendant, in its brief, at page 6, says: "We are prepared to admit that the denial would be insufficient in this case if the action had been on a policy which covered a vessel generally against perils of the sea;" citing *Doll* v. *Good*, 38 Cal. 289, 290; 1 Wait, Pr. 422.

The plaintiff contends that its right to recover did not depend upon the fact that the total loss of the vessel took place in the Gulf of California, but by reason of the fact that it had a right to recover, in case of such loss, whether it took place in the Gulf of California, or in any other navigable waters not prohibited to the vessel in the policy; and that the defendant's denial, in the form in which it was stated, admitted a total loss of the vessel by the perils of the sea, which is claimed, and not that it took place in said gulf, was the

material issue raised by the pleadings. So that the main question in this case, and that upon which all the others raised by the parties really depend, is, what construction is properly to be placed upon the words of the written indorsement on the policy?

The last words of it are, "without prejudice to this insurance." The natural inquiry is, what privilege or privileges were to be conceded "without prejudice to the insurance," and what else, if anything, did the sentence contain? It was unpunctuated save by a period at the end thereof.

We are of opinion that its meaning was either that, while the vessel was employed in the Gulf of California, her captain might act as her pilot "without prejudice to the insurance," or that permission already granted in the body of the policy, to navigate the Gulf of California, was again given in the written indorsement, and that the captain might, while so navigating the ship, act as her pilot "without prejudice to the insurance." It is much more reasonable to suppose one of these two to be the proper interpretation of the language in question than the one for which the defendant contends; viz., that the vessel was thereby restricted from all the waters which it was privileged to navigate in the body of the policy, and confined by the indorsement to the Gulf of California, as its navigable waters, where its captain was privileged to act as pilot.

Where so important and material a restriction, opposed, too, to the terms of the original contract, is intended to be made, it would seem that such intention, in order to bind the insured, should be expressed in plain and unambiguous terms. The construction which the defendant asks to have placed upon the words of the indorsement, taking all those words as written and punctuated, seems to us to be strained and unnatural. The circumstances, also, that surround the transaction are, we think, not calculated to induce the belief of the correctness of the defendant's construction of the language of the indorsement.

The plaintiff already had the right, before that indorsement was made, to navigate with its vessel the Gulf of California, but we may well suppose that it desired its captain to act, while in those waters, as the ship's pilot, and that it sought the modification of the policy with such end in view. And that must have been the prime object; for it did not need any permission, as we have seen, to run its vessel in said gulf,—that it already possessed; and it should not be presumed, under such state of facts, that this permission was given as asked, but only on condition that the other waters in which the vessel had been originally permitted to voyage should be entirely abandoned, unless such an intention had been most plainly and unmistakably expressed.

Nor can we believe that either of the parties to the modification of the policy, at the time it occurred, had such an understanding of its terms as that for which the defendant contends; for, had that been the case, the restrictive words, if any such were intended, would have been made as plain of comprehension as are those granting a privilege; and that they were not so is additional evidence in favor of the plaintiff's contention.

We think, therefore, that, considering the terms of the policy, which is made a part of the complaint, and the averments of that pleading, that the denial of the defendant was an admission of the truth of the material fact that the vessel was totally lost by perils of the sea, against which the defendant had insured her, and that the fact of her being lost or not in the *Gulf of California* was immaterial.

The defendant also contends that the court should have instructed the jury that plaintiff's verdict should be reduced by the sum of $610; claiming that this sum of money, which was the proceeds of the sale of the abandoned vessel, was presumed to have been received by the plaintiff, and defendant should have credit therefor. But there was no averment in the answer of any such

liability of the plaintiff, or the facts out of which it grew. And the allegation in the complaint, of non-payment by the defendant of the plaintiff's demand, was not denied in the answer, nor was any payment to the plaintiff of any sum of money whatever therein averred. Thus no issue upon this point existed, or was made up, upon which evidence could properly have been submitted to the jury, or upon which they should have been instructed by the court. The instruction was therefore properly refused.

The propriety of the refusal by the trial court of the motion for nonsuit, to grant the defendant's instructions, and the granting of those given to the jury, and its order denying the motion for a new trial, all depended upon the questions above discussed. Hence the judgment and order last mentioned should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 591

WARE v. WALKER. (No. 8,905.)

(*Supreme Court of California.* September 2, 1886.)

1. PLEADING—AMENDED COMPLAINT—MOTION TO STRIKE OUT.
 Where suit was brought, in the name of several plaintiffs, against several defendants, to enjoin the obstruction of a flow of water into a ditch of one of the plaintiffs, and an amended complaint was filed wherein one of them alone was named as plaintiff, and one alone as defendant, *held*, on a motion to strike out the amended pleading, that, the cause of action being the same, the motion was properly denied.
2. APPEAL—EVIDENCE—FINDINGS OF TRIAL COURT.
 Where, in the trial of a suit to enjoin a defendant from obstructing the flow of water into plaintiff's ditch, the findings of the court below are sustained by the evidence, they will not, on appeal, be disturbed. *Trenor* v. *Central Pac. R. Co.*, 50 Cal. 230.
3. WATERS AND WATER-COURSES—APPROPRIATION OF WATER AS AGAINST A SUBSEQUENT PURCHASER—GRANT.
 The findings of the court in this case considered, and *held*, that the plaintiff, by the construction of his ditch, and the appropriation and user of the water of the stream, acquired, as against the defendant, a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant.

Commissioners' decision.

Department 2. Appeal from superior court, Santa Clara county.

J. Alexander Yoell, for appellant. *S. O. Houghton*, for respondent.

FOOTE, C. The plaintiff obtained a final decree in this action, perpetually enjoining the defendant, Walker, from interfering with the ditch or dam of Ware, or his associates, in the bed of the Arroyo de Los Gatos, upon the land of the defendant, or from obstructing the flow of the water of said arroyo into said ditch, and for costs. From that judgment, and an order refusing him a new trial, the defendant appeals.

His first contention is that the court erred in not granting his motion to strike out the second amended complaint filed in the action. It appears that the cause of action, to-wit, the interference of the defendant with certain water-rights of the plaintiff, and a certain ditch and dam in which he had an interest, by obstructing the flow of the water therein from the Arroyo de Los Gatos, from which it was appropriated by plaintiff, was the same cause of action as stated in all the complaints, three in number, filed in the action, and the remedy of injunction was prayed for in all of them. Further, it appears that originally the action was brought by several plaintiffs, against the present and other defendants; such other defendants being joined because

they had not voluntarily become parties plaintiff, although no injury was alleged to have been done by them, that being wholly charged against defendant, Walker.

The first complaint was demurred to, and the demurrer sustained. An amended complaint was then filed, which was also demurred to, and the demurrer sustained. A second amended complaint was then filed, wherein Ware alone was named as plaintiff, and Walker alone as defendant. That complaint the defendant moved to strike out, because it was not, as he claimed, a complaint proper to the original action, not being between the same parties, or stating the same cause of action.

The cause of action, as we have seen, was certainly the same. The fact that by reason of the demurrer which the defendant filed, and which was sustained, the plaintiff was compelled to discontinue his action as to all the plaintiffs who had not a joint cause of action with Ware, cannot be just cause of complaint by the defendant, for his objection obliged the plaintiff thus to frame his pleading. And the fact that the cause was discontinued as to those defendants brought in because they could not be made to join as plaintiffs, but against whom no cause of action was ever stated, was a mere discontinuance as to them, to which proceeding Walker has no legal right to object. *Browner* v. *Davis*, 15 Cal. 11, 12. Therefore the motion to strike out had no merit, and was properly denied.

There was evidence to support all the findings, and hence they should not on appeal be disturbed. *Trenor* v. *Central Pac. R. Co.*, 50 Cal. 230.

It is urged by the appellant that the findings do not support the judgment. By them it is substantially declared, among other things, that the plaintiff, with others, appropriated certain water of the Arroyo de Los Gatos at a time when the land now owned and possessed by the defendant was still the property of the United States government, and that said water was taken out from the bed of said stream, at said time, with the approval of the party then in possession of said land, and who afterwards obtained a patent for it; that as part of the ditch which conducted the water to the plaintiff's land the bed of said arroyo was used; that after a time, when the defendant had become the owner of said land, he was not willing to allow the plaintiff to appropriate and use said water; and that, when the plaintiff undertook (by reason of the changes in the bed of the stream having diverted the flow of water away from the head of his ditch) to go higher up in the bed of said stream, which *belonged* to the defendant, and construct therein, at another point on his (defendant's) land, a certain dam and extension of the ditch, so as to again cause said water to flow into it, the defendant tore down the dam, and obstructed so much of the ditch as was upon his land above the original point of appropriation. It was to prevent further action of that kind, and to maintain his control over the water, thus flowing over a portion of the defendant's land, where the original ditch had not run, that the plaintiff brought the present action.

The conduct of the defendant in the premises, according to the findings, was not justifiable. The plaintiff was entitled to use the water of the stream, to which he had obtained the right of appropriation prior to the defendant's ownership of the land, through which the water flowed in its natural current. All that the plaintiff did in securing to himself the continued use of the water to which he had thus become entitled was to go higher up in the bed of the stream than he had originally done, and dig out a small ditch or channel in the gravelly surface thereof through a bar that had been formed by freshets in the stream, and erect, at the head of such ditch, a wing-dam to divert the waters of the stream, in the usual quantity that he had hitherto used, down along its bed into his original ditch. At no point where he thus used the bed of said stream (owing to the height of the banks thereof) could the defendant make any beneficial use of the water thus taken; and no portion of his land, available for any useful purpose, was invaded or taken. In fact, all that the

plaintiff did was to remove obstructions to the flow of its waters from the bed of the stream, higher up on the defendant's land than the point from whence such waters could be originally diverted into the ditch.

The plaintiff did nothing more of injury to the defendant than if he had removed a number of fallen trees which might have been washed down by the floods of winter, and which had lain across the stream, obstructing the flow of the water, and causing it to run upon the further side away from the plaintiff's ditch; and such action was lawful. The plaintiff, by the construction of his ditch and the appropriation and user of the water of the stream, acquired, as against the defendant, a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant. Where the use of a thing is granted, everything is granted essential to such use. Such a right carries with it an implied authority to do all that is necessary to secure the enjoyment of such easement.

"The express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one." Gale & W. Easem. (Amer. Ed.) 231. So, also, "in the civil law, the right to a servitude drew with it the right to such secondary servitudes as were essential for its enjoyment." Id. Again, it is said that "by the civil law the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest enjoyment of his servitude." Id. 232. "But, in entering upon the neighboring soil for the purpose of doing these necessary works, the owner of the dominant tenement was bound, not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labors might have caused to the servient tenement." Id. 235.

The stream had become obstructed by the deposits, from natural causes, of gravel in its bed, so as to prevent the flow of water to plaintiff's ditch. The defendant, as owner of the servient tenement, was under no obligation to remove these obstructions to the enjoyment by plaintiff of his right to the water.

The duty of making the repairs essential to his enjoyment of the easement devolved upon the plaintiff. Gale & W. Easem. 215; *Taylor* v. *Whitehead*, 2 Doug. 745. In the exercise of this right, plaintiff in a reasonable and proper manner, and, as is found by the court, without damage to the defendant, made such an alignment of the stream, and performed such acts as were essential to his enjoyment of the water. This he had a right to do. *Prescott* v. *White*, 21 Pick. 341; *Prescott* v. *Williams*, 5 Metc. 429.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 728

KAHN *v.* BAUER, Treasurer. (No. 11,764.)

(*Supreme Court of California.* December 22, 1886.)

MANDAMUS—MOTION TO QUASH—AFFIDAVIT FOR.

On a motion to quash a writ of *mandamus* compelling a state officer to redeem certain bonds in accordance with a state law, an affidavit which states, in substance, that the validity of the bonds had been passed on in the United States courts is insufficient.

In bank. Motion to quash alternative writ of mandate.

An alternative writ of mandate had issued in this case, compelling defendant to advertise for the redemption of the Montgomery avenue bonds, as provided in the act of April 1, 1872, (St. 1871-72, p. 919.) A motion was made to quash the writ, based on an affidavit which stated, in sub-

stance, that the validity of the bonds in question had been passed on in other actions, by the circuit court of the United States, and also that a writ of error was pending in the supreme court of the United States.

D. M. Delmas, for petitioner. *John L. Love* and *P. G. Galpin*, for respondent.

BY THE COURT. The facts stated in the affidavit on which the motion to quash the writ heretofore issued in this case is made, are insufficient to authorize this court to grant the motion.

The motion must be denied, with leave to respondent to answer within 10 days.

2 Cal. Unrep. 729

KAHN *v.* BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO. (No. 11,765.)

(*Supreme Court of California.* December 22, 1886.)

In bank.

D. M. Delmas, for Petitioner. *John L. Love* and *P. G. Galpin*, for respondent.

BY THE COURT. On the authority of *Kahn* v. *Bauer*, *ante*, 477, (No. 11,764, this day decided,) motion denied, with leave to respondent to answer within 10 days.

71 Cal. 444

HAGGIN and others *v.* CLARK. (No. 9,280.)

(*Supreme Court of California.* December 27, 1886.)

1. JUDGMENT—SATISFACTION—DECISION ON APPEAL.

The decision of the supreme court, on an appeal in a case determining the proportion of the judgment to which, as between himself and his co-plaintiff, the appellant is entitled, becomes the law of the case to the extent thus determined, and upon a tender thereof by the defendant he becomes entitled to a satisfaction of the judgment.

2. SAME—MOTION TO SATISFY—PRACTICE.

Where the findings in a cause show that two plaintiffs are entitled to recover, and show the share or interest which each plaintiff has in the subject-matter of the litigation, neither oral testimony nor affidavits can be received, on a motion to have the judgment satisfied, to show that the interest of the plaintiffs in the judgment is other or different from that shown in the findings.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

Moses G. Cobb, for appellants. *E. D. Sawyer*, for respondents.

SEARLS, C. This cause was decided by Department 2 on the thirtieth day of January, 1886, in an opinion to be found in 9 Pac. Rep. 736. A reargument in bank was ordered, and we are again called upon to review the cause.

It is claimed that in the former opinion too much weight was given to the previous decision in the same case, (61 Cal. 1,) and that what we extracted from the last-named decision as the *law of the case*, and treated as *res adjudicata*, on the question at issue, was in reality *obiter dicta*, or at least based upon a record in no respects binding upon the plaintiffs Haggin and Le Roy. The following summary will suffice to an understanding of the salient points involved in the case.

On the second day of May, 1864, Theodore Le Roy, as the assignee of Jacob P. Leese, recovered judgment in ejectment against defendant Clark for the undivided four-sixteenths of certain premises situate in the city and county of San Francisco. On the twenty-second of March, 1865, Haggin and Le Roy, as plaintiffs, recovered judgment against said Clark for possession of the same land, according to their respective interests; that is to say, the said Haggin four-sixteenths, and said Le Roy eight-sixteenths, undivided. On the eighteenth day of June, 1866, Theodore Le Roy and Rudolph Steinbach conveyed to Haggin seven-sixteenths, undivided, of, in, and to said land, which in-

cluded the four-sixteenths of said land formerly owned by said Haggin, which still left said Le Roy the owner of nine-sixteenths of said land.

Two actions were brought against Clark to recover mesne profits of the land during the period of his wrongful possession. One of these actions was brought by Le Roy, and the other by Haggin and Le Roy. By consent of counsel, the two actions were tried together, upon an agreement that, in case of recovery by plaintiffs, one-half of the amount found in their favor should be awarded in each case. The causes were tried by the court without a jury, and all of the foregoing facts, as to title and the quantity of interest, appear in the findings of fact. Judgment was rendered in each case, about September 11, 1874, in favor of the plaintiff or plaintiffs therein for $5,400, and certain further sums by way of interest, which interest was, however, on appeal to this court, stricken out and disallowed, with costs to defendant, and thereafter judgment was entered in the court below for $5,400, with legal interest thereon from date of entry; and at the same time, and as a part of the same judgment, defendant recovered his costs of appeal, taxed at $79.50. Pending the appeal to this court, defendant Clark took from Le Roy an assignment of all his interest in the two judgments, and subsequently the court below ordered them satisfied on payment to Haggin of the share or proportion due him as per the findings in the case. This appeal is from the order so made satisfying the judgments in *Le Roy and Haggin* v. *Clark*.

The question presented for determination is this: Where the findings in a cause show that two plaintiffs are entitled to recover, and show the share or interest which each plaintiff has in the subject-matter of the action, can oral testimony or affidavits be received, on a motion to have the judgment satisfied, to show that the interest of the plaintiffs in the judgment is other or different from that shown in the findings?

By section 578 of the Code of Civil Procedure it is provided that the judgment may, "when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

In the present case it appears that the court did, by its findings, determine the interests of the respective plaintiffs as between themselves. We must presume, in favor of the findings, (in the absence of the pleadings,) that they are responsive to the issues made in the case. It is true, the appellant contends that there was nothing in the pleadings warranting these findings, but the pleadings, which are the only legitimate evidence on the subject, were not offered to substantiate their position. We must therefore hold that under the presumption in favor of the findings above referred to, that some necessity existed for the findings of the court, and that they were warranted by the issues in the cause.

In view of this position, it was not in order for plaintiff Haggin, upon a motion to have the judgment satisfied, to show by affidavits and deeds that his interest all along was greater than that found by the court. *Non constat* but this very evidence may have been introduced upon the trial, and overcome by the admissions of the pleadings or by other evidence. If injustice was done the appellant, he had his redress by a motion for a new trial or appeal to correct the error; but he cannot waive all these rights, and by a motion founded upon oral evidence or affidavits try the facts of the cause anew, or any portion of them, in a manner not known to the practice of our courts.

We may infer that it was in view of this reasoning that this court, when the cause was here before, (61 Cal. 1,) indicated as the *data* upon which the amount due Haggin was to be determined the proportion or interest to which the findings showed him to be entitled. We see no reason for modifying what was said in the opinion heretofore rendered by Department 2 on this appeal, to the effect that, the relative rights of the parties having been settled on the former appeal, (61 Cal. 1,) such decision became the law of the case. Waiving this conclusion, however, and we are of opinion that, if appellant has a

remedy, it must be by appropriate action against his co-plaintiff, who he shows occupied the relation of a trustee to himself, and not by the means invoked on this motion.

We are of opinion the former decision of Department 2, affirming the order of the court below, should stand as the decision in the cause.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

71 Cal. 470

PARTRIDGE *v.* SHEPARD and others. (No. 9,404.

(*Supreme Court of California.* December 29, 1886.)

1. LIS PENDENS—EJECTMENT—CONVEYANCE—JUDGMENT BY STIPULATION—CALIFORNIA PRACTICE ACT, § 263.

A judgment by stipulation of parties will bind them, and those in privity with them; and as, by section 263 of the practice act of California, "an action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action," a judgment by stipulation will be a bar to a claim of title under a deed made by a person in possession, during the pendency of an action against him for the recovery of the land conveyed.

2. EJECTMENT—EVIDENCE—AFFIDAVIT TO SHOW FORMER JUDGMENT VALID.

In an action of ejectment, the defendant having introduced the record of a former judgment in evidence, as evidence of his title, the introduction of an affidavit to show that there was no fraud in the entry of that judgment was error, but, as the judgment was not subject to collateral attack in the action of ejectment, the error was harmless, and not ground for reversal.

3. SAME—SHOWING TITLE OUT OF PLAINTIFF'S GRANTOR AT TIME OF DEED—DEED OF TRUST—PAYMENT AND RECONVEYANCE.

A deed of trust is a conveyance of the legal title; and where, in an action of ejectment, the plaintiff claims under a conveyance made June 15, 1872, a deed of trust executed by his grantors January 29, 1872, is admissible as tending to show that the title was not in plaintiff's grantors at the time his conveyance was made. The questions of the payment of the debt which the deed of trust was given to secure, and of the reconveyance of the land, do not affect the admissibilty of the deed.

4. SAME—PAYMENT OF TAXES—STATUTE OF LIMITATIONS—CODE CIVIL PROC. CAL. § 325.

In an action of ejectment, evidence of the payment of taxes by the defendant is properly admitted under the plea of the statute of limitations. Code Civil Proc. Cal. § 325.[1]

5. SAME—PAYING TAXES—LANDS SECURITY FOR A LOAN.

In an action of ejectment, the plaintiff, as a witness for himself, having testified to paying taxes and street assessments on a part of the premises in dispute on which one D. lived at the time, and that he had tried to get money out of D., and had spoken of moneys advanced to D. and his wife, a question asked him, on cross-examination, as to whether he held the property as security for the debt, was proper, as tending to show that he was not making the payment testified to for himself, as owner, but for D.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

E. A. & G. E. Lawrence, for appellant. *Page Eells*, for respondents.

SEARLS, C. This is an action of ejectment to recover portions of blocks 370, 371, 376, and 377, Western addition, San Francisco. The cause was tried by a jury, and a verdict rendered in favor of defendants, upon which judgment was entered. Plaintiff moved for a new trial, which was refused, and this appeal is by plaintiff from the judgment and order denying his motion. The complaint avers that on the second day of June, 1878, plaintiff

[1] See Jaques v. Lester, (Ill.) 8 N. E. Rep. 795, and note; Peoria, D. & E. Ry. Co. v. Forsyth, Id. 766; McNoble v. Justiniano, (Cal.) 11 Pac. Rep. 742; Ross v. Evans, (Cal.) 4 Pac. Rep. 443.

was the owner and in possession of the demanded premises, and that on the third day of June, 1878, defendants entered and ousted him therefrom. Defendants Shepard and Judson answered separately,—the former by way of general denial of the allegations of the complaint, and the latter, in addition to a denial of the allegations of the complaint, pleaded the statute of limitations of five years, also that the claim of the plaintiff is barred by the provisions of the statute of March 5, 1864, entitled "An act to limit the time for the commencement of civil actions in certain cases;" and in a supplemental answer defendant pleads a former recovery by him and Gilbert J. Place of the same premises by a judgment of the district court of the Fourth judicial district of the state of California in and for the city and county of San Francisco, rendered in their favor, and against Paul Molloy, Michael Dalton, Richard Donovan, and others, on or about March 27, 1873.

At the trial there was testimony on behalf of plaintiff tending to show that, in 1863, Richard Donovan went to live upon the demanded premises with his family; that he inclosed the same, in company with Michael Dalton, with a good fence, and pastured his goats and a horse thereon; that in October, 1865, Dalton built a house on the premises, as Donovan had previously done; that they cultivated a portion of the premises for a couple of years, and held the land as tenants in common. Michael Dalton and Margaret C. Dalton, his wife, conveyed to the plaintiff herein their interest in the demanded premises, by deed dated June 15, 1872, and recorded February 3, 1873. On the twenty-third day of February, 1866, R. Donovan, M. Dalton, and Margaret Dalton, his wife, conveyed, to Alfred Borel, 50-vara lot No. 4, in block 377.

On the eighth of March, 1867, Richard Donovan, Michael Dalton, and Margaret, his wife, executed an agreement to Alfred Borel, in which the conveyance of lot 4, in block 377, is recited, and it is agreed that, upon a division of the property, Borel should be at liberty to so locate the interests of the grantors in the deed of lot 4, block 377, as to protect his (Borel's) title to said lot 4; and, in the event said lot should not be set off to Borel in a division of the property, then the parties of the first part convey to said Borel an equivalent amount of land, of equal quantity and value, in the tract of which they were the owners, etc. The deed from Donovan, Dalton, and wife to Borel was afterwards stricken out by the court upon the ground that lot 4, in block 377, was not in controversy in this action; and the agreement above referred to was also, on motion of defendants, stricken out, upon the ground that it did not appear that Borel had failed to procure title to lot 4, in block 377. A deed from Borel to plaintiff, Partridge, dated March 8, 1867, of lot 4, in block 377, was offered in evidence; and, on objection of defendants, was ruled out, upon the ground that the land therein described is not in controversy in this action.

Defendants Egbert, Judson, and Shepard introduced the judgment roll in *Egbert, Judson and Gilbert J. Place* v. *R. Donovan, Michael Dalton, and others, as defendants*, being an action of ejectment to recover by the plaintiffs therein possession of certain premises therein described, and which are shown to embrace the demanded premises in this action. That action was commenced as early as 1865; the answer of Michael Dalton having been filed March 31, 1865, and that of Donovan, May 13, 1865. Defendants denied plaintiffs' title, set up the statute of limitations in bar of the recovery, and some other defenses. On the twenty-seventh day of March, 1873, Richard Donovan, Michael Dalton, James Casey, and Daniel Cronin, defendants in said cause, appeared in court by counsel, withdrew the answers by them respectively filed, and consented that judgment be entered in favor of plaintiffs in accordance with the prayer of their complaint, whereupon judgment was entered by the court in favor of plaintiffs, and against said defendants, for the recovery of the possession of the premises described in the complaint. A writ of possession issued to the sheriff of the city and county of San Francisco, on

the twenty-eighth day of March, 1873, which was returned July 28, 1873, by the sheriff. The return shows that plaintiffs were placed in possession of that portion of the premises described in the map attached thereto, and made part of the return.

Defendants introduced evidence tending to show possession in themselves continuously since 1873; also deed from Jose R. Valencia and Torevia Tanfaran to Richard Donovan, dated February 4, 1863, conveying the demanded premises; also a quitclaim deed from Richard Donovan to Richard Whoulihan, dated February 28, 1863, conveying the Donovan and Dalton tract, except a lot on the south side of Page street, 20 feet front by 80 feet deep. On the twenty-eighth of February, 1863, Richard Whoulihan conveyed the one undivided half of the same premises to Susannah Donovan, wife of Richard Donovan, in consideration of love and affection. Defendants deraign title from Susannah Donovan and Richard Donovan by sundry mesne conveyances. Defendants also introduced a deed from Dalton and wife to E. W. Burr and Benjamin D. Dean, of the second part, and Savings & Loan Society, of the third part, being a deed of trust dated January 29, 1872, given to secure the payment of $2,000 and interest to the third party, and all further indebtedness, not exceeding $3,000. This deed conveys a lot on the south-west corner of Page and Fillmore streets, fronting 63 feet on Fillmore by 120 feet on Page street, and being a portion of block 371; also the undivided one-half of the residue of the demanded premises.

The first point made by appellant is that the court below erred in overruling his objection to the question put to plaintiff Partridge, who was a witness in his own behalf, and whom the court permitted defendants' counsel to ask, on cross-examination, as follows: "You held it [the property] as security for the debt, did you not?" The witness had testified to paying taxes and street assessments, not only upon lot 4, in block 377, but upon the lot where Dalton lived, and upon other portions of the property; that he had tried to get money out of Dalton, but could not, and the latter had come to him to pay his (Dalton's) taxes, and had spoken of "moneys advanced to Dalton and his wife." Under these circumstances it was proper, on cross-examination, to ascertain whether plaintiff was paying taxes and street assessments upon the property as an owner and for himself, or for Dalton; and, if he claimed the property as security for such payment, it would tend in some degree to show that he was not making the payment for himself, but for Dalton. The answer of the witness was: "Well, partially. Yes; partially. I was saving myself at the same time,—saving the property for which I have a deed." Conceding the question to have been improper, there was nothing in the answer which could have in the least injured plaintiff.

It is objected to the judgment roll in *Judson et al.* v. *Molloy* that it was a "*consent judgment.*" We know of no good reason why a judgment entered by consent of parties, in a cause in which the court has jurisdiction of the subject-matter and of the parties, is less efficacious than if entered after a trial of the issues. It may be impeached, like any other judicial record, by evidence of a want of jurisdiction in the court rendering it, by showing collusion between the parties, or by proof of fraud on the part of the party offering the record. Code Civil Proc. § 1916; Freem. Judgm. § 330; *Semple* v. *Wright*, 32 Cal. 659; *Secrist* v. *Zimmerman*, 55 Pa. St. 446; *McCreery* v. *Fuller*, 63 Cal. 30. We conclude, therefore, that a judgment by stipulation of parties will bind them, and those in privity with them.

The action, as before stated, was commenced as early as 1865, pending which, and in 1869, Partridge took a conveyance of lot 6, in block 371, from Dalton, one of the defendants in that action, and subsequently, on the fifteenth day of June, 1872, plaintiff took a conveyance from Dalton and wife of all their interest in the demanded premises. The former deed was recorded November 30, 1870, and the latter on the third day of February, 1873. There is no evi-

dence that defendants Judson and Shepard had any notice in fact of these deeds, or of either of them, or any interest in plaintiff; but, on the contrary, the evidence shows that they did not have such knowledge. Judson paid the defendants Donovan and Dalton some $12,000, to end the litigation, and procure the judgment in his favor; but we fail to see in this any evidence of fraud or collusion.

No notice of the pendency of the action was, so far as appears, filed in the office of the recorder. Prior to May 1, 1872, the provision of the practice act, § 27, in relation to filing notice of the pendency of actions, did not apply to the action of ejectment. *Long* v. *Neville*, 29 Cal. 131; *Wattson* v. *Dowling*, 26 Cal. 125. By the act of March 2, 1872, which took effect May 1, 1872, the practice act was so amended that notice of the pendency of an action applied alike to causes affecting the right to possession of real property with those relating to the title. At common law the purchaser *pendente lite* of the subject of the controversy took as a mere volunteer or intruder, and was bound by the result of the controversy. *Richardson* v. *White*, 18 Cal. 106; *Debell* v. *Foxworthy's Heirs*, 9 B. Mon. 228; *Secombe* v. *Steele*, 20 How. 105; *Green* v. *White*, 7 Blackf. 242; *Baker* v. *Pierson*, 5 Mich. 461. By section 263 of the practice act it was provided that "an action for the recovery of real property, against a person in possession, cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action."

The defendant Dalton was in possession, and an action of ejectment was being prosecuted against him to recover possession. Pending such action, and before the amendment of March, 1872, he conveyed 50-vara lot No. 6, in block 371, a portion of the demanded premises in that cause, and a portion of which 50-vara lot is included in this action, to plaintiff, Partridge. His grantee was bound equally with himself by the judgment afterwards rendered in that action, and the judgment was admissible in evidence against the plaintiff in this cause, and plaintiff's objection thereto was properly overruled. Whether the judgment offered in evidence was a bar to the recovery by plaintiff of so much of the land as was conveyed to him by the deed of June 15, 1872, executed after the amendment of the practice act, so as to require notice of the pendency of actions of this character to be recorded, must depend upon the question whether or not the statute, when amended, applied to actions existing and pending at the date of such amendment. That question is not necessarily involved in the objection as made, because if the judgment was admissible for any purpose, or as to any part of the demanded premises, its admission was proper, and upon the question as indicated above we express no opinion.

The instruction asked by counsel for plaintiff in the following language: "I instruct you that the record of the judgment in the case of *Judson* v. *Molloy* against Dalton, given in evidence herein, is no bar to plaintiff's recovery herein,"—was properly refused, for the reasons given in disposing of the admissibility of the judgment as evidence.

We think the objection of plaintiff to the introduction of the affidavit of E. A. Lawrence should have been sustained. It was introduced to show that there was no fraud in the entry of the former judgment. Its introduction, however, could not injure the plaintiff, for the reason that in the present action of ejectment a collateral attack upon that judgment could not be made. Being fair upon its face, and rendered by a court of competent jurisdiction, in a proper case, it must stand until set aside by some direct proceeding for that purpose. Freem. Judgm. § 334. It follows that the affidavit could cut no figure, under the pleadings, in the determination of the cause, and the judgment should not be reversed on account of this error.

The deed from Dalton and wife to Burr and Dean, dated January 29, 1872, was properly admitted in evidence. It was a deed of trust given to secure the payment of money, but it conveyed the legal title. *Koch* v. *Briggs*, 14

Cal. 256; *Grant* v. *Burr*, 54 Cal. 298; *Bateman* v. *Burr*, 57 Cal. 480; *Durkin* v. *Burr*, 60 Cal. 360. It was therefore admissible to show title out of Dalton and wife prior to their conveyance of June 15, 1872, to plaintiff.

The question of the payment of the money, which the trust deed was given to secure, and of a reconveyance, did not affect the admissibility of the deed, but were questions to be determined upon proper testimony, and were, as we think, properly disposed of by the court.

The evidence of the payment of taxes by Judson was properly admitted under his plea of the statute of limitations. Code Civil Proc. § 325.

We think the evidence of adverse possession on the part of Judson was sufficient to authorize the verdict of the jury, and that, coupled with the other defenses set up and proved, defendants were clearly entitled to the judgment in their favor, and that the record presents no error calling for a reversal.

The judgment and order appealed from should therefore be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 466

MAXWELL *v.* SAN LUIS OBISPO CO. (No. 9,828.)

(*Supreme Court of California.* December 29, 1886.)

TAXATION—ACTIONS TO RECOVER BACK ILLEGAL LICENSE TAX—PAYMENT UNDER DURESS.

When it appears that there was no liability to anything beyond civil and criminal prosecutions in case of refusal to pay certain license taxes, and that in such prosecutions the invalidity of the law which authorized the collection of the taxes would have been a perfect defense, a party making payment is not under such duress or compulsion that he can recover back money so paid in an action brought for that purpose.[1]

Department 2.

Appeal from superior court, San Luis Obispo county.

This was an action by the respondent, Maxwell, as assignee of various parties, to recover from the defendant money paid by his assignors as license taxes for carrying on their business to the defendant, under duress, as was alleged. The defendant appealed from an order overruling its demurrer to the complaint.

J. M. Wilcoxson, *William Graves*, and *William Leviston*, for respondent, Maxwell. *J. R. Patton*, *F. Adams*, and *V. A. Gregg*, for appellant, San Luis Obispo county

SHARPSTEIN, J. The only question which we have to consider in this case is, does the complaint state facts sufficient to constitute a cause of action? The action was brought to recover moneys alleged to have been paid by the assignors of plaintiff to the tax collector of San Luis Obispo county, and by him paid into the treasury of said county. Such an action may be maintained under some circumstances, one of which is that the money was paid under compulsion, or the legal equivalent.

"The illegality of the demand paid, constitutes, of itself, no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment." *Brumagim* v. *Tillinghast*, 18 Cal. 271.

In this case, plaintiff alleges that the moneys sued for were exacted and collected by the tax collector without authority of law, and as a condition precedent to the carrying on of business by the assignors of plaintiff, and by threats, and menaces of legal prosecutions, suits, actions, and processes against said assignors, and attachments, seizures, confiscations, and sequestrations,

[1] See note at end of case.

which he, the said tax collector, gave out and made to said assignors, and to each of them, for the purpose of causing them, and each of them, to pay to him said moneys, and that said moneys were all paid under and by reason of such threats and menaces, and would not have been paid but for such threats and menaces.

The tax collector had no real or apparent power to execute the threats of seizures, confiscations, or sequestrations. The law under which he assumed to exact license taxes authorized him to direct suits to be brought for the recovery of such taxes, and to have attachments issue in such actions, (Pol. Code, § 3360;) and it is made a misdemeanor for any person to carry on business for which a license is required by law, without having a license, (Pen. Code, § 435.) The assignors of plaintiff were not liable to anything beyond civil and criminal prosecutions, in which the invalidity of the law which authorized the collection of license taxes would have been a perfect defense.

In *Benson* v. *Monroe*, 7 Cush. 125, the court said: "It is an established rule of law that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact that the party so paying protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity, in the first instance, to contest the claim at law. He has or may have a day in court. He may plead and make proof that the claim on him is such as he is not bound to pay."

In *Muscatine* v. *Keokuk N. P. Co.*, 45 Iowa, 185, the court said: "We are of the opinion that the mere danger of a multiplicity of suits is not sufficient to make these payments compulsory. No adjudicated case has been cited in favor of such proposition."

In *Oceanic S. N. Co.* v. *Tappan*, 16 Blatchf. 296, the court said: "It is stated, in general terms, in some of the decisions, that where money is paid to a public officer upon an unlawful demand to save the person paying from the infliction, under color of authority, of great or irreparable injury, from which he can only be saved by making the payment, such payment is made under an urgent and immediate necessity, and may be recovered back. But it will be found that none of these decisions were in cases where the injury apprehended by the party paying could only be inflicted by the decision of a court in favor of the validity of the claim made against him."

The question whether money paid to a tax collector, to avoid prosecution under a void law, constitutes a voluntary payment, has never before, so far as we are advised, been before this court. But it has been held that the payment of an illegal tax, under a threat to sell property in case of non-payment, was a voluntary payment. *Bank of Santa Rosa* v. *Chalfant*, 52 Cal. 170; *Bucknall* v. *Story*, 46 Cal. 589.

"When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense; and many payments are held to be voluntary which are made unwillingly, and only as a choice of evils or of risks." Cooley, Tax'n, 811. "All payments are supposed to be voluntary until the contrary appears." Id. 810.

Tested by what we must consider as an established rule, the complaint in this case does not show that the payments alleged to have been made were not voluntary, and therefore fails to state facts sufficient to constitute a cause of action.

Judgment reversed, and the court below is directed to sustain the demurrer to the complaint.

We concur: McKee, J.; Thornton, J.

NOTE.

The payment of a tax illegally levied is a voluntary payment, and cannot be recovered. Balfour v. City of Portland, 28 Fed. Rep. 738; Sonoma Tax Case, 13 Fed. Rep. 789, and note; Dunnell Manuf'g Co. v. Newell, (R. I.) 2 Atl. Rep. 766; Welton v. Merrick Co., (Neb.) 20 N. W. Rep. 111; Younger v. Board Sup'rs, (Cal.) 9 Pac. Rep. 103. The contrary was held in Jex v. City of New York, (N. Y.) 9 N. E. Rep. 38; Schultze v. City of New York, (N. Y.) 8 N. E. Rep. 528; Breucher v. Village of Port Chester, (N. Y.) 4 N. E. Rep. 272; Newsom v. Board Com'rs, (Ind.) 3 N. E. Rep. 163; Thomas v. City of Burlington, (Iowa,) 28 N. W. Rep. 480; Winzer v. City of Burlington, (Iowa,) 27 N. W. Rep. 241.

71 Cal. 479

HEFNER *v.* URTON. (No. 9,018.)

(*Supreme Court of California.* December 29, 1886.)

1. MORTGAGE—FORECLOSURE—PARTIES.
 In the foreclosure of a mortgage it is necessary to make parties of all persons who have succeeded to any of the rights of the mortgagor in the premises, and any person who claims an interest adverse to the plaintiff, if there is to be a complete settlement of the question involved.
2. SAME—HOMESTEAD—HUSBAND AND WIFE.
 Where a married man makes a declaration of homestead in premises which he has previously mortgaged, his wife acquires such an interest in the premises as to be a necessary party in foreclosure proceedings for the complete settlement of the question involved.
3. SAME—ASSISTANCE, WRIT OF—WIFE NOT MADE A PARTY.
 Where a wife is a necessary party to a foreclosure proceeding, but has not been joined with her husband, a purchaser at the sale will not be entitled to a writ of assistance against the husband to obtain possession of the land.

In bank. Appeal from superior court, Sonoma county.

James W. Oates, for plaintiff and appellant. *J. T. Campbell* and *John Goss*, for respondent.

MYRICK, J. In January, 1876, the defendant, W. L. Urton, being the owner of certain premises, executed to the plaintiff a promissory note for $2,000, and a mortgage upon the premises to secure the payment of the note, which mortgage was duly recorded. Urton was a married man, residing with his family on the premises. In April, 1876, Urton made and filed for record a declaration of homestead of the premises mortgaged. The note became due in January, 1877, and in February, 1881, an action of foreclosure was commenced; said W. L. Urton being the sole defendant. A decree of foreclosure was made in March, 1881. At the sale under the decree the plaintiff became the purchaser, and a deed was executed to him. After the execution of the deed the plaintiff demanded of defendant that he surrender possession. The demand being refused, plaintiff applied to the court for a writ of assistance. This application was denied, on the ground that the wife was a necessary party to determine the right to a lien upon the homestead. This is the question for consideration on this appeal.

At the time Urton executed the mortgage he had full power and authority so to do, and a lien was thereby created; and the subsequent declaration of homestead did not impair the lien. Civil Code, subd. 4, § 1241. But, in endeavoring to enforce that lien, it was necessary to make parties to the foreclosure all persons who had in the mean time succeeded to any of the rights of the mortgagor in the premises. So, also, any person who claimed an interest in the controversy adverse to the plaintiff, or who was a necessary party to a complete settlement of the question involved, should have been made a party. Urton was the owner of the premises when the mortgage was executed. By the declaration of homestead some portion of his title (just what portion is not necessary now to be determined) passed from him to his wife. He could no longer mortgage or sell unless she joined with him. She had the right of residence thereon with him and the family during their joint

lives, with some rights in case she should survive him. She had a right of redemption as his successor in interest. Code Civil Proc. subd. 1, § 701. In order to foreclose her interest, and have a complete settlement of the question involved, viz., whether the mortgage was a lien, she was a necessary party. She would have had a right to question the execution or validity of the mortgage; whether it was barred; whether it had been paid.

It will not do to say that the writ was asked for only as to the husband, and that he should not be heard to object. It would be against the policy of the law to aid in separating the family; to remove the husband, leaving the wife on the premises, and subject him to punishment as for a contempt if he should return to visit her, or supply her with food. We agree with the judge of the court below, that the wife was a necessary party to the foreclosure; and, as she was not a party, the writ was properly denied.

The case of *Graham* v. *Oviatt*, 58 Cal. 428, is not in conflict with the views herein expressed.

Order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.

McKINSTRY, J. I concur in the judgment.

2 Cal. Unrep. 729

Ex parte BERNARD. (No. 20,259.)

(*Supreme Court of California.* December 30, 1886.)

ARREST—CIVIL PROCESS—AFFIDAVIT FOR—CODE CIVIL PROC. § 479.

An affidavit for an order of arrest under section 479, Code Civil Proc. Cal., need not, in order to show that the defendant's proposed departure from the state is with intent to defraud his creditors, allege that he is about to remove any of his assets or property.

Department 1. On *habeas corpus* from superior court, city and county of San Francisco.

This was a petition for a writ of *habeas corpus* filed by B. S. Bernard. The petitioner had been placed under arrest by an order of the superior court of the city and county of San Francisco, issued on an affidavit made by one Borowsky, plaintiff in an action on a contract pending in that court against the petitioner. The affidavit alleged, in substance, that the petitioner was about to depart the state with intent to defraud his creditors, but did not state or show that he was about to remove any of his assets or property from the state.

Wm. H. Sharp, for petitioner. *Crittenden Thornton* and *F. H. Merzbach*, for respondent.

BY THE COURT. We are of opinion that the affidavit on which the judge of the superior court made the order of arrest stated facts and circumstances tending to show that the petitioner was about to depart from the state with intent to defraud his creditors. We therefore decline to discharge the petitioner from arrest.

The petitioner is remanded to custody, and the writ is discharged.

71 Cal. 456

THOMAS *v.* ENGLAND and another. (No. 9,805.)

(Supreme Court of California. December 28, 1886.)

1. WAYS—PRIVATE—PRESCRIPTION—ADVERSE POSSESSION—IMPLIED CONSENT OF OWNER OF SERVIENT ESTATE.
 The laws of California, fixing the time in which a right by prescription shall be acquired, have not changed the common-law requirements as to the manner of acquiring such right. It must still be by adverse possession; and, one of the requisites of adverse possession being that it shall not be with the consent, express or implied, of the owner of the alleged servient estate, where, in an action to establish a right of way, the court finds that the use of the way by plaintiff, claiming title by prescription, was with the implied consent of the owner of the land over which the way passed, a judgment for defendant is proper.[1]
2. SAME—QUESTION FOR JURY.
 The question whether a possession is adverse is for the jury, or the court sitting as such, and, in an action to establish a right of way by prescription, the finding of the court on that question, in the absence of the testimony from the record, will be presumed to be correct.

Commissioners' decision.

Department 1. Appeal from superior court, San Benito county.

Montgomery & Scott and *Brotherton & Herrington,* for appellant. *N. C. Briggs,* for respondent.

SEARLS, C. This is an action to establish a right of way over the land of defendants, and to bar and enjoin them from closing or obstructing the same. The claim of plaintiff is that on the first day of September, 1874, he entered upon the land over which the right of way is claimed, constructed a roadway thereon, and thence hitherto, until the fourteenth of February, 1884, main-

[1] See Kripp v. Curtis, (Cal.) 11 Pac. Rep. 879, and note; South Branch R. Co. v. Parker, (N. J.) 5 Atl. Rep. 641.

tained said roadway, and continuously maintained said roadway under a claim of right, adversely to the defendants and their predecessors. The answer denies the adverse user of the right of way, avers that it was by permission of the owner of the land, and states facts which, if true, would constitute a license from the owner to plaintiff. Certain interrogatories were submitted to a jury, and passed upon by them. The court adopted these findings, and prepared others in addition thereto, upon which judgment was rendered in favor of defendants. Plaintiff appeals from the judgment.

Respondent moves to dismiss the appeal upon the grounds: (1) That it does not appear that the notice of appeal was ever filed; (2) that it does not appear that the notice, if filed, was filed before the filing of the undertaking on appeal herein.

The objections are met by the record and certificate of the clerk of the court below, showing the notice of appeal to have been filed October 18, 1884, and that the undertaking on appeal was filed the same day. The motion to dismiss should be denied. In former times prescription implied a claim to an incorporeal hereditament arising from the same having been enjoyed for so long a time that there was no existing evidence as to the period when such user and enjoyment commenced. Its origin must have been at a time "whereof the memory of man runneth not to the contrary." Prescription, as known to the common law, applied to the manner of acquiring or losing a *right* by the effect of the lapse of time, as contradistinguished from the mode of acquiring title to a thing itself by the effect given to a long possession or enjoyment of it. The former applied to intangible rights capable of enjoyment without title to the thing out of which they flow, or to which they attach, while the latter related to the thing itself. Prescription, as understood and interpreted in modern times, raises a legal presumption of title under a grant, but is not conclusive, and may be rebutted by other evidence. 1 Greenl. Ev. § 17; *Sargent* v. *Ballard*, 9 Pick. 251; *Corning* v. *Gould*, 16 Wend. 531.

In this state, however, under section 1007 of the Civil Code, "occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all." This section merely fixes the time in which a right by prescription shall be acquired, but does not alter the requisites which before the Code were essential to the growth of a prescriptive right. *Woodruff* v. *North B. G. M. Co.*, 18 Fed. Rep. 753. The user must be adverse to the true owner. *Anaheim W. Co.* v. *Semi-tropic W. Co.*, 64 Cal. 185.

If the user must be adverse, then it must be accompanied by the elements required to make out an adverse possession. These elements were well stated in *Unger* v. *Mooney*, 63 Cal. 595, as follows: "(1) The possession must be by actual occupation, open and notorious, not clandestine. (2) It must be hostile to the plaintiff's title. (3) It must be held under a claim of title, exclusive of any other right, as one's own. (4) It must be continuous and uninterrupted for a period of five years prior to the commencement of the action. (5) Since the passage of the proviso to section 325 of the Code of Civil Procedure, in 1878, payment of taxes."

For the findings it appears that William Thomas, deceased, and the plaintiff herein, were twin brothers, living upon adjoining land, to which they had applied for title from the government of the United States. The brothers sustained towards each other relations of a mutually friendly character. In going to and coming from the nearest highway leading to Hollister, plaintiff was accustomed from September 1, 1874, to February, 1884, to pass over the land of William. This was done by the implied assent of William. Plaintiff graded the road, and William placed gates thereon. Plaintiff claimed the right to use such road, but never informed William of such claim, and he was never aware thereof, nor were his heirs aware of such claim until 1883. William

Thomas died January 4, 1880, leaving as his only surviving heirs his widow, Elizabeth, and a son, A. B. Thomas, then and now a minor under the age of 18 years. A patent issued from the government of the United States to the heirs of William Thomas, dated May 1, 1875, but such patent was not delivered to the heirs until November, 1882. Plaintiff offered to purchase the right of way from the heirs of William Thomas, deceased, but the date of such offer can only be determined inferentially from the findings.

To perfect an easement by occupancy for five years, the enjoyment must be *adverse, continuous, open, peaceable.* It must be *adverse,* and under claim of a legal right, and not by the consent, permission, or indulgence, merely, of the owner of the alleged servient estate. This is quite obvious in cases where the consent, permission, or license is expressly given. But it is no less true where the permission or license is implied, as it may well be from the facts and circumstances under which the use was enjoyed. *Bradley's Fish Co.* v. *Dudley,* 37 Conn. 136. The question is one for the jury, or for a court sitting as such, to determine as a fact, in the light of the relations between the parties, and all the surrounding circumstances. *Putnam* v. *Bowker,* 11 Cush. 542. The finding of the court is that the right of plaintiff to pass over the land was always with the implied permission of William Thomas, his heirs and personal representatives. In the absence of the testimony we are bound to suppose there was evidence sufficient to support this and other findings, and they are sufficient to support the judgment, and defeat plaintiff's right to recover.

We are of opinion the judgment of the court below should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed, and the motion to dismiss the appeal is denied

71 Cal. 461

BLACKWOOD *v.* CUTTING PACKING CO. (No. 9,581.)

(*Supreme Court of California.* December 28, 1886.)

JUDGMENT—SETTING ASIDE DEFAULT—STIPULATION EXTENDING TIME TO ANSWER.

A complaint was filed on the fifth day of January, 1884, and on the same day it was stipulated with the defendants that they should have until the eleventh of the month in which to answer. On the ninth of the month this time was extended "to, and to include, February 17, 1884," which was Sunday and a holiday. On the eighteenth of the month a default was entered, and a judgment rendered in favor of the plaintiff for the amount of his demand, and costs. A notice of motion was then served and filed by the defendants, on the same day, to set aside the judgment, and allow an answer to be filed. *Held,* that although the stipulation was not filed or entered in accordance with subdivision 1, § 283, Code Civil Proc. Cal., and was not, therefore, legally binding upon the trial court, yet, as the defendants seem to have relied upon it in good faith as giving them the right to answer on the said eighteenth day of February, the judgment should be set aside, and defendant allowed to file his answer.

Commissioners' decision.

Department 1. Appeal from superior court, Alameda county.

Action to recover an alleged balance due on a sale of apricots. Judgment against defendants by default. Defendants, on the same day, moved the court to open the default, and its motion was denied. A bill of exceptions on the motion and decision was preserved, and this appeal taken both from the judgment and the order denying defendants' motion.

Chickering & Thomas and *Warren Olney,* for appellant. *A. A. Moore* and *Geo. W. Reed,* for respondent.

FOOTE, C. The plaintiff brought an action against the defendant for an alleged balance due on a sale of some apricots. The complaint was filed on

the fifth day of January, 1884, and summons served on the eighth day of the same month and year. On the eighteenth day of February of that year a default was entered and a judgment rendered in favor of the plaintiff, for the amount of his demand, and costs. Upon that same day a notice of motion was served and filed to set aside the default and judgment, in these words:

"*To the Plaintiff, and A. A. Moore and George W. Reed, his Attorneys:* You will please take notice that on Friday, the twenty-ninth day of February, 1884, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the court-room of this court, department No. 2, in the court-house, at the city of Oakland, Alameda county, California, we shall move said court for an order setting aside the judgment and default heretofore entered against said defendant, and granting said defendant leave to file an answer to the complaint in said action.

"Said motion will be made and based upon the following grounds, to-wit: (1) That said default was taken against said defendant before the time allowed by law for answering, and the extension in writing, by the stipulation of said plaintiff's attorneys, had expired; (2) on the ground of the mistake, inadvertence, and excusable neglect of defendant's attorneys.

"Said motion will be made upon the papers on file herein, and upon the affidavits, copies of which are hereto attached and served herewith.

"Yours, etc., CHICKERING & THOMAS,

"*Dated February* 18, 1884. "Attorneys for Defendant."

The affidavits of merit, made in support of the motion, by one of the attorneys for defendant, and Mr. Cutting, the vice-president of the corporation sued in the action, are as follows:

"*State of California, City and County of San Francisco.* William Thomas, being duly sworn, deposes and says: I am one of the attorneys for the defendant in the above-entitled action. The vice-president of the said defendant has fully and fairly stated to me the facts of the said case, and I have advised him and believe that said defendant has a good defense thereto on the merits. We were retained in the case on the fifteenth of February, 1884. As there was but little time to prepare the papers, I at once prepared a stipulation, allowing us a few more days within which to answer, and sent it to Oakland by B. Noyes, Esq., a member of the bar, employed in our office, requesting him to see one of the plaintiff's attorneys, and ask for such time. I am informed by said Noyes, and therefore believe, that he called at the office of said plaintiff's attorneys on the afternoon of the sixteenth inst., but could not find said attorneys, both of them being absent; that said Noyes believed and understood that defendant's time to answer did not expire until the close of the eighteenth day of February, 1884. I have always understood the terms of the stipulation set out in the affidavit of Francis Cutting, filed herewith, to give the whole of the succeeding day, when the last day expressed therein falls on a Sunday, and such, I am informed, is the general belief of the members of the bar of this city and county. WILLIAM THOMAS."

(Duly verified.)

"*State of California, City and County of San Francisco.* Francis Cutting, being duly sworn, deposes and says that he is the vice-president of the defendant corporation in the above-entitled action; that he has fully and fairly stated the facts of the above-entitled case to his counsel, Chickering & Thomas, and that he is advised by said counsel that the defendant corporation has a good defense on the merits of the said action; that A. D. Cutler is an employe of said corporation, and was such employe on February 5, 1884; that on said last date George W. Reed, one of the plaintiff's attorneys, addressed to said Cutler a letter in the words following, to-wit:

"'OAKLAND, February 5, 1884.

"'*Mr. A. D. Cutler*—DEAR SIR: Mr. Blackwood called to see us to-day in regard to the last suit brought against Cutting Packing Company. He desired me to say to you that the defendant might have until February 11, 1884, within which time to answer, and the time is hereby extended until that time. In regard to the proposition made by you concerning the amending of the complaint, I will talk with Mr. Moore, and advise you to-morrow.

"'Yours truly, GEO. W. REED.'

"That the above-entitled action is the 'last suit' mentioned in said letter; that on February 9, 1884, affiant saw A. A. Moore, one of plaintiff's attorneys, who indorsed on the back of said letter the following, to-wit:

"'Time to answer in this case is hereby extended to, and to include, February 17, 1884. A. A. MOORE, Attorney for Plaintiff.'

"*February* 9, 1884. FRANCIS CUTTING."

(Duly verified.)

Upon the hearing of the motion, its counsel stated that the defendant had prepared a verified answer to the complaint, which was then and there offered to be filed if the court would allow it, after setting aside the default and vacating the judgment. The court denied the motion, and from the order made therein, and the judgment rendered against it, the defendant appeals.

It appears by the record, from a letter dated February 5, 1884, of one of the plaintiff's attorneys, that the defendant was granted until the eleventh of February, 1884, in which to answer; that on the ninth of the same month, this time was extended "to, and to include, February 17, 1884."

The affidavits of merit were sufficient in form and matter, and the stipulation under consideration, had it been entered or filed, in accordance with subdivision 1, § 283, Code Civil Proc., would have entitled the defendant to have answered at any time on Monday, the eighteenth day of February, 1884, (sections 10, 12, 13, Code Civil Proc.,) since the seventeenth day of February, 1884, fell on Sunday, which was a holiday, and that which was fixed in the stipulation to be performed on that day (viz., the filing of the answer) could have been done on the next day, which was Monday, the eighteenth day of February, 1884.

It was not filed or entered, and was not, therefore, legally binding upon the trial court. Nevertheless, the parties defendant seem to have relied upon it in good faith as a stipulation, which gave them the right to answer the complaint on the said eighteenth day of February. They appeared at once in court on the same day that default was taken, and offered to file an answer then and there if permitted.

Under all the circumstances of this case it would seem that it was one in which a wise discretion might have been exercised in granting the defendant's motion. Therefore we think that the judgment and order should be reversed, and the defendant given a reasonable time in which to answer the complaint.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded, with leave to defendant to answer within a reasonable time.

71 Cal. 454

McGrath v. Hyde. (No. 11,607.)

(*Supreme Court of California.* December 27, 1886.)

APPEAL — WHEN TAKEN — FILING NOTICE AND UNDERTAKING — BILL OF EXCEPTIONS — TRANSCRIPT.

Where final judgment was entered August 20, 1885, *nunc pro tunc* as of January 13, 1885, and notice of appeal from the judgment and decree, and undertaking on appeal, were filed October 10, 1885, by defendant, and the time for preparing and serving a bill of exceptions extended to that day, and the bill was served October 8, 1885, and submitted to the court October 28, 1885, pursuant to notice served on the plaintiff's attorney, October 23d, and finally settled May 7, 1886, a motion to dismiss the appeal made April 30, 1886, will be denied; the appellant, under rule 2 of the supreme court of California, having 40 days from the time of settling the bill of exceptions to file his transcript, and the bill having been served and filed in time.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

The grounds of the motion to dismiss were that no statement or bill of exceptions had been prepared, served, or filed, and that no transcript had been filed; that the time for filing said statement or bill of exceptions and transcript had expired.

E. B. Holladay, for appellant. *M. Cooney*, for respondent.

SEARLS, C. This is a motion on behalf of the plaintiff to dismiss an appeal prosecuted by the defendant. Rule 2 of this court requires the appellant to file his transcript within 40 days after the appeal is perfected, and the bill of exceptions and statement (if there be any) are settled.

There are two certificates of the clerk of the superior court on file, from which it appears that final judgment was entered in the cause against defendant August 20, 1885, *nunc pro tunc*, as of January 13, 1885; that on October 10, 1885, defendant filed her notice of appeal from the judgment and decree, and on the same day filed an undertaking on appeal in the sum of $300. A notice of appeal by defendant from the final judgment had been previously filed on the seventeenth day of September, 1885; but, so far as appears, the appeal was not perfected by filing an undertaking. Defendant had also, on the twenty-ninth day of July, 1885, perfected an appeal from an order denying a motion for a new trial in the cause. A bill of exceptions was prepared by defendant, and submitted to the court for settlement, on the twenty-eighth of October, 1885, pursuant to a notice served on plaintiff's attorney, October 23d, and such amendments were made thereto, and proceedings had therein, that the exceptions were finally settled and signed by the judge of the superior court May 7, 1886. It further appears that the time for preparing and serving the bill of exceptions was extended to October 10, 1885, and that it was served upon the attorney for plaintiff on the eighth day of October, 1885. Notice of this motion was served April 30, 1886.

As a bill of exceptions had been prepared and served, and had not yet been settled by the judge when this motion was made, the motion to dismiss the appeal should be denied. Appellant was entitled to 40 days within which to file her transcript after the bill was settled. If unwarranted delay was had in the settlement of the bill of exceptions after it was proposed, the court below was the proper forum in which to seek redress.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the motion is denied.

71 Cal. 452

FISK *v.* ATKINSON and another. (No. 9,017.)

(*Supreme Court of California.* December 27, 1886.)

ACTION OR SUIT—ABATEMENT—ACTION PENDING APPEAL.

An action commenced during the pendency of an appeal from a judgment sustaining a demurrer to plaintiff's complaint, in a suit on the same cause of action brought by the same plaintiff against the same defendant, will be abated.

For commissioners' opinion, see 10 Pac. Rep. 374.

In bank. Appeal from superior court, city and county of San Francisco.

Joseph Mee, for appellant. *A. Campbell, Sr.*, and *Cambell & Sanderson*, for respondents.

FOOTE, C. We adhere to the opinion formerly expressed by us in this cause, which was approved by Department 2 of this court. 10 Pac. Rep. 374. In the action instituted in San Mateo county, the pendency of which was pleaded in abatement of the present suit, a demurrer was sustained to the complaint, and, the plaintiff declining to amend his pleading, judgment passed for the defendants. From that judgment an appeal was taken by the plaintiff, pending which the present suit for the same cause of action, between the same parties, was brought in the city and county of San Francisco. The plaintiff had an opportunity in his former action to have amended his complaint, but did not choose to do so, preferring rather to prosecute an appeal from the judgment rendered therein, and to commence another suit, with the same subject-matter, against the same parties, in another county, without dismissing that appeal. His last action was therefore unnecessary and vexatious, and should be abated, and the judgment in this cause should be the same as that heretofore rendered by Department 2.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with directions to the court below to enter judgment in favor of defendant Byrnes, that the action abate, and for his costs and disbursements.

71 Cal. 488

COHN *v.* CENTRAL PAC. R. Co. (No. 11,519.)

(*Supreme Court of California.* December 30, 1886.)

1. ACTION OR SUIT—VENUE—CHANGE OF—CORPORATION—PRINCIPAL PLACE OF BUSINESS—CONST. CAL. ART. 12, § 16.

Under section 16, art. 12, Const. Cal., providing that "a corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises or the breach occurred, or in the county where the principal place of business of such corporation is situate, subject to the power of the court to change the place of trial, as in other cases," a railroad company, the principal place of business of which is in San Francisco, when sued in Los Angeles county for damages for breach of a contract made in San Francisco, to be performed out of the state, and the breach of which occurred outside of the state, is entitled to a change of venue to San Francisco county.

2. SAME—CORPORATION—"RESIDENCE" OF—CODE CIVIL PROC. CAL. § 395.

When the affidavit on which an application for a change of venue is based, states that the principal place of business of the defendant, a corporation, is San Francisco, *held*, that such place is its "residence," within the meaning of that term as used in section 395, Code Civil Proc. Cal., fixing the place of trial of actions; following *Jenkins* v. *California Stage Co.*, 22 Cal. 538. MYRICK, J., dissents.

In bank. Appeal from superior court, Los Angeles county.

Howard & Scott, for appellant. *Glassell, Smith & Patton* and *Howard & Robarts*, for respondent.

McKee, J. This is an action against the corporation defendant, in which the superior court of Los Angeles county changed the place of trial of the action to the city and county of San Francisco. The basis of the application upon which the court ordered the change of venue was an affidavit, verified by the attorney of the corporation, showing that the residence of the corporation was, at the commencement of the action, in the city and county of San Francisco, and that that was the proper place for the trial of the case. Upon that showing, in connection with the pleadings in the case, the court made the order from which the plaintiff appeals.

Section 16, art. 12, of the constitution, ordains: "A corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises, or the breach occurred, or in the county where the principal place of business of such corporation is situate, subject to the power of the court to change the place of trial, as in other cases."

Now, the action in hand was brought to recover damages for breach of a contract, which, as it appears by the complaint in the action, was made in the city and county of San Francisco, to be performed outside the state, and the breach of which occurred outside the state. The action was not brought in the county where the contract was made, nor where it was to be performed, nor in the county where the breach occurred, or where the obligation and liability arose; nor was it brought in the county of the alleged residence of the defendant. It was brought in Los Angeles county. Therefore the county designated in the complaint was not the proper county, unless the residence of the defendant was unknown to the plaintiff. If that were the fact, then the action was properly brought, under section 395, Code Civil Proc., and could be tried in the county designated in the complaint, subject, however, even upon that assumption, to the power of the court to change the place of trial to the place of defendant's residence. According to the uncontroverted statement in the affidavit, "the principal place of business of said defendant corporation was, at the time of the filing of the complaint in the action, and still is, at the city and county of San Francisco."

In *Jenkins* v. *California Stage Co.*, 22 Cal. 538, this court held that the principal place of business of a corporation *is its "residence,"* within the meaning of that term as used in section 20 of the practice act, fixing the place of trial. Section 20 of the practice act was re-enacted by section 395, Code Civil Proc. The order appealed from was therefore properly entered upon the authority of that case, unless the case itself had been overruled.

It is contended that it has been overruled by the decision in *California Southern R. Co.* v. *Southern Pac. R. Co.*, 65 Cal. 394; S. C. 4 Pac. Rep. 344. But that case arose out of a proceeding *in rem* to condemn a tract of land under the law of eminent domain. Upon an application by the defendant in the case the lower court refused to order the place of trial to be changed from San Diego county to the city and county of San Francisco, the alleged residence of defendant; and this court, on appeal, affirmed the order entered by the court below, because the land sought to be condemned was situated in San Diego county, and the condemnatory proceeding was properly brought in San Diego county, and had to be tried there. That was the only question raised and decided in the case. The other question, whether a domestic corporation had any place of residence in the state where it was entitled, as matter of right, to the trial of a suit brought against it in another county, did not necessarily arise in the case, and the expressions of opinion in the case upon that question are not authoritative. Therefore the case does not overrule *Jenkins* v. *California Stage Co.*; and, under the constitutional provisions of section 16, art. 12, *supra*, and upon the authority of that case, the court below, upon the affidavit made in this case, properly granted a change of venue. Order affirmed.

We concur: MORRISON, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

MYRICK, J., (*concurring.*) I concur in the judgment, because, under section 16, art. 12, Const., the action should have been brought in the city and county of San Francisco. The contract was there made. It was not to be performed in the county of Los Angeles, nor did the obligation or liability arise, or the breach occur, in the latter county. Besides, the principal place of business of the corporation is situated in the city and county of San Francisco. I do not, however, join in approval of *Jenkins* v. *California Stage Co.*

71 Cal. 498

MYERS v. MOULTON and others. (No. 11,108.)

(*Supreme Court of California.* December 31, 1886.)

1. PARTNERSHIP—AUTHORITY OF PARTNER—SELLING ALL PARTNERSHIP PROPERTY—STALLION NOT MERCHANDISE—CIVIL CODE CAL. SUBD. 3, § 2430.
Under section 2430, subd. 3, Civil Code Cal., providing that a partner, as such, has no authority "to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise," a stallion kept for breeding purposes is not merchandise.

2. SALE—BILL OF SALE—LIEN.
Plaintiff sold a stallion to A., who, as security for a loan, gave a bill of sale of 70 head of horses to B. The testimony tended to show that the stallion was included in the bill of sale. Plaintiff bought back the stallion from A., and directed that it be delivered into the possession of B., from whom he seeks to recover it. *Held* that, the court having found for B., it must have found, under the testimony, that the stallion was included in the bill of sale, and on delivery into his posession the lien arising from his bill of sale attached, and he was entitled to possession.

3. Same—Offer to Pay on Condition Which Lienee was not Bound to Perform.
A. offered to pay up the debt to B. if certain horses that had been driven away were returned, but he did not in fact pay it, or tender any money to pay it. *Held*, the offer of A., on conditions which it does not appear that B. was bound to perform, did not release the lien.

4. Replevin—Joint Judgment for Defendants having Separate Defenses.
Two defendants in replevin, sued jointly, answered separately; one claiming title to one-half the property, the other claiming a lien to secure a loan. The judgment for defendants was a joint judgment. *Held* that, as they were sued jointly, there was no error in entering a joint judgment in their favor.

5. Same—Judgment Awarding Value if No Return, where Defendants Ask Only for Return—Code Civil Proc. Cal. § 667.
In replevin, defendants alleged, and the court found, the value of the horse, and that it was taken from them at the commencement of the action. Defendants prayed only for its return. *Held* to justify a judgment awarding defendants the value of the horse in case a return thereof could not be made; section 667, Code Civil Proc. Cal., providing therefor in such a case.

Commissioners' decision.

Department 2. Appeal from superior court, Lassen county.

E. V. Spencer, for appellant. *J. D. Goodwin*, for respondents.

Belcher, C. C. This action was brought to recover from the defendants the possession or value of a wagon, set of double harness, and a horse. At the commencement of the action the plaintiff claimed a delivery of the property to himself, and by proper proceedings took it from the defendants. The defendants answered separately; each admitting that he was in possession of the property when the action was commenced, and denying all the other allegations of the complaint, and then, averring the value of the property, and that it had been taken from him, demanded judgment for its return.

After trial the court below found that the plaintiff was the owner and entitled to the possession of the wagon and set of harness, and that he was not the owner or entitled to the possession of the horse, but the defendants were lawfully in its possession, and, as against plaintiff, entitled to its possession. Judgment was then entered that the defendants have a return of the horse, with damages in the sum of $1 for its detention and their costs, or, in case a return could not be had, that they recover from the plaintiff its value, fixed at $600. The plaintiff moved for a new trial, and, his motion being denied, appealed from the judgment and order.

It appears from the evidence that the plaintiff and the wife of defendant Moulton were partners, engaged in the business of stock-raising upon a ranch owned by them in Lassen county. They owned, in equal shares, a large band of horses, and also the horse in question, which was a stallion, known as J. W. Mackay, and was kept upon the ranch for breeding purposes. Defendant Moulton lived upon the ranch, and took charge of the business and property for his wife. About the first of January, 1884, the horse was pledged to one Frank Horn to secure the payment of a sum of money borrowed for ranch purposes. Horn took and held possession of the horse till sometime in June following. On the seventh of June, 1884, plaintiff made a bill of sale, which reads as follows:

"Madeline Plains, Lassen County, Cal.,
"Moulton & Myers' Ranch, June 7, 1884.

"Know all men by these presents that I, Jacob Myers, party of the first part, do sell all my real and personal property located in Lassen county, Cal., to John T. Alexander and J. C. Frazer, of the same county and state, for the sum of $3,000, gold coin of the United States, for value received, the receipt of which is hereby acknowledged.

[Signed] "Jacob Myers."

On the eleventh of June, 1884, Alexander, the grantee in the Myers bill of sale, executed a bill of sale to the defendant Bonyman, by which he bargained

and sold "to E. Bonyman, seventy head of horses, more or less, wagons, hay-rake, mowing-machine, harness, stove, cooking utensils, all the hay on the land, and all appurtenances remaining on hand on the Myers & Moulton ranch, situate on the Madeline Plains, for the sum of $400 cash in hand paid."

This last bill of sale was given to secure the payment of $400, which Alexander borrowed of Bonyman, and for which he gave his promissory note. The plaintiff afterwards bought the horse back from Alexander, and then, with his individual money, paid to Horn the sum of $300, to secure the payment of which the horse was held by him in pledge. On redeeming the horse, plaintiff directed that he be delivered into the possession of defendant Bonyman, who was then with Moulton upon the Moulton & Myers ranch, and he was so delivered on the twenty-sixth day of June. At some time—it does not appear when—Alexander offered to pay the note given by him to Bonyman, if certain horses that had been driven away were returned, but he did not in fact pay it, or tender any money to pay it. Moulton and Bonyman remained on the ranch, and retained possession of the horse until this action was commenced, on the twenty-eighth day of November, 1884.

It is argued for appellant that when Myers made his bill of sale, on the seventh of June, he transferred the entire interest of Moulton & Myers in the horse and other property of the firm, and the partnership was thereby dissolved, and that when he bought the horse back from Alexander he became its sole owner, subject only to the lien of Horn. This claim cannot be maintained. "Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing," (section 2429, Civil Code;) but a partner, as such, has no authority "to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise," (section 2430, subd. 3, Civil Code.)

The words used in the bill of sale are, "do sell all my real and personal property." This language does not purport to transfer the interest of the seller's copartner; and, if it did, it is clear that he had no power to transfer it. The horse was a stallion, kept and used for breeding purposes, and its sale was not necessary to carry on the business of the firm in the ordinary manner; and, besides, it was not "merchandise" within the meaning of that word as used in the subdivision above quoted from the Civil Code.

It must follow that, notwithstanding the bill of sale, Mrs. Moulton remained the owner of an undivided half interest in the horse, and, as such owner, had the same right to its possession as her co-owner. When, therefore, the plaintiff bought the horse back from Alexander, he bought only the half interest which he had sold, and that half interest was subject to any valid liens created upon it while Alexander held the title.

It is also argued that Bonyman acquired no interest in the horse by his bill of sale from Alexander, because the horse was not included in that bill of sale; and, if it was included, that then his lien was released, and his interest divested, when Alexander offered to pay his note if the horses which had been driven away were returned.

The answer to this is—*First*, that the testimony tends to show that the horse was intended to be and was included in the bill of sale, and, in support of the judgment, it must be presumed that the court so found; and, *second*, when the horse was delivered into the possession of Bonyman, and the lien upon a half interest in him, created by the bill of sale, at once attached, and that lien was not released by an offer from Alexander to pay his note, on conditions which, so far as we are advised, Bonyman was not bound to perform. Section 1494, Civil Code. This must be so, for the reason that it does not appear from the record what horses, if any, had been driven away, where they were driven to, who drove them, or under what circumstances or

claim of right it was done. It may be that they were taken by Mrs. Moulton, the owner of the other undivided half interest in them, and, if so, she had a right to their possession. It cannot be said, therefore, that Bonyman was bound to return them.

The case, then, is this: When the action was brought, the horse was upon the Moulton & Myers ranch, in possession of the defendants Moulton and Bonyman. Mrs. Moulton owned one-half of the horse, and her husband held possession for her. Bonyman had the other half in pledge, and as pledgee also held possession. Plaintiff demanded that the horse be given over into his exclusive possession, and the defendants refused to comply with this demand. The question is, were they justified in their refusal? The court below thought they were, and to us its conclusions seem correct. Certainly the plaintiff could not have taken the horse from Mrs. Moulton, his co-owner; and, as her husband held for her, his possession was her possession. So the plaintiff had no right to take the horse from Bonyman so long as he held it under a valid pledge.

But it is said the judgment was a joint one, and erroneous for that reason. The defendants were sued jointly, and, though they answered separately, we see no error in entering a joint judgment in their favor.

It is further said that the judgment is erroneous, because it awards to the defendants the value of the horse in case a return thereof cannot be had. They alleged, and the court found, the value of the horse, and that it was taken from them at the commencement of the action. They prayed only for its return. This was sufficient to justify the judgment entered. The Code provides: "If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same." Section 667, Code Civil Proc.

We find no error in the record, and the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 495

STARKIE *v.* PERRY. (No. 9,766.)

(*Supreme Court of California.* December 31, 1886.)

PARENT AND CHILD — ACCOUNTING MADE IN LOCO PARENTIS — CLAIM FOR BOARD AND CLOTHING.

Where plaintiff took defendant on the death of her mother, who was his sister, to live in his home "as a member of his family," where she continued during her minority, and, after she came of age, to labor constantly, doing house-work and helping in farm-work, plaintiff cannot recover from her, or set off against a judgment against him for a balance due defendant from him, as administrator of her mother's estate, sums claimed to have been expended by him in board and clothes for defendant during and after her minority, his position being that of a parent while she was in his house.

Department 2. Appeal from superior court, Marin county.

Action to settle a trust. Judgment for plaintiff. Defendant appeals.

E. S. Lippitt, for appellant. *Wm. B. Haskell*, for respondent.

MCKEE, J. In this case the plaintiff, by the allegations in his complaint, admits having received for the defendant, between the year 1873 and the commencement of the action, the sum of $575, as her portion of the estate of her deceased mother; but he claims to have paid, laid out, and expended for the defendant, between the same times, for the necessary clothing, board, and

lodging, a sum of money exceeding that which he received for her, for which, it is alleged, defendant has refused to settle with him; therefore he brought the action in hand to have his account settled and allowed, and to obtain judgment that he be discharged and released from his trust as to the moneys which he received for her.

Upon an answer specifically denying the allegations of the complaint, and setting up a counter-claim for work and labor done by the defendant for the plaintiff at his request, the case was tried, and the court, by its decision, finds that the necessary board, clothing, and lodging of the defendant, for the time stated in the complaint, were furnished by the plaintiff under the following circumstances, namely: In the year 1870 the mother of the defendant died in Marin county, seized and possessed of some real and personal property; and the plaintiff, who was the brother of deceased and the uncle of defendant, was appointed and qualified as administrator of the estate; and, while acting in that capacity, he took his niece, the defendant, in the year 1873, to live in his home, "as a member of his family." At that time defendant was a minor about fifteen years old; and she continued to live with the plaintiff for about seven years; during which time, the court finds, "she labored constantly, doing house-work and helping in the farm-work, milking cows and working in the field," and he "boarded and cared for the defendant and expended for her for clothing $275.50." The value of her board and lodging was less than the value of her work and labor. How much the one exceeded the other the court does not find; but it held that the plaintiff was not entitled to recover for the board and lodging of the defendant, but was entitled to recover the value of the clothes furnished her, and for that sum, with interest, judgment was given in favor of the plaintiff and against the defendant.

The appeal is from the judgment. We think the judgment erroneous, because, when the defendant became "a member of the family" of her uncle, at his request, the uncle stood towards her in *loco parentis*, and, in that relation, he was bound in law to support and maintain her according to his circumstances. Section 196, Civil Code. Her support and maintenance included necessaries of food, clothes, and lodging, for which he could not charge her, as a member of his family, any more than he could charge for such things one of his own children. And the fact that the defendant continued to be a member of the family after she attained her majority did not change the *quasi* paternal relation existing between herself and her uncle. The relation still continued, unless changed by some understanding or contract, express or implied, between herself and her uncle, which brought her under an obligation to pay for her maintenance. But the plaintiff does not claim and there were no proofs of any contract, express or implied, which changed the relation established by the plaintiff himself between him and his niece into one of master and servant, or which bound her to pay him for a service he voluntarily assumed to perform for her.

The service rendered by the plaintiff in maintenance of the defendant as a member of his family was gratuitous. So, also, were the services rendered by the defendant in the home of the plaintiff. No cause of action arises out of gratuitous services; therefore, neither the plaintiff nor defendant had any cause of action against the other to recover for the value of such services.

Admittedly, plaintiff was trustee of the defendant as to the money which he received for her from the estate of her mother; and, as such, he must be held to the same degree of responsibility as if he had been formally appointed her guardian. In accounting for the fund, he will not be allowed to avail himself of his fiduciary character for any object of personal benefit. Hence, he ought not to be allowed for any portion of it which he may have appropriated as compensation to himself for a service voluntarily rendered in maintenance of his *cestui que trust* as a member of his family. For that purpose the trust fund was not legally chargeable. The court therefore erred in allow-

ing the plaintiff, in the settlement of his trust, the benefit of any portion of the fund as compensation to himself, for clothes furnished to the defendant in her maintenance as a member of his family.

Judgment reversed, and cause remanded.

We concur: THORNTON, J.; SHARPSTEIN, J.

71 Cal. 509

COCHRAN *v.* JEWELL. (No. 9,365.)

(Supreme Court of California. December 31, 1886.)

DAMAGES—ACTION ON CONTRACT FOR SALE.

In this action, which is for a breach of contract for the sale of hops, *held*, on the evidence, that plaintiff was entitled to one-half the judgment rendered by the court below. THORNTON and MCKEE, JJ., dissenting.

Commissioners' decision.

In bank. Appeal from superior court, San Francisco.

E. S. Lippitt, for appellant. *York & Whitworth*, for respondent.

BELCHER, C. C. This is an action to recover damages for the breach of a contract alleged to have been made on the twenty-fourth day of November, 1882, for the sale and delivery to plaintiff of 97 bales of hops, weighing 14,596 pounds, at the price of 80 cents per pound. The case was tried before a jury, and a verdict was returned in favor of plaintiff for $2,189.40, on which judgment was entered. The defendant moved for a new trial, and the plaintiff was required by the court to remit from his judgment $729.40, and, having done so, the motion was denied. The defendant then appealed from the judgment and order.

When the alleged contract was made, the defendant resided and had his hops in Sonoma county. The contract was made through the agency of his son, and a broker in the city of San Francisco. It is claimed for the appellant that neither the son nor the broker had any authority to sell the hops for less than 90 cents per pound, and the contract was therefore made without any authority, and was void. On the other hand, it is claimed, and we think there was testimony tending to show, that the contract was ratified by the defendant after he had knowledge of it. We cannot, therefore, reverse the judgment on the ground that the verdict was not justified by the evidence.

It is further claimed for the appellant that the court erred in giving and refusing instructions to the jury. After carefully looking at the instructions we are unable to see that any substantial error was committed in this respect. The instructions given by the court of its own motion and at the request of the parties seem to cover all the points involved, and to fully, fairly, and correctly state the law of the case.

But we are unable to see why, when the court below was requiring the plaintiff to remit from his judgment an amount equal to five cents for each pound of the hops, it did not make the amount equal to ten cents. It appears from the evidence that a few hours after the contract of sale was made the son went back to the broker's office, and told the broker that "he had sold too cheap," and that he wished to have the contract canceled. The son and broker then went to the plaintiff's office, and asked him to cancel the contract. The plaintiff declined, and, according to his testimony, the following conversation was had: "I told him I could not cancel, as hops were going up. He said his father was interested in the hops, and that his father had been offered 90 cents at Petaluma, and he had been offered 90 cents here after he had sold them. I told him I had been offered 90 cents per pound for them since I bought them, but that I would cancel the contract for 5 cents per pound. He wanted it left open until he could go and consult with his father to see whether he wanted to pay the difference—5 cents—or deliver. I told him I would leave

it open till 12 o'clock the next day,—a Saturday. He said he would go home and consult his father, and would telegraph me what he wanted to do. The next morning he telegraphed me that he would keep the hops. The telegram marked 'F' is the one I received. It was received on the 25th, the day it was sent, before 12 o'clock M., according to agreement."

The telegram referred to was signed by the son, and in the following words: "Will keep hops and pay difference."

The plaintiff further testified that he afterwards met the defendant, and that, after stating to him in detail the facts of the case, the defendant said: "Well, we went, and we consulted a lawyer, and we telegraphed you that we would pay that." From this it appears that the plaintiff agreed in advance to accept five cents per pound as the measure of his damages in case of the non-delivery of the hops. This being so, why should he now be permitted to exact more?

Upon the question of what was the real damage sustained by the plaintiff, the evidence was very conflicting; some of the witnesses making it even less than the amount thus agreed upon. Under the circumstances, we think the damages still given by the judgment excessive, and that the judgment and order should be reversed, and the cause remanded for a new trial, unless within 30 days the plaintiff shall file with the clerk of this court a release of all the damages recovered over and above the sum of $729.80, and that upon his filing such release the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial, unless within 30 days plaintiff shall file with the clerk of this court a release of all damages recovered over and above the sum of $729.80; and upon his filing such release the judgment and order will stand affirmed.

We dissent: THORNTON, J.; MCKEE, J.

71 Cal. 493

GRUELL v. SPOONER. (No. 9,682.)

(*Supreme Court of California.* December 31, 1886.)

1. EJECTMENT—OUSTER, WHAT IS.
 Where, when plaintiff is in possession of land, defendant erects a house on the land, and incloses it all but a few acres, on which plaintiff's house stands, and assumes and exercises control over it, there is a sufficient ouster to enable plaintiff to bring an action of ejectment on the ground of prior possession.
2. APPEAL—DISMISSAL—TIME.
 An appeal to the supreme court of California, not taken within a year after the judgment appealed from, will be dismissed.
3. SAME—NOTICE—DESCRIPTION OF ORDER.
 A notice of appeal, with caption, showing title of court and cause, which specifies the date of the order, and of the filing thereof, but does not mention the nature of the order made, is sufficient to inform respondent what order is appealed from, where no other order is entered on that day.

Department 2. Appeal from superior court, San Luis Obispo county.

Action of ejectment. Judgment for plaintiff. Defendant appeals.

F. Adams and *V. A. Gregg*, for appellant. *Graves, Turner & Graves*, for respondent.

THORNTON, J. The appeal from the judgment was not taken within a year after the entry of the judgment, and must be dismissed.

The notice of appeal described the order appealed from as one made and entered on June 2, 1884. The order denying a new trial was entered on that

day, and it does not appear that any other order was on that day entered. The order was so described in the notice of appeal as to inform the respondent that it was appealed from. The appeal cannot be dismissed for the reason, as contended, that the order appealed from was not sufficiently designated and described in the notice.

The action is ejectment, and plaintiff recovered on the ground of prior possession. The evidence seems to be sufficient to sustain the finding to that effect.

It is said there is no proof of ouster; but the evidence shows that defendant erected a house on the land, and inclosed it, except a few acres on which plaintiff's house stands, and was assuming and exercising control over it. This was evidence of a withholding which is sufficient to sustain the action. *Payne* v. *Treadwell*, 16 Cal. 223. Where the defendant claims and exercises control over the land, the plaintiff can elect to be disseized, and bring his action to recover possession. He is not obliged to enter on the land, which might result in a breach of the peace, or from which he might be turned out for an unlawful and forcible entry, and have to resort to ejectment at last.

The defendant was called as a witness by plaintiff, and, on his cross-examination by his counsel, certain questions were asked him, objected to by counsel for plaintiff, and the objections sustained. The questions were answered at a subsequent stage of the trial, and the defendant sustained no injury for which a reversal should be had, granting that the court erred in sustaining the objections when first made.

Judgment and order are affirmed.

We concur: McKEE, J.; SHARPSTEIN, J.

2 Cal. Unrep. 730

BROWN and others *v.* CENTRAL PAC. R. Co. (No. 11,383.)*

(*Supreme Court of California.* January 3, 1887.)

1. NEGLIGENCE—CONTRIBUTORY—PROXIMATE CAUSE—TRAIN CONDUCTOR.

Where, on the trial of an action for damages against a railroad company brought for the death of a train conductor in defendant's employ, it appears that such conductor was in absolute control of a long freight train; that there were three brakemen who were under him, and whose positions, respectively, were on the front, middle, and rear of the train; that the middle brakeman, when the train was leaving the last station at which it stopped before the accident, was about to go to his position, when he was stopped by the conductor to assist him in checking waybills, and remained in the baggage car after such checking was finished, and until the accident happened, there is evidence of negligence in the conductor; but the verdict for plaintiff may be sustained, where the instructions of the judge are clear, on the theory that the jury considered that the negligence of the conductor did not contribute *proximately* to produce the accident.

2. TRIAL—GENERAL OR SPECIAL VERDICT—OMISSION TO MAKE SPECIAL FINDINGS.

When, on the trial of an action for damages, the jury are instructed that they may return either a general or a special verdict, but, if a general verdict is returned, they must also make written findings on the particular findings of fact submitted to them in writing, and the jury return a general verdict for the plaintiff, without passing on the special facts submitted, which is received and entered by the court without objection by counsel, the defendant cannot object to the verdict, on appeal, as irregular, as the reception and entry of the verdict by the court amounted to a waiver of the request for the special findings.

Commissioners' decision.

In bank. Appeal from superior court, Los Angeles county.

Action for damages against railroad company. Judgment for plaintiffs. Defendant appeals.

Glassell, Smith & Patton, for appellant. *Howard, Brousseau & Howard*, for respondent.

SEARLS, C. This is an action to recover damages by plaintiffs, the widow and children, as heirs, of Gilman George Brown, deceased, for the death of

*Reversed in banc. See 14 Pac. 138, 72 Cal. 523.

the latter, through the alleged negligence of defendant, a railroad corporation. Plaintiffs had a verdict and judgment for $10,000, and costs, from which judgment, and from an order denying a new trial, defendant appeals.

The decedent of plaintiffs was a conductor on the railroad of defendant, and, as such, left Los Angeles on the evening of April 7, 1877, in charge of a mixed train, consisting of over 20 cars, drawn by a locomotive engine in charge of Frank Wilson as engineer. While proceeding on its way, about midnight of the same day, the train, when at or near the foot of a slightly descending grade, broke in two, or parted; the front part with the engine running a considerable distance before the accident was discovered. When discovered, the engineer, in obedience to the signal of the only brakeman left upon the front part of the train, reversed his engine, and backed up, in doing which he collided with the still advancing rear portion of the train, partially wrecking the latter, and killing the conductor, Brown.

The *gravamen* of the charge against defendant, as contained in the complaint, is that, through its negligence, carelessness, and default, it employed, as engineer upon its train, one Frank Wilson, an unsafe, unskillful, untrustworthy, and incompetent person, of whose unskillfulness, untrustworthiness, and incompetency defendant had notice; and that, by reason of the negligence, carelessness, and lack of skill of said engineer, the accident occurred, whereby Brown was killed. The answer denies all negligence on the part of defendant, and avers that the accident and its consequences were due to the negligence of Brown, the deceased conductor, in not having his brakemen at their posts, etc.

Plaintiffs' intestate, as conductor of the train, and Frank Wilson, the engineer, by whose negligence it is claimed Brown was killed, were co-employes in the same general business. It follows that defendant could only be liable for the negligent act of the engineer whereby deceased lost his life, upon the theory that it neglected to use ordinary care in the employment or retention of such engieeer. *Hogan* v. *Central Pac. R. Co.*, 49 Cal. 130.

"An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe." Civil Code, § 1970; *Sweeney* v. *Central Pac. R. Co.*, 57 Cal. 15.

Under the pleadings and evidence in the cause, three propositions were essential to recovery by the plaintiffs: (1) Negligence or the want of ordinary care by defendant in the employment or retention of Frank Wilson as an engineer; (2) negligence of such engineer, whereby Brown was killed; and (3) the absence of concurring negligence on the part of Brown proximately contributing to the injury. There was evidence *pro* and *con* upon each of these propositions.

Upon the first, there was testimony tending to show that Wilson, the engineer, had been for some time addicted to the intemperate use of intoxicating drinks, to such a degree and in so public a manner that defendant's officers whose duty it was to employ, superintend, and discharge engineers, would be likely to know, and should have known, of his habit, and that he had been previously discharged once or twice by defendant on another division on account of intoxication. This was denied by defendant.

As bearing upon the first and second propositions, there was uncontradicted testimony that on the day of the accident Wilson had with him upon his engine a bottle of whisky, from which he and others drank freely; that, when the train had parted, he ran back over the road without sending a flag-man ahead, or sounding his whistle or bell, which was in violation of the rules of the company. There was also testimony to the effect that Wilson was either asleep, or stupid from drink, when the train parted, and had to be aroused by

his fireman, and that in backing up he did so at a dangerous rate of speed. These last facts are contradicted.

Without proceeding to state the testimony, which is quite voluminous, it is sufficient to say there was evidence sufficient to uphold the verdict of the jury, and the cause should not be reversed for want of evidence, or because the verdict was contrary to the evidence.

The only branch of the case which has awakened serious doubts as to the correctness of the verdict is that relating to the contributory negligence of the deceased. He was conductor of the train, and was making his first trip over the road. The night was clear, and the moon shone, but upon the desert tract over which the train was passing the dust obstructed the view to a great extent. The road was composed of not heavy, but of varying and changing, grades. The train was a long and heavy one, and was supplied with three brakemen, one of whom acted also as baggage master. The conductor was master of the train, and, under ordinary circumstances and for all practical purposes, had absolute control over all persons employed thereon.

The position of the brakemen should have been, one in front, one at or near the middle of the train, and the other upon the rear car. The middle brakeman, upon leaving Indio, the last station at which the train stopped before the accident, was about to go to his place, when he was detained by the conductor to assist the latter in calling off and checking way-bills. That office performed, he remained in the baggage car with the conductor, and was lying down upon some mail-sacks when the accident occurred.

Neither the conductor nor brakeman was aware the train had parted. They felt a shock as if from passing over a rough joint, and, although the evidence is not clear upon the point, we suppose the detached portion, consisting of say six cars, slowed down. We infer this from the fact that the conductor asked the brakeman if they were approaching Walters, or "Is this Walters?"—a very natural inquiry for a stranger upon the road on finding the speed of his train checked. He was informed they had not run far enough for Walters. Mr. Brown then rose, looked out the side of the baggage car, and so far as appears saw nothing to indicate trouble. The crash came very soon thereafter.

It would seem to us that the conductor was negligent in not having his crew at their posts, and we can only uphold the verdict upon the theory that the jury, from all the facts presented, and under the very clear instructions of the court upon the point, must have come to the conclusion that the negligence of the conductor did not contribute *proximately* to produce the fatal result. We are not quite satisfied upon the point, but, as before stated, do not feel warranted in setting the verdict aside for this cause.

The giving of the following instruction is assigned as error: "*Second.* If you find from the evidence that the plaintiffs are the widow and children, respectively, of Gilman George Brown; that said Brown met his death in consequence of the negligence of the defendant, through its employe Frank Wilson, without such negligence on his part as to directly contribute to the accident,—then your verdict should be for the plaintiffs, and you should assess their damages at such sum as under all the circumstances of the case may be just; and, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by these plaintiffs in the death of the deceased by being deprived of their support by him; also the relations proved as existing between the plaintiffs and deceased at the time of his death, and the injury, if any, sustained by plaintiffs in the loss of his society."

The instruction simply informs the jury as to their duty in the premises if they shall find that Brown, without contributory negligence on his part, "met his death in consequence of the negligence of the defendant, through its employe Frank Wilson." It does not state, or purport to state, the facts or cir-

cumstances which, under the pleadings and proofs, would constitute negligence on the part of defendant. It speaks of negligence in the abstract, for the apparent purpose of reaching the conclusions flowing therefrom and consequent thereto.

In a criminal case against a defendant charged with murder, there can be no impropriety in charging the jury that, if they find the defendant guilty of murder in the first degree, they may fix the penalty at, etc., although such charge failed to define what constitutes murder. So, in the present case, the instruction under consideration defined the result from a given stand-point. The *data* from which this stand-point was to be determined—its existence or non-existence ascertained—was to be found in the other instructions given, between which and the one indicated there was and is no conflict.

We should be glad to insert at large the instructions given, containing, as we think they do, a clear exposition of the law applicable to the case; but their length precludes us from so doing.

After instructing the jury, the court, at the request of counsel for defendant, submitted to them certain questions of fact in writing, and in reference thereto instructed them as follows: "In this case you, in your discretion, may render a general or a special verdict; but the court instructs you that, if you render a general verdict, you will also find upon the particular questions of fact stated in writing, and herewith submitted to you, and make your written findings thereto." The jury returned a general verdict in favor of plaintiffs, but did not pass upon the special facts submitted.

One of the members of the firm of attorneys who acted in the cause for the defendant was present at the rendition of the verdict, polled the jury, and made no objection to the want of findings upon the special facts, and no notice seems to have been taken of the omission. The attorney so present had not participated in the trial, but consented, on behalf of his law firm, to receive the verdict.

The action being for the recovery of money only, it was discretionary with the jury to find a general or special verdict, subject to the provision that, if they found a general verdict, the court in its discretion might require them to find upon particular questions of fact in addition thereto. Code Civil Proc. § 625. This, as shown above, the court required, but the jury failed to respond. The verdict as rendered was complete, and such as the court was authorized to receive, and the reception and entry of verdict by the court and counsel without objection amounted to a waiver of the request for findings upon the particular questions of fact.

Upon the whole case as presented we are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 535

McDONALD v. HANLON. (No. 11,832.)

(*Supreme Court of California.* January 6, 1887.)

APPEAL—STAY PENDING APPEAL—CODE CIVIL PROC. CAL. § 1176.

By Code Civil Proc. Cal. § 1176, the power of accepting an undertaking, and directing a stay of proceedings, under a judgment, pending an appeal therefrom, is vested exclusively in the court that tried the case, and no appeal lies from its refusal.

In bank. Appeal from superior court, city and county of San Francisco.

Action under Code Civil Proc. Cal. § 1161, for the unlawful detainer of certain premises. Judgment for plaintiff. Defendant appeals, and, pending

the appeal, makes this application to stay proceedings under the judgment.

Joseph Kirk, for appellant. *Thos. E. Curran* and *S. B. McKee, Jr.*, for respondent.

MORRISON, C. J. This is an application for leave to file an undertaking on appeal to stay proceedings in the cause on appeal, and to stay all further proceedings in the superior court of the city and county of San Francisco, wherein said action was pending. The action was brought under section 1161, Code Civil Proc., and a judgment therein duly entered in favor of the plaintiff, from which an appeal is being prosecuted to this court. An application similar to this was made in the superior court, and was denied. It is now renewed in this court, on the same grounds and for like reasons.

Section 1176 of the Code of Civil Procedure provides that "an appeal taken by the defendant shall not stay proceedings upon the judgment, unless the judge or justice before whom the same was rendered so directs." This was an amendment to the Code of March 9, 1880, and it is claimed that the power of accepting an undertaking, and directing a stay of proceedings, is vested thereby in the court that tried the case exclusively. Such seems to have been the understanding of the statute; for, as has been remarked, application for a stay was first made to the court that tried the case. In this interpretation of the statute we agree, and the motion must therefore be denied. So ordered.

We concur: THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.

70 Cal. 534

ALAMEDA MACADAMIZING CO. *v.* WILLIAMS and others. (No. 8,194.)

(*Supreme Court of California.* August 30, 1886.)

1. MUNICIPAL CORPORATIONS—IMPROVEMENT OF STREETS—AUTHORITY TO ORDER.
 Under an act authorizing a city council to order the whole or any portion of the street macadamized, the ordering of the macadamizing and improving of specifically described portions of a single street, which portion included the whole of the street between certain points, except certain portions which had already been improved and macadamized, so as to make the whole improvement uniform, is not in excess of the authority of the board.
2. SAME—DEMAND OF ASSESSMENT—UNKNOWN OWNERS—PERSONAL DEMAND A NULLITY.
 Where, in cases of local improvements, the statute provides but one mode of making a demand, when the property is assessed to "unknown owners," and that is by demand on the premises, the courts cannot substitute another therefor, and a personal demand is a nullity.
3. SAME—DEMAND IN HEARING OF PREMISES NOT A DEMAND ON THEM.
 A demand near to or in the hearing of the premises does not satisfy the requirements of a statute providing for a public demand on the premises.
4. APPEAL—FINDING SUPPORTING JUDGMENT PRESUMED.
 When evidence is introduced on a certain point, in the absence of a showing to the contrary, and of written findings, it will be presumed that the court's finding supported the judgment.
5. DEED—BOUNDARIES—SIDE LINE OF STREET.
 Land expressly described as being bounded by a side line of a street is so bounded, and not by the center line of the street.[1]

Commissioners' decision.

In bank. Appeal from superior court, Alameda county.

George W. Gordon, for appellant. *James C. Martin*, for respondents.

SEARLS, C. This action was brought to foreclose a lien on block 52, East Fourteenth street, Oakland, based upon a street assessment made by the municipal authorities of the city of Oakland. Plaintiff had judgment, from which, and from an order denying a new trial, defendant Williams appeals.

The first point made by appellant is that the council exceeded its jurisdic-

[1] See note at end of case.

tion in attempting to let the work of macadamizing several separate and distinct portions of Fourteenth street in one contract. The jurisdiction of the municipal corporation to improve the street is contained in the Statutes of 1863–64, p. 333, and in 1869–70, p. 443. Section 2 of the latter act is in these words: "The city council are hereby authorized and empowered to order the whole or any portion of the streets, lanes, alleys, * * * macadamized," etc.; including the power to grade, construct culverts, curbing, cross-walks, etc.

The resolution of intention to do the work as adopted by the city council, September 17, 1877, described the portion of East Fourteenth street to be macadamized as follows: "From the easterly line of First avenue to the westerly line of Fifteenth avenue," except certain portions which are specified, "all of which has already been macadamized to the official grade." The two acts above referred to confer upon the municipal authorities of the city of Oakland ample authority to open and improve the public streets of that city, in all the various modes by which those objects are usually attained, and they might improve "*the whole or any portion* of the streets." The improvements to be made in this instance were confined to a single street, and included the whole surface thereof between certain terminal points, except certain portions which had already been improved and macadamized, and which portions were specifically described. There is no question but the city council clearly designated the portions of the street to be improved, and the character of the improvements to be made. Under such circumstances, we are of opinion the authority of the board was not exceeded by ordering the portions of the same street not yet improved to be macadamized so as to render it uniform with the portions already improved in that respect.

2. The court did not err in excluding the written protest offered in evidence. The *proposed work* was the macadamizing *certain portions* of East Fourteenth street, designating them; the construction of certain culverts and cross-walks, describing them, and their location, etc. The protest was "against the macadamizing of said East Fourteenth street, between the points named" as terminals, and did not relate to the cross-walks and culverts to be constructed, was not restricted to the portions to be macadamized, and professed to be made, not by the owners of property upon the portions of the street to be improved, but by property-owners on the line of East Fourteenth street, between First and Fifteenth avenues, *non constat* but that the protestants may have all been the owners of property upon the portions of the street already improved, and excepted from the work to be done. We may, however, waive these objections to the protest as technical; for it appears from the record that the issue was made by the pleadings as to whether a majority of the property-owners on the line of the street did in fact protest. At the trial the names of protestants and the number of front feet owned by each on the line of the work, were admitted, and we must presume, in the absence of written findings, that the finding on this issue was in favor of the plaintiff, who had judgment; and, as the admission of the plaintiff afforded defendant the benefit of the testimony which the protest would have furnished, he cannot complain.

3. Plaintiff introduced in evidence a book labeled "Book F, Street Assessment, Oakland," which defendant admitted was the proper street assessment book of the city of Oakland, in which the assessment mentioned in the complaint should have been recorded. Plaintiff's counsel then read therefrom the contract between the city marshal, as street superintendent, and the plaintiff herein, for the performance of the street improvements upon which the action is based; and, secondly, the record of the assessment, dated, "OAKLAND, June 4, 1878," signed by "J. R. CUTTING, Marshal City of Oakland," the diagram signed and dated in like manner, and the warrant attached thereto, authorizing and empowering the plaintiff to demand and receive the several

assessments upon the assessment and diagram thereto attached, which warrant was of like date, and signed by the marshal as in case of the assessment and diagram, and duly countersigned by the mayor. The record is verified as follows: "Recorded June 4, 1878. J. R. CUTTING, City Marshal of the City of Oakland." Then follows the contractor's return, showing a demand, and recorded and certified, as in case of the other record, on the sixth of July, 1878.

The defendant on his part introduced evidence tending to show that on the sixth day of July, 1878, the name of J. R. Cutting was not at the end or bottom of the assessment; that the recollection of the witness (D. H. Whittemore) was that it was not at the end of the diagram, but of that fact the witness was not certain; that his impression was the warrant was signed and countersigned.

We do not find in the record of this cause any objection on the part of defendant to the introduction of this testimony. The statement of the defendant in his specification of errors upon which he would rely on his motion for a new trial, (transcript, folio 205,) to the effect that he objected to the testimony and excepted to the decision admitting it in evidence, cannot be received as a properly authenticated exception. This is but his specification of an alleged error, and which, upon turning to the statement, proves to be without foundation. We do not understand that the judge who settles and certifies to the correctness of a statement on motion for a new trial thereby gives validity to the statement of fact in the specifications of error. The specification of errors is essential to a statement, but its office under section 659 of the Code of Civil Procedure is to call attention to the precise ground relied upon, and not to fortify the alleged error by a statement of facts in its support. The specifications may be amended after the time has expired for preparing and settling the statement on motion for a new trial. *Low* v. *McCallan*, 64 Cal. 2.

But waiving this question entirely, and we fail to find any error in the action of the court admitting the record of the assessment diagram, warrant, and return. Section 18 of the act of April 4, 1864, (St. 1863–64,) provides that "the records kept by the marshal of said city, [Oakland] in conformity with the provisions of this act, and signed by him, shall have the same force and effect as other public records, and copies therefrom, duly certified, may be used in evidence with the same effect as the originals." As a public record, the evidence offered being fair on its face and signed by the marshal, was proper to be admitted in evidence. So, too, the certificate of record signed by the marshal was sufficient to authenticate it as a record. The finding of the court below being in favor of plaintiff, and the court having the record before it, with all the evidence on the subject, we do not feel at liberty to disturb the result for this cause.

4. The several lots of land of the defendant were assessed to unknown owners, and the plaintiff herein, after receiving the assessment diagram and warrant, caused payment to be demanded of defendant as follows: *First*, by a demand upon the defendant personally; *second*, by a demand made upon each and every of the assessed lots, by standing on the sidewalk in front of and close to the fence bounding such lots, but not actually upon them, (unless such lots extended to the middle of the street,) and there make a demand in an audible voice.

The statute of April 4, 1864, (St. 1863–64, p. 338,) provides that the contractor or his agents or assigns shall call upon the persons assessed, if they can be found, and demand payment; but whenever they cannot be found, "or whenever the name of the owner of the property is stated as 'unknown' in the assessment, then the said contractor, or his agent or assigns, shall publicly demand payment on the premises assessed." The street seems, from the record, to have been filled in front of the lots of the defendant, so that

they, or a part of them at least, were in a hollow, and, so far as appears, such lots were unoccupied.

The questions presented are: *First*, did the lots in question extend to the middle of the street, so that the demand was in fact made by a person standing upon them? and, if not, then, *second*, was the demand so made, contiguous to the premises, and capable of being heard thereon, but by a person not actually standing upon the land, a sufficient compliance with the requirements of the statute?

Section 831 of the Civil Code is as follows: *First*, "an owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown;" and by section 1112 of the same Code it is provided that "a transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." The conveyance under which defendant holds the property is not before us. The contention of appellant is that the assessment and diagram show that the line of the lots runs along the margin of the street, *and not into it.* The assessment describes the property as "fronting upon East Fourteenth street, in said city," etc., and the diagram attached thereto, and to which reference is made, simply shows the lots on each side of the street and the several cross-streets. Were these the only sources from which to arrive at a conclusion, we should doubt their sufficiency to overcome the presumption of the Code; but, turning to the complaint, we find a specific description of defendant's several parcels of land, from which it appears that the margin or line of the street is the boundary of the land.

In *Severy* v. *Central Pac. R. Co.*, 51 Cal. 194, it was held that where a deed described the conveyed premises as running "thence along the easterly line of Sacramento street, one hundred and fifty feet," and no other language was employed to modify or affect this description, the eastern line and not the middle of Sacramento street was the boundary. *Maynard* v. *Weeks*, 41 Vt. 617; *Tyler* v. *Hammond*, 11 Pick. 193; *O'Linda* v. *Lothrop*, 21 Pick. 295. Land described in a deed as bounded by a street will be considered as bounded by the center of the street, unless it clearly appears that it was intended to make the side line of the street as a boundary instead of the center. *Moody* v. *Palmer*, 50 Cal. 31.

In the present case it does clearly appear from the complaint that the side line of the street is the boundary. To illustrate: In assessment No. 272 the land assessed is described as follows: "Commencing at the point of intersection of the westerly line of Second avenue with the northerly line of East Fourteenth street; running thence, westerly, along said line of East Fourteenth street, 145 feet; thence, at right angles, 140 feet; thence, at right angles, easterly, 145 feet, to the said line of Second avenue; thence southerly, along said line of Second avenue, 140 feet, to the point of commencement." With such a description, we hold the presumption that the lot runs to the center of East Fourteenth street and Second avenue is rebutted. There are four parcels of land described, all in like terms, and hence the conclusion is the same as to all the parcels.

As to the sufficiency of the demand made by a person not actually upon the premises. It is proper to say, before discussing this last question, that the demand made upon defendant personally was without authority of law. The statute provides but one mode of making a demand in cases where, as in the present, the property is assessed to "unknown owners," and that is by a demand upon the premises. It matters not that other methods may be as efficacious as the one provided. The law-makers have prescribed a method, and the courts are not at liberty to adopt a substitute therefor. This preliminary question disposed of, it only remains to determine the legality of the demand upon the premises made as hereinbefore stated.

The language of the statute is as follows: "Whenever the name of the owner of the lot is stated as 'unknown' in the assessment, then the said contractor, or his agent or assigns, shall publicly demand payment on the premises assessed." The contention of the respondent is that, if the person making the demand is in such close proximity to the premises that his voice can be heard thereon, all the objects of a demand are attained, and that a physical, corporeal contact with the premises by the person making the demand can add nothing to its efficiency, and such seems to have been the view of the court below. So far as the present case is concerned, at least, this view seems plausible. We must, however, give to this provision of the statute an interpretation alike applicable to all cases arising under it. If the demand may be legally made by one not actually upon the premises, then how far from such premises may he remain, and the demand still be held good? If it be answered that it may be made at any distance, provided the voice can be distinctly heard upon the premises, the response must be that the effect of this rule will tend to substitute the opinion of the person making the demand, as to whether he could be heard, for an essential fact in the case, and will tend to open a door for fraud. Premises of this character in a city will usually have an occupant, or some person in charge, to whom the presence of a person upon them in the attitude of an apparent trespasser will, in itself, many times attract attention, and cause the demand to be heard. Many reasons more or less cogent might be urged why the law-makers required a demand to be made upon the premises to be charged, but it is sufficient to say that the statute so requires, and that, in our opinion, by the term "on the premises" the law-makers meant, "by a person on the premises."

This provision seems to have been taken from the rule of the common law in relation to the demand of rent before entry or ejectment, where, in order to claim a forfeiture, it was held that, in the absence of an agreement to the contrary, a demand must be made "upon the land, and at the most notorious place of it;" and such demand, it is said, must be made, although there be no person present to answer; and, as the tenant had the whole day upon which the rent fell due to make payment, the landlord or his agent, to complete the forfeiture, must not "only make the demand at the proper time and place, but must *remain upon the land* and continue the demand, actually or constructively, until after sunset." Wood, Landl. & Ten. § 452. And it was even held that a personal demand made off the land was not sufficient to work a forfeiture of a lease. The land was regarded as the debtor, and to create a forfeiture for non-payment of rent, the demand must be made upon it. So, in the present case, the land is charged with the payment of the assessment; and, where the owner is designated as "unknown," the statute is imperative in requiring the demand to be made *publicly on the premises*, and a demand made near to, in the neighborhood of, or within hearing of, the premises does not satisfy the requirements of the statute.

It follows that the demand, as made, was insufficient, and the judgment of the court below, and the order denying a new trial, should be reversed, and a new trial had.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

NOTE.

A deed bounding land by the side of a road conveys no title to land within the center of the highway. Holmes v. Turner's Falls Co., (Mass.) 8 N. E. Rep. 646.

As to the construction of deeds in which land is described as bounded by a highway, see Watkins v. Lynch, (Cal.) 11 Pac. Rep. 808; O'Brien v. King, (N. J.) 7 Atl. Rep. 34;

Kohler v. Kleppinger, (Pa.) 5 Atl. Rep. 746, and note; Cleveland v. Obenchain, (Ind.) 8 N. E. Rep. 625; Chadwick v. Davis, (Mass.) 8 N. E. Rep. 601; Gaylord v. King, Id. 596.

71 Cal. 504

FITZGERALD *v.* FERNANDEZ and others. (No. 9,620.)

(*Supreme Court of California.* December 31, 1886.)

1. HOMESTEAD—TENANT IN COMMON—EXCLUSIVE POSSESSION—CALIFORNIA ACT OF MARCH 9, 1868.

 When a person is entitled to a homestead, the California act of March 9, 1868, § 1, gives him one in a tract of which he has exclusive occupation, and which he duly incloses, selects, records, and resides on as such, although he has only an undivided interest therein. *Held*, that a tenant in common or joint tenant, having an undivided interest less than the whole, who, with his family, entered into actual possession of a part in the name of the whole, but did not inclose the same, acquired no homestead under this act.[1]

2. SAME—CALIFORNIA ACT OF MARCH 9, 1868—APPLICATION TO PREVIOUSLY RECORDED HOMESTEAD.

 The second section of the act says: "This act shall apply to all homesteads heretofore recorded under the laws of this state, as well as those that may hereafter be acquired." *Held* not to validate homesteads previously recorded on lands held in joint tenancy, or in tenancy in common, unless the first section was complied with.

3. SAME—FORECLOSURE OF MORTGAGE GIVEN BY HUSBAND ALONE—WIFE A PARTY—BOUND ON DEFAULT BY JUDGMENT.

 In an action to foreclose a mortgage executed by a husband on lands claimed by his wife to be a homestead, she is a proper party; and if, after being duly served, she does not appear, but is represented by her husband's attorney, without her knowledge and consent, a judgment against her is binding, unless she can show a valid cause for her failure to appear.

Commissioners' decision.

Department 2. Appeal from superior court, Contra Costa county.

A. H. Griffith, for appellant. *Eli Chase*, *W. S. Tinning*, and *Theodore Wagner*, for respondents.

SEARLS, C. This is an action to set aside and annul a decree of foreclosure against the plaintiff herein, to vacate an order of sale issued under such decree, and to enjoin D. P. Mahan, the sheriff of Contra Costa county, and Ber-

[1] As to the title and occupation to support a homestead claim and declaration, see King v. Goetz, (Cal.) 11 Pac. Rep. 656, and note; Bothell v. Sweet, (N. H.) 6 Atl. Rep. 646.

nardo Fernandez, the other defendant, from making a sale of the mortgaged premises, or from enforcing the judgment of foreclosure, upon the ground that the mortgaged property is the homestead of plaintiff. Defendants had judgment, from which, and from an order denying a new trial, the appeal is prosecuted by the plaintiff. There is no statement or bill of exceptions, and the case is presented on the judgment roll.

Two principal questions are involved in the appeal—*First*, were the premises in question the homestead of plaintiff and her husband at the date of the execution of a mortgage thereon (September 25, 1873) by the latter to defendant Fernandez? *Second*, was the plaintiff concluded, and her right to a homestead, if any she had, foreclosed, by the decree of May 6, 1880, rendered in an action to foreclose the mortgage of September 25, 1873, in which action plaintiff was a party defendant, was served with a summons, and was represented by an attorney, who answered for her, but who was employed by her husband without her knowledge or authorization?

The facts essential to an understanding of the first proposition, as gleaned from the findings, are as follows: John Fitzgerald and plaintiff were husband and wife. On the second day of December, 1860, the former purchased from tenants in common or joint tenants, who owned undivided interests therein, less than the whole, their interest in and to the premises in question, and with his family, including the plaintiff, entered into the actual possession of a part, in the name of the whole, of the premises so purchased, and has ever since resided thereon. On the tenth day of November, 1865, John Fitzgerald filed, and caused to be recorded in due and regular form, a declaration of homestead on said premises. The land was not in the exclusive occupation of John Fitzgerald, and was not fully inclosed prior to 1869 or 1870, and was and still is owned by said Fitzgerald and others as tenants in common. On the twenty-fifth day of September, 1873, John Fitzgerald executed a mortgage on the premises to defendant Bernardo Fernandez, to secure the payment of $1,500, and interest, payable on demand.

Was the lien of this mortgage superior to the homestead claim? Prior to the act of March 9, 1868, (St. 1868, p. 116,) a homestead could not be carved out of land held by one in joint tenancy, or as a tenant in common. *Wolf* v. *Fleischacker*, 5 Cal. 244; *Reynolds* v. *Pixley*, 6 Cal. 165; *Giblin* v. *Jordan*, Id. 417; *Kellersberger* v. *Kopp*, Id. 564; *Bishop* v. *Hubbard*, 23 Cal. 517; *Elias* v. *Verdugo*, 27 Cal. 419; *Seaton* v. *Son*, 32 Cal. 483.

The act of March 9, 1868, *supra*, under which appellant claims her homestead became valid, is as follows:

"Section 1. Whenever any party entitled to a homestead under the laws of this state shall be in exclusive occupation of any parcel or tract of land, having the same inclosed, and shall select and record and reside upon the same as a homestead, such party so selecting and claiming shall be entitled to such homestead, and to all the rights and exemptions provided by the general law relating to homesteads, to the extent of such claimant's interest in such homestead property, although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest therein.

"Sec. 2. This act shall apply to all homesteads heretofore recorded under the laws of this state, as well as those that may hereafter be acquired."

As will be seen, the first section of this act gives to joint tenants or tenants in common, *who shall be in the exclusive occupation of land, having the same inclosed*, the right to select and record the same as a homestead; and the second section applies the act to homesteads theretofore recorded under the laws of the state, as well as to those subsequently recorded. John Fitzgerald was not in the exclusive occupation of the land upon which he sought to impress the homestead character, and did not have it inclosed. He did not, therefore, by virtue of the act, become entitled to a homestead in the premises. The contention of appellant that, by virtue of the second section, homesteads pre-

viously recorded upon lands held in joint tenancy, or in tenancy in common, were validated without reference to compliance with the provisions of the first section, cannot be maintained. The language of the second section is not that such second action applies, but that "this act shall apply to all homesteads heretofore recorded," etc. As the act, taken together, only gives the homestead right in such cases to those in the exclusive occupation of the land, and having it inclosed, plaintiff and her husband were wanting in an essential element requisite to a valid homestead.

The very question now under consideration was involved in *Cameto* v. *Dupuy*, 47 Cal. 79, in which a homestead had been declared in 1864, and this court held (1) that the homestead of 1864 was not valid, for the reason that the premises were then held in joint tenancy; (2) that the defect was not cured by the act of 1868, (St. 1867-68, p. 116,) for the reason that such last-mentioned act only provides for the acquisition of such right in lands held in joint tenancy, or tenancy in common, where the person filling the declaration is in the exclusive occupation of the tract sought to be dedicated as a homestead.

It follows that the premises in question were not impressed with the homestead character, and the court below did not err in its conclusion.

The conclusion reached renders an inquiry into the second proposition involved unnecessary to a disposition of the appeal. We may, however, say: (1) That where a mortgage is executed by the husband alone, upon property claimed by husband and wife as a homestead, the latter is a proper party defendant in an action to foreclose. *Maybury* v. *Ruiz*, 58 Cal. 11. (2) Where, as in this case, an action against husband and wife is brought to foreclose a mortgage, and process is served upon both, whereby the court acquires jurisdiction of the person of the wife as well as of the subject-matter, a decree of foreclosure entered therein is not void because the wife did not appear, but was represented by an attorney employed by the husband without her knowledge or consent, who appeared and answered for her. (3) In such a case, if there had been no appearance for her, the plaintiff would have been entitled to a default and decree against her, and his position should not be held worse by an appearance with which he had no connection. (4) As her complaint in this case fails to show any excuse or cause why she did not appear, or why she did not apply to the court in which the action to foreclose was pending for leave to defend, the court below properly held the decree of foreclosure valid and binding upon her, and a bar to her present cause of action.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 682

COOK *v.* ROCHFORD. (No. 11,134.)

(*Supreme Court of California.* August 23, 1886.)

SALE—DELIVERY—ATTACHING CREDITORS.

In an action against a sheriff for the recovery of property attached by him as that of one C., where it is claimed that C. sold the property to plaintiff before the attachment, testimony of plaintiff and C. to the effect that on a day named prior to the attachment C. sold the property to plaintiff, taking his promissory note in payment, and gave him a bill of sale of the property, viz., saloon furniture and stock; that C. delivered to plaintiff the keys of the safe and the saloon, took his account-book, and left, and has had nothing to do with the business since, and that plaintiff has continued to own the property, and carry on the business, up to the time of the levy of the attachment; that there was but one advertisement in any paper authorized by C., and that was changed on the day of the sale by the insertion of plaintiff's name in the place of that of C.; that the advertisements that appeared in various other papers were not changed; that the sale was made in good faith; that the plaintiff was C.'s bar-tender at the time of the sale, and the business was conducted after the transfer just as it had been before, plaintiff continuing to tend bar: *held*, insufficient evidence of an immediate delivery and continued change of possession of the property in controversy.[1]

Department 1. Appeal from superior court, Modoc county.

Replevin.

The complaint in this action alleges that the defendant is sheriff of Modoc county, California; that on the first July, 1884, at Alturas, Modoc county, California, plaintiff was the owner and in the exclusive possession of certain saloon furniture, fixtures, and stock set out in the complaint; that the value of such goods was $1,109.75; that the defendant, as such sheriff, on the first July, 1884, without the consent of plaintiff, took such goods from the plaintiff's possession; that before the commencement of this action, on July 2, 1884, plaintiff demanded of defendant possession and return to him of such goods, which defendant refused, and still refuses, to do. Defendant's answer denies that plaintiff was the owner or in possession of the property; denies any damage to plaintiff; alleges that he, as sheriff of Modoc county, on July 1, 1884, levied upon and attached the property described in the complaint under process of court issued in the case of *Sykes & Co.* against *Whiting & Culver;* that the goods were the property of J. B. Culver, of the firm of Whiting & Culver; that any claim of title of plaintiff thereto, based upon any contract with said Culver, is fraudulent and void. There was a verdict and judgment for plaintiff. Motion for new trial by defendant denied by the court. Defendant appeals from the judgment, and from the order denying the motion for a new trial.

The testimony offered on behalf of plaintiff and defendant, respectively, is as follows:

W. D. Cook, having been duly sworn, testified as follows:

"I am the plaintiff. I am an unmarried man. I am twenty-four years of age. Have resided in the town of Alturas, in this county, for the past eighteen months. I had been laboring as a bar-keeper in the Branch saloon, in this town, during my residence here, up to about the twentieth day of November, 1883. Shortly after this I began laboring for John B. Culver, as bar-keeper in the Delta saloon, in this town, and continued so to labor for him until the twenty-sixth day of June, 1884, when I purchased of Culver all the property described in the complaint, and then took of him a written bill of sale therefor. Culver first proposed a sale to me of the property about the first of June, when I took the matter under advisement, and on the day we traded I approached him, and asked him if he was still willing to sell upon the terms he had offered. He answered that he was, and we closed the trade. No one was present at the sale other than Culver and myself. It was made

[1]See note at end of case.

at the saloon. The articles or property was not inventoried, nor in anywise examined or listed; but a lumping was made. I knew what there was in the saloon. Culver, a few hours after the sale, gave me a bill of sale, then took his account-books, and left. The purchase price was $1,183. I had no property nor money whatever at the time I made the purchase. I bought the property on credit. I gave my individual, unsecured promissory notes to Culver for the purchase money in part, and assumed, as between Culver and myself, only the payment of certain debts of Culver for the balance. I knew at the time of making the purchase that Culver was indebted to some parties in San Francisco for some of the stock on hand, but did not then know that he was indebted to E. Sikes & Co.

"As I have said, I assumed the payment of certain debts of Culver in San Francisco. I did not, in writing or otherwise, agree with Culver's creditors to pay these debts, but merely so contracted with Culver. Since this action was begun I have paid those debts so assumed, and also paid about all I owe Culver on the promissory notes. I made the purchase in good faith. I could make no money keeping bar, and I thought I could do no worse running the saloon on my own responsibility, was the reason I made the purchase. I did not know at the time I made the purchase that F. W. Ewing, attorney for E. Sikes & Co., was then endeavoring to collect their claim against Culver. Culver said nothing to me about it. The defendant, as sheriff, on the first day of July, 1884, levied upon and attached all of the property described in my complaint, and then took the same into his official custody, and so kept and detained the same continuously until the twenty-first day of that month. His taking was by virtue of a writ of attachment in the action then pending in the superior court of this county in favor of E. Sikes & Co. and against John B. Culver. At the time of the sale, nor at any other time thereafter, until attached, was anything done with reference to the property in controversy that would evidence to a person that there had been a change of ownership or possession thereof. The bar fixtures, and everything in the saloon, remained just the same, and I continued to tend the bar just the same as I had while laboring for Culver. On the same day that I purchased the property I went to the office of the Northern Picket, a weekly newspaper published in town, and ordered Culver's name removed and my own inserted in the advertisement as the proprietor of the Delta saloon, which was done, and have had the advertisement in that paper ever since. Culver did not stop there after the sale, but would come around, and be in the saloon; but he and I were in the saloon, sitting there, when the defendant came in to make the attachment. Culver then told the sheriff that he had sold out to me, but I did not say anything about it. I did not then, nor have I ever, shown him my bill of sale. I assisted the sheriff in making the inventory of the property. I did not make any demand upon the sheriff for the return of the property until the next day. The property in controversy was, at all times alleged, worth $1,109.75. I have been damaged $100 by defendant's keeping the said property from the time it was attached until the twenty-first July, 1884. After I had made the purchase, and immediately thereafter, Culver gave me possession by handing me the keys of the door and safe, and, with a wave of his hand, said, 'There is the property,' or words of similar import. Culver then took his account-book and left, and has never had anything to do with it since, and from that time has had no interest in it, one way or another."

John B. Culver, sworn on behalf of plaintiff, testified as follows: "When I made a sale of the property in controversy to plaintiff I was indebted to E. Sikes & Co., of San Francisco, to the amount of $350. I never have paid their claim, but I expect to as soon as I get able. I made the sale to Cook in good faith, and without any intention of defrauding E. Sikes & Co. The saloon building, and which I had rented, has been long known as the 'Delta Saloon,' and so advertised in various local newspapers, with myself as pro-

prietor. There was but one of these advertisements, to-wit, the one in the Northern Picket, that was authorized by me. This advertisement was discontinued by me on the day of the sale. I have done nothing with reference to the other advertisements. At the time of the sale, nor at any time subsequently that I know of, was anything done to evidence the change of the possession of the property, other than that I took my accounts, and left the saloon, and gave plaintiff the keys thereto. When the sheriff made the attachment I told him the property belonged to Cook; that I had sold it to him five days before; and afterwards Mr. Cook told him the same."

C. C. Rochford, being sworn, testified as follows: "I am the defendant herein. I attached the property in controversy in the Delta saloon, in this town, on the first day of July, 1884. The plaintiff and John B. Culver were both in the saloon when I went into and when I did make the attachment. I had been well acquainted with Culver and Cook when Culver was proprietor of the saloon and Cook his bar-tender; had been in the saloon very frequently during that time. When I made the attachment of the property in controversy I did not see or know anything that evidenced a change of possession or ownership thereof, excepting only that Culver told me, while making the levy, that he had sold to Cook. Cook did not say a word about it, but assisted me in making the levy. He did not claim the property until the next day. I placed a keeper in possession of the saloon, and, at plaintiff's request, conducted the business, selling for cash only; all receipts of which were turned over to plaintiff on July 21, 1884, when he gave a bond for the return of the property. After plaintiff demanded a return of the property, E. Sikes & Co. indemnified me by their attorney giving me his word that I should be saved from all expense for damages in the premises if I would hold the property, but no writing of indemnity was given me, nor have I any now."

J. S. Whiting was duly sworn on behalf of the defendant, whereupon defendant offered to prove by this witness that E. Sikes & Co., by their attorney, had presented and were pressing Culver for the payment of their claim on the day before the sale from Culver to Cook, and that Culver replied, asking for an extension of time for a few days, that he might hear from E. Sikes & Co.; to which plaintiff objected on the ground that such testimony would be incompetent, irrelevant, and immaterial. The court sustained the objection, and the defendant excepted.

J. J. May, for plaintiff and respondent. *Ewing & Claflin*, for defendant and appellant.

By the Court. The court below should have granted a new trial. The evidence was insufficient to show that there was an immediate delivery and continued change of possession of the property in controversy.

Judgment and order reversed, and cause remanded for a new trial.

NOTE.

As to what is a sufficient change of possession to overcome the presumption of fraud, see Bailey v. Johnson, (Colo.) 12 Pac. Rep. 209; Ross v. Sedgwick, (Cal.) 10 Pac. Rep. 400; Cessna v. Nimmick, (Pa.) 4 Atl. Rep. 193; for circumstances held sufficient to justify the submission of the question to the jury, see Tuckwood v. Hawthorn, (Wis.) 30 N. W. Rep. 705; what is insufficient, see Comaita v. Kyle, (Nev.) 5 Pac. Rep. 666; Seavey v. Walker, (Ind.) 9 N. E. Rep. 347.

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Duff and another *v.* Duff and another. (No. 9,681.)

(*Supreme Court of California.* December 31, 1886.)

1. New Trial — Motion — Practice as to Time — When Trial Closed — Findings by Jury and Judge — Exceptions on Appeal.

An action was brought in February, 1881, to have defendants adjudged trustees for plaintiffs of real estate alleged to have been fraudulently and collusively conveyed to them, and for an accounting and the appointment of a receiver. Certain special ques-

tions or issues were submitted to a jury for the court's advisement, which, in September, 1881, responded to the same by a verdict. In November, 1881, defendant moved to set aside this verdict, on grounds of error in giving and refusing instructions, and insufficiency of evidence to support certain of the findings. No statement or bill of exceptions was made on this motion, which was denied on the ground that the court would reserve its decisions on these findings till the conclusion of the trial. In February, 1883, the court filed a series of findings, followed by an interlocutory judgment filed in July, 1883, adjudging certain trusts in favor of plaintiffs, and directing defendants to account for rents and profits. The court itself took and stated the amount, and filed findings thereon on January 31, 1884, and gave final judgment on February 1, 1884. No notice was given defendants of the filing of the final findings of the court on January 31, 1884. On February 11, 1884, defendants filed and served notice of intention to move for a new trial, on the grounds of the insufficiency of the evidence to justify the findings of the jury, and the findings of facts and decision of the court; that findings of the court were against law and evidence, and of error in law occurring at the trial, and excepted to by the defendants. A bill of exceptions embodying these objections was settled and certified by the court, both parties being present. Defendants' motion for new trial was heard and denied May 10, 1884, and on July 5, 1884, defendants appealed from the interlocutory judgment, from the final judgment, and from the order denying their motion for a new trial. *Held*, the trial did not end till the filing of the findings of the court on January 31, 1884, the notice for new trial was given in time, and the appellants had the right to be heard on the matters stated in their bill of exceptions; following *Hinds* v. *Gage*, 56 Cal. 486.

2. Appeal—Interlocutory Judgment.
No appeal lies from an interlocutory judgment in an action to have a trust declared in real property alleged to have been fraudulently conveyed.

3. Evidence—Admissions—Of Party in Interest—Against Interest—Description in Petition for Letters of Administration.
A statement in a petition for letters of administration, drawn by an attorney instructed to draw a suitable petition, which describes certain real estate by lots and block, or metes and bounds, as belonging to the estate, and signed, "F. S. D., by S. M. B., his Atty.," etc., is not admissible, in a suit against F. S. D., to recover from him lands answering such description, as an admission that said lands belonged to the estate, unless it is shown that such statement was made with his knowledge, direction, or sanction, and not merely under general instruction to draw the petition in which they occur.

4. Same—Statement for Arbitration of Another Matter.
Statements made by defendant, under his signature, for the purpose of submitting to arbitration matters of difference in another action, cannot be used against him as evidence of admissions made by him touching the subject-matter in litigation.

5. Statute of Limitations—Fraud in Relation to Real Estate—Code Civil Proc. Cal. § 338, Subd. 4.
Whether actions for relief, on the ground of fraud, in relation to real property, come within Code Civil Proc. Cal. § 338, subd. 4, as to limitation of actions, *quære;* but if not, they are governed by the same rules, as to limitation, as have been adopted and enforced with regard to such subdivision and section.[1]

6. Equity—Fraud in Relation to Real Estate—Grounds of Relief—Laches.
A complaint in an action for relief on grounds of fraud in relation to real property, which sets forth that plaintiff's husband in 1863 executed a power of attorney to defendant's ancestor, by which he authorized him, *inter alia*, to sell and convey for the constituent the property referred to therein; that, immediately after, he left the state, and never returned; that subsequently, from 1866 to 1872, said attorney conveyed, under the power, certain of the property to defendants, respectively, without consideration, for the purpose of defrauding plaintiff's ancestor, and in collusion with defendants; that plaintiff's husband died in 1875, having devised all his property, whatsoever and wheresoever, to her, without knowledge of such conveyances aforementioned; that, shortly after her husband's death, plaintiff was informed by defendants, his brothers, that he was not entitled to any of the lands sued for, and that she was only informed in 1879 of his title to such lands,—shows a case of concealed fraud, and a sufficient cause of action, not barred by laches or lapse of time.

7. Same—Jurisdiction—Concurrent Remedy at Law not Ground for Refusal—Length of Time.
In an action for relief on the ground of fraud in relation to real estate, where the complaint avers that the conveyances alleged to be fraudulent were without consid-

[1]See note at end of case.

eration, but the allegations in the complaint show that there has been a great lapse of time, the court, taking into consideration the probability of the statute of limitations being invoked, will not refuse relief in equity on the ground that, the conveyances being alleged to be without consideration, plaintiff's complaint shows a complete and adequate remedy at law by ejectment.

8. New Trial—Appeal—Insufficient Findings—Title.
In an equitable action involving the issue of the title of plaintiff's devisor to real estate, a finding that such devisor was "the owner of the legal title of the lands," is not sufficient, but it should be found that he was or was not the owner of the land; and where facts are alleged in the answer tending to show that the purchase of the land in suit was made, and the purchase money paid, by others, who caused the legal title to be made to such devisor, by which a resulting trust in favor of the parties paying the money was created, a finding that such devisor "did not acquire the legal title in trust for other persons" is not sufficient.

9. Same—Actual Notice.
Where, in such a case, there is an implication by defendants that circumstances were known to the constituent which should have stimulated him to inquiry, a finding that said constituent, in his life-time, had not *actual* knowledge or information of any deeds by his attorney, is not sufficient to support the allegation of want of notice.

10. Same—Power of Attorney.
A finding that property referred to in a letter, being a power of attorney, is held in trust for plaintiff, as stated in it, should find that the property referred to in the letter is held in trust "in the manner and proportions mentioned" in the letter.

11. Same—Finding as to Bar of Action under Statute.
A court, in its findings upon the question of an action being barred by the statute of limitations, should not only find facts on which its decision as to the defense of the statute of limitations may be based, but should find, in addition to such facts, whether the cause of action is barred by the statute or not.

In bank. Appeal from superior court, Humboldt county.

Action for a surrender of real estate. Judgment for plaintiffs. Defendants appeal.

S. M. Buck, James Hanna, and *Horace L. Smith,* for appellants. *J. D. H. Chamberlin, J. J. De Haven, L. D. McKisick,* and *S. M. Wilson,* for respondents.

Thornton, J. The plaintiffs are Julia Duff, the widow, and Agnes Duff, the infant daughter, of William R. Duff, deceased. The defendants are Robert P. Duff and Frank S. Duff, the brothers of the decedent above named. The object of the action is to have defendants adjudged trustees for plaintiffs of the real property alleged to have been fraudulently conveyed to them by Richard Duff, their father, under powers of attorney executed to him by William R. Duff; that the defendants be decreed to reconvey the said real property to the plaintiffs, and that they account to them for the rents and profits received by them from the property aforesaid; and that a receiver be appointed to take charge of said property, and collect the rents, etc., during the pendency of this action.

Issue being joined by the several answers of the defendants, certain special questions on issues, 14 in number, were framed, and submitted to a jury, who, on the twenty-second of September, responded to the same by a verdict. On the fourteenth of November, 1881, the defendant moved the court to set aside so much of the verdict as answers the issues numbered 1, 10, 11, and 13, on the ground—*First,* that the court erred in giving the instructions to the jury as requested by plaintiffs; *second,* in refusing to instruct as requested by defendants; *third,* insufficiency of the evidence to justify the verdict. Under this last ground several particulars are specified in which the evidence was so insufficient. The record states that "the above motion is made upon the papers in the case, the documentary evidence introduced on the trial of said issues, and all evidence introduced on said trial, as shown by the minutes of the court." No statement or bill of exceptions was made on this motion. The court, on the thirtieth of July, 1882, denied the mo-

tion. In denying the motion, an opinion was filed, in which the learned judge said that it was conceded that the verdict or findings of a jury, in a case of the kind before the court, are merely advisory, and may be adopted in full, or modified or wholly rejected, by the court; that, if the court had mistaken the law, and misdirected the jury in the instructions given, or erred in refusing instructions asked, all such errors can be corrected when the case is finally submitted, and no injury can result to either party; that, though the case was tried half a dozen times, it would still be in the power of and the duty of the court "to reject, modify, or approve any or all the findings of the jury, and adopt such findings only as might be justified by the evidence."

The opinion proceeds as follows: "As far as I am now informed, I am satisfied that I will have to reject some of the findings, and perhaps modify others. My understanding is that other issues and further evidence are yet to be submitted to the court before the final submission of the cause for decision. I prefer withholding a definite and ultimate decision upon the matters involved in this motion until all the evidence is in, and the trial concluded. I see no impropriety in the practice, more particularly as the arguments and briefs of counsel on the motion seem to me to cover substantially the whole grounds of the controversy. Reserving the right hereafter to adopt such findings as are sustained by the evidence, to reject those which are not, and to modify others if necessary, I shall deny the motion."

On the twenty-third of February, 1883, the court filed a series of findings covering the most important issues in the cause. An interlocutory judgment followed, which was filed on the twenty-fourth of July, 1883. By this decree it was adjudged that certain trusts in said property existed in favor of plaintiffs, and defendants were directed to account to them for rents and profits, etc., and a referee was appointed to ascertain certain matters, and report to the court, and take and state the account above referred to. It appears that the referee never acted, and that the inquiry was made and the account was afterwards taken and stated by the court. Additional findings were made by the court covering the matters of which an account was to be taken. These findings were filed on the thirty-first of January, 1884.

The final judgment herein was filed on the first day of February, 1884, and on the eleventh day of the same month a notice of intention to move for a trial was, on behalf of defendants, served and filed. The notice stated that the motion would be made on a bill of exceptions to be settled and filed, and on the following grounds: "(1) Insufficiency of the evidence to justify the findings of the jury upon the issues of fact submitted; (2) insufficiency of the evidence to justify the findings of facts and decision of the court; (3) that the findings of fact and decision of the court are against law and evidence; (4) error in law occurring at the trial, and excepted to by the defendants."

Both parties appeared before the judge on the settlement of the bill, which was certified and allowed on the eighteenth day of April, 1884. On the tenth of May, 1884, defendants' motion for a new trial was denied, and the fifth day of July following the defendants appealed from the interlocutory judgment, from the final judgment, and from the order denying their motion for a new trial.

What can be heard by this court on these three appeals?

No appeal lies from an interlocutory judgment except in an action for the partition of real property. Code Civil Proc. § 939, sub. 3. The appeal from the interlocutory judgment may therefore be disregarded.

There is no appeal from the order of July 30, 1882, denying defendants' motion to set aside the verdict of the jury as to certain of the special issues above stated. It is urged, on behalf of respondents, that this motion was for a new trial, opportunely made, and its denial was appealable, and that on such appeal the insufficiency of the evidence to justify the findings of the jury and

the errors of law properly reserved might have been considered; but no appeal having been taken from the order of the thirtieth July, 1882, which it is contended denied defendants' motion for a new trial, and no bill of exceptions or statement settled on such motion, the defendants cannot now be heard on their bill of exceptions as to that part of the trial which was had before the jury. Is this contention maintainable?

In *Hinds* v. *Gage*, 56 Cal. 486, which was an action to dissolve a partnership, for an accounting between the partners, for the payment of the partnership debts, and to set aside certain alleged fraudulent judgments and sales, the court below, on the twentieth of June, 1878, filed its findings of fact, and on the twenty-seventh of same month a decree was entered setting aside the judgments and sales, dissolving the partnership, directing the property to be sold by a receiver who had been theretofore appointed, and ordering a reference to a referee to take an account between the partners, and to ascertain the indebtedness of the firm to third parties and between themselves. It was also ordered that the referee report the result of the accounting, and that upon the coming in of the report, and its approval, the proceeds of the partnership property be applied as stated in the decree. On the fifth of July, 1878, defendants gave notice of their intention to move for a new trial, which motion was denied March 5, 1879. The report of the referee was filed October 18, 1878, and after hearing the objections of the defendants thereto, it was confirmed. The court held that, as the notice of motion for a new trial was given before the report of the referee was filed, it was therefore premature, and that the appeal from the order denying such new trial should be dismissed. The court relied on and followed *Crowther* v. *Rowlandson*, 27 Cal. 377, in which it was held that it was the intention of the legislature that the proceedings in new trials should be postponed until cases had been tried, and that the trial of the case was not complete until the final report of the referee was filed. The case of *Hinds* v. *Gage* has never been overruled.

In the case before us the referee did not act, and the account was taken and stated by the court. The findings on this branch of the case were filed on the thirty-first of January, 1884. If the trial in the case of *Hinds* v. *Gage* did not end until the report of the referee was filed, by a parity of reasoning the trial in this case did not end until the filing of the findings of the court on the day first above mentioned. The notice of new trial was served and filed on the eleventh of February following; and, though this was on the eleventh day after such filing, still, as it does not appear that any notice of the filing of these findings was ever served on the defendants, from which service the 10 days in which they had to be given notice of such motion is to be computed, we must hold the notice given in time. The appellants, then, on their appeal from the order of the tenth day of May, 1884, denying a new trial, within the reason of the rule laid down in *Hinds* v. *Gage*, have a right to be heard on the matters stated in their bill of exceptions.

Another view may be taken in relation to this matter, which would accord to the defendants the right to be heard as above stated. The case should be regarded as having been tried by the court, and the findings as incomplete until findings latest in date were filed. The defendants, then, have a right to be heard, on giving notice of their motion for a new trial within 10 days after receiving notice of the filing of the findings. As above said, they have received no notice of the filing, and, therefore, their motion was in time.

We think that it is eminently just that the defendants should be here heard on their bill of exceptions. The court, in denying the motion to set aside the findings above mentioned, seemed to be of opinion that the defendants would lose nothing by deferring their notice as they did. This is apparent from the opinion of the court above stated. It is evident from his remarks that the learned judge did not regard the case as finally submitted, and the motion seems to have been denied, without considering the merits of it, on the

ground that it would be better to make it after the final decision,—a course of procedure from which he said "no injury could result to either party." Though this course of procedure, taken at the suggestion of the judge, would not warrant us in establishing a practice not sustained by the Code, still, as we find the course proper, we advert to it to show that, if the defendants are not heard here in regard to the questions arising on their bill of exceptions, injustice would be done them. In fact, their motion for a new trial was not heard on the merits at all in the lower court until after the second set of findings was filed. When the bill of exceptions was settled, no objection was made to it as containing matters not proper to be inserted in it at that stage of the case, and the motion proceeded and was determined as if it was in all respects regularly made.

The parties appear to have acted on the intimation of the court. On the twenty-third of February, 1883, the court, after having been advised by the verdict, filed the first set of findings; and on the fifth of March, 1883, the parties consented in writing that defendants should have 20 days from March 1, 1883, to prepare and serve a bill of exceptions, and file and serve a notice of motion for new trial. On the same day, and in pursuance of this consent, an order of court was accordingly entered. This consent was continued in writing, and by order, to a day subsequent to the settlement of the bill of exceptions. Under these circumstances it would be most unfair now to hold that the bill of exceptions should not be considered in its entirety.

In the course of the trial several exceptions were reserved by defendants to the rulings of the court upon the admissibility of evidence offered on behalf of plaintiffs, which we proceed to consider.

The plaintiffs offered in evidence a petition signed, "F. S. DUFF, by S. M. BUCK, his Atty.," for letters of administration on the estate of Richard Duff, deceased. The petition was filed in December, 1877, and described by metes and bounds, or by reference to lots in certain blocks in the city of Eureka, giving the numbers of the lots and blocks, certain parcels of land as belonging to the estate of Richard Duff, deceased, and stated that certain of the parcels described as belonging to the estate were held by Robert P. Duff. Some parcels of this property described as held by Robert P. Duff were really claimed by and had been conveyed to Frank S. Duff. These parcels, or some of them, are portions of the property involved here. When this paper was offered, there was no proof that F. S. Duff (who is the defendant Frank S. Duff) ever signed it, or knew of its contents, or, in fact, ever heard of it.

At no time has the statute ever required that the real property belonging, or claimed to belong, to the estate of a decedent, should be described in the petition for letters of administration. It is only required that the value and character of the property, "when known to the applicant," should be stated. As the petition must state the facts essential to give jurisdiction of the case, it may in some cases be necessary to state that the deceased left property in the county in which the application is made. Code Civil Proc. § 1294. But the statute never required any further statement regarding the property than that above pointed out.

The paper in question was not offered to prove the fact that an application to procure letters of administration on the estate of the decedent was made by defendant Frank, but as an admission by Frank that certain statements made in it that certain parcels of the land individually claimed by him were not his property, but belonged to the estate of Richard Duff, deceased. This petition is a pleading, and the rules in regard to admissions in pleadings apply to it. *Foster* v. *Wilber*, 1 Paige, 540; *Van Vleck* v. *Burroughs*, 6 Barb. 344; *Carle* v. *Underhill*, 3 Bradf. Surr. 101; Code Civil Proc. §§ 420, 1371. Conceding that it contained the admissions of facts which would be evidence against a party who had knowingly made them, are they evidence against him under the circumstances above mentioned?

In 2 Whart. Ev. § 838, it is said "that the pleadings of a party in one suit may be used in evidence against him in another suit, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But, in order to bring such admission home to him, the pleading must either be signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts." The learned author cites the following cases: *Parsons* v. *Copeland*, 33 Me. 370; *Green* v. *Bedell*, 48 N. H. 546; *Currier* v. *Silloway*, 1 Allen, 19; *Gordon* v. *Parmelee*, 2 Allen, 212; *Bliss* v. *Nichols*, 12 Allen, 443; *Brown* v. *Jewett*, 120 Mass. 215; *Cook* v. *Barr*, 44 N. Y. 156; *Tabb* v. *Cabell*, 17 Grat. 160; *Hammat* v. *Russ*, 16 Me. 171; *Ayers* v. *Insurance Co.*, 17 Iowa, 176; *Meade* v. *Black*, 22 Wis. 241; *Hobson* v. *Odgen*, 16 Kan. 388.

In *Cook* v. *Barr*, 44 N. Y. 156, the commission of appeals, speaking by EARL, C., said: "When a party to a civil action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to give them in evidence; and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made. Admissions do not furnish conclusive evidence of the facts admitted, unless they were made under such circumstances as to constitute an estoppel, or were made in the pleadings in an action, when they are conclusive in that action. They may be contained in a letter addressed to the opposite party, or to a third person, and in either case are entitled to equal weight and credit. They are received in evidence because of the great probability that a party would not admit or state anything against himself or his own interest unless it were true. And I am unable to see why the rule does not apply to admissions contained in the pleadings in an action under our system of practice, which requires the facts to be alleged truly in the pleadings. It must first be shown, however, by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction."

In *Boileau* v. *Rutlin*, 2 Exch. 664, a question arose on the admissibility of a bill in chancery as evidence of the admission by the complainant of the truth of the facts stated therein, and it was held inadmissible for any such purpose, but only for the purpose of showing that a suit was instituted, and the subject-matter of it. This case was decided in 1848, and Judge CURTIS, in *Church* v. *Shelton*, 2 Curt. 275, states that it was held as above after a very careful examination of all the previous authorities both in England and Ireland. The same learned judge further says of this ruling: "I consider this decision to be in conformity with the weight of authority in this country;" and cites *Adams* v. *McMillan*, 7 Port. (Ala.) 73; *Durden* v. *Cleveland*, 4 Ala. 225; and *Isaac's Lessee* v. *Clarke*, 2 Gill, 1.

In *Church* v. *Shelton*, *supra*, the question arose as to the admissibility of a libel as evidence of a confession, by the party filing it, of the particular facts stated in it. The learned judge held it inadmissible as a confession, but admissible on another ground and for another purpose. The purpose for which it was admitted in the case cited does not exist in the case before us.

In the cases excluding bills in chancery, they seem to have been considered as the mere suggestions of counsel, for which the parties on whose behalf they were filed should not be held responsible.

In *Boileau* v. *Rutlin*, *supra*, it seems that the privity of the party complainant appeared. Still the bill was held inadmissible as an admission of the facts stated in it.

In *Marianski* v. *Cairns*, 1 Macq. 212, the defendant offered in evidence a pleading (answer) of plaintiff in a suit brought against him by his wife for alimony, as an admission of his poverty. Its admissibility was sustained by the house of lords on the ground that it was signed by the plaintiff. As to this Lord TRURO said: "The document in question stands on a footing quite different from that of pleadings in general, for it is signed by the party him-

self; and I recollect to have asked (though I do not remember that I have received an answer) whether it was upon oath or not. Assuming, however, that it was not upon oath, still it was a representation made by the individual himself, under his hand, as to the state of his own circumstances. By that document he described himself as living upon 8s. a week. And, one of the points in this case being whether Marianski had the means to make the advances which he claimed to be due to him, the document was tendered to show his position and resources at a period shortly antecedent to that at which the advances were alleged to have been made by him. Now, it certainly appears to me that this document is not open to the objection which would apply to pleadings in ordinary; and I am of opinion that being a statement of his own circumstances, made by the individual, and signed by him, the fact of its having been made in the course of another suit ought not to render it inadmissible as evidence in *this* suit."

In *McDermott* v. *Mitchell*, 47 Cal. 249, the joint answer of Root and Mitchell in the action of *Brock* v. *Mitchell and Root*, verified by Root, but not by Mitchell, was offered in evidence. It was held admissible as to Root, but not as to Mitchell. "As to the latter," the court said, "it was the mere work of the attorney, and not admissible as evidence against the client in another action."

In the cases above cited from Massachusetts, the pleadings were admitted on the ground that they were the statements of an agent (the attorney for the party) while employed and acting within the scope of his authority. 2 Allen, 215.

In this case it appears that the petition admitted was not signed by the petitioner, Frank S. Duff. His name was written at the end of the paper by his attorney. So far as appears, the authority of the attorney was to file a petition appropriate to the procurement of an order of court for letters of administration. This authority would not extend beyond the insertion of such allegations which the law required such application should contain. As is clear from the section of the statute above cited, a description of the property of the decedent's estate was not required, but only the value and character of such property. The character of the property would sufficiently appear by a statement in the petition that it was realty or personalty. The attorney was only authorized to file a petition stating the character and value of the property. In going beyond this, he was not acting within the scope of his authority, and therefore the statements in the petition describing the property were not on that ground admissible.

Evidence in relation to the preparation and filing of this paper was put in at a subsequent stage of the trial. The evidence shows that Frank Duff and his brother, James, called to see the attorney who drew it (Mr. Buck) about the date of its filing. James Duff said to him that he claimed that a portion of the property held by Robert Duff belonged to the estate of his father, and desired to have some one appointed administrator, and a suit brought for the purpose of testing his right. After some conversation Buck proposed to James Duff to file a petition, and asked him who should become the administrator. It seems not to have occurred to James that he could not very well be such because he was not a resident of the state. Buck suggested Frank as a proper person, to which Frank reluctantly assented. Frank had nothing to say about the business. Buck then asked about the property, and James said that it was the property of Robert Duff, and distinctly stated in Frank's presence that he made no claim to the portion of it that belonged to Frank Duff. Buck then asked where he could get a description of the property, to which James replied that he did not know unless from the records. Instead of sending to the recorder's office, Buck sent to the assessor's office, and told the person sent to copy the property assessed to Robert Duff. It turned out that some of Frank's property was assessed to Robert, and this portion of

Frank's property so assessed was put by description in the petition. There is no evidence that Frank knew of this until a subsequent period, when a second petition for letters of administration was drawn up.

If the second petition, which omitted all the property of Frank S. Duff and that claimed by Robert P. Duff, was filed as a substitute for the first, was not the first petition inadmissible, within the rule declared in *Mecham* v. *McKay*, 37 Cal. 154, and followed in *Ponce* v. *McElvy*, 51 Cal. 223? As it does not appear that the second petition took the place of the first, the question does not arise here, and we do not determine it. It does not appear that any letters were granted or obtained on this petition.

As the petition was not signed by Frank Duff personally, and it does not appear that the facts were inserted with his knowledge or under his direction and with his sanction, we are of opinion, on the authorities above cited, that the court erred in admitting it as evidence. It is well settled that, an error against the appellant being shown, injury to him is presumed, and that it devolves upon the respondent to show that no injury has in fact been done. *Ponce* v. *McElvy*, 51 Cal. 223. On an examination of the record we are not satisfied that no injury was done to the defendants by admitting this paper in evidence.

The statements as to R. P. Duff's property in the petition offered are entirely irrelevant as to any issue proffered by Frank Duff, and are not admissible against Robert P. Duff. There is no such joinder of interest between Frank and Robert Duff as will make any admissions of Frank binding on Robert Duff. If not admissible against the former, they are not against the latter. The statements are not admissible as declarations of a co-conspirator, as they do not appear to be in furtherance of any common design, or made in the execution of such design. They were in no sense any part of the *res gestæ*.

The judgment roll in the case of *William R. Duff* v. *James T. Ryan and James R. Duff* was offered in evidence by plaintiffs. It was objected to by defendants as irrelevant. This objection was overruled, and defendants excepted. The action of *Duff* v. *Ryan* was brought to recover a claim for $11,017.77, assigned by Richard Duff to the plaintiff in that action. Plaintiff recovered judgment on the thirty-first of August, 1885, for $11,572.39. It does not appear that anything was ever paid on the judgment to William R. Duff. We cannot see how this evidence was relevant to any issue in the case. If William R. had collected anything on it, it might be relevant as evidence that he had means, and was able to purchase the property in question here, but the judgment roll alone was irrelevant, and should have been ruled out. Such evidence might have misled the jury, and for that reason should not have been admitted. While we might not reverse the judgment on account of the admission of this document, on a subsequent trial it should not be admitted without further evidence which would show its relevancy.

We cannot see on what ground the paper marked "copy of R. P. Duff's statement" was admissible. Conceding that it was sufficiently proved that it was a copy of an original paper signed by R. P. Duff, still the admissions, if any, contained in it (and it was offered to prove those admissions) were made for the purpose of submitting to arbitration some matters of difference between the heirs of Richard Duff and R. P. Duff, and were doubtless made for the purpose of dispensing with proofs of the facts admitted. An admission for that purpose cannot be offered in this action, any more than an admission in one action, made for the purpose of dispensing with proof otherwise required, can be offered in another action which is not allowed. The court acts on such admission on the trial of the action, to use the language of Mr. Greenleaf, "not as truth in the abstract, but as a formula for the solution of the particular problem before it,—namely, the case in judgment,—without injury to the general administration of justice." 4 Greenl. Ev. § 206.

It is urged that section 338, subd. 4, Code Civil Proc., does not apply to an action like this, which, though founded in fraud, is but an action to recover real property. In support of this point, attention is called to the fact that the heading to the chapter of which the above section is a part, is in these words: "The time of commencing actions other than for the recovery of real property," and that the first section (335) in the chapter is as follows: "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows." And it is further said that this is really an action to recover real property; referring to *Oakland* v. *Carpentier*, 13 Cal. 552, where it was said of a like provision in section 17 of the then statute: "We think that this provision has no relation to an equitable proceeding to set aside a fraudulent deed of real estate, when the effect of it is to restore the possession of the premises to the defrauded party. In such a case, the action is substantially an action for the recovery of real estate. Indeed, it is literally."

Granting that this action is of the character above stated, the result would be that there is not now, and never has been, any statute of limitations in this state in regard to actions for relief on the ground of fraud in relation to real property, and we would then be compelled to fall back on the rules of equity as a part of the common law governing actions for relief on the ground of fraud in the sale and purchase of real property. These rules are substantially the same as those which have been adopted and enforced in regard to the subdivision and section above mentioned. See *Boyd* v. *Blankman*, 29 Cal. 46, 47; 2 Pom. Eq. Jur. § 917, and cases cited in note 3.

It may be remarked that the section and subdivision of the statute under consideration has in many cases been applied to actions for relief on the ground of fraud in purchases of real property. See *Boyd* v. *Blankman, supra; Moore* v. *Moore*, 56 Cal. 90; *People* v. *Blankenship*, 52 Cal. 619. In the case last cited this section and subdivision were held applicable to an action brought by the state to cancel a patent alleged to have been procured by fraud. But, in the view above taken, it is immaterial whether the section and subdivision apply or not.

The complaint states facts sufficient to constitute a cause of action. Its allegations are substantially as follows: That in 1863 W. R. Duff was the owner of the property involved herein; that in August, 1863, he executed to Richard Duff a letter of attorney, by which he authorized Richard, *inter alia*, to sell and convey for the constituent the property referred to; that, immediately after the execution of this letter, William R. Duff departed from this state, and never returned to it; that subsequently, during a period extending from the fifth day of July, 1866, to the third day of April, 1872, Richard Duff, assuming to act for his principal under the letter, by deeds purporting to be executed under it, conveyed to defendant, Robert P. Duff, certain of the property aforesaid; that prior to the seventh of July, 1867, Richard, acting under the letter of attorney, by deeds purporting to be executed under it, conveyed to the defendant Frank S. Duff certain portions of the property aforesaid; that between the first day of November, 1867, and the first of January, 1880, Robert P. Duff conveyed to Frank certain of the parcels of the land in controversy; that between the sixth day of July, 1867, and the commencement of the action, Frank conveyed to Robert certain parcels of the land in suit; that the deeds above mentioned, executed by Richard to Robert and Frank, were "without any consideration of any kind given or agreed to be given to William R. Duff, or any person for the use and benefit of William," and that the deeds executed by Robert to Frank, and by Frank to Robert, were without any valuable consideration, and neither of them were purchasers for value; and that Robert and Frank, when these last-mentioned lands were conveyed to them, respectively, had full knowledge of all the matters hereinbefore alleged; and that the conveyances executed by Richard as attorney were made with the intent and purpose of defrauding William, and that they had been

accepted by Robert and Frank acting in collusion with the attorney, Richard, with the intent to defraud William; that, during a period of seven years preceding the commencement of this action, defendants had received the rents and profits of the land, to the amount of $1,000 per annum; that William R. Duff died intestate, leaving the plaintiffs surviving him, Julia K. Duff, his widow, and Agnes, a minor, only child of the said Julia and William; that William devised his property to his wife, Julia; and Agnes, born after her father's death, is entitled to share because not mentioned in the will. The complaint further alleges the proper appointment of William L. Duff as guardian *ad litem* of Agnes; that Julia Duff had no knowledge or information of the aforementioned conveyances, and the acts stated in relation to them, and their fraudulent character, until an intimation was made to her in a letter received by her from Mrs. Louisa Wilson, sister of the defendants, on or about the twentieth of April, 1879, in consequence of which she was led to make inquiry concerning the property owned by William R. Duff in the county of Humboldt; that she has made discovery of the aforementioned acts of Richard and the defendants since April, 1879.

We are of opinion that the complaint sets forth a case of concealed fraud. It is averred that William was ignorant of the conveyances during his whole life. Let it be observed that there is no allegation that the deeds were recorded. So, conceding, as contended, that William was bound to look at the records of the county of Humboldt, it does not appear that they would have given him any information.

But a relation of trust and confidence existed here between Richard Duff and William. The former was the attorney of the latter, and under such circumstances it is the duty of the attorney to keep his constituent informed of all sales and conveyances that he has make of the property to which his agency extends. "An agent must use ordinary diligence to keep his principal informed of his acts in the course of his agency." Civil Code, § 2020. This has always been the rule governing the relation of principal and agent. It does not appear that anything had occurred to put William on inquiry.

It must also be observed that William was absent from the state while the transactions above referred to occurred, having left the state immediately after the execution of the letter of attorney, and remained absent during the remainder of his life. Under these circumstances, we think the averment that William was ignorant of the conveyances, and had no knowledge or information that the conveyances had been executed by his attorney, is sufficient. See *Buckner* v. *Calcote*, 28 Miss. 597, and cases there cited. His wife and child were also absent, and we do not see why the same rule does not apply to them, though the agency terminated on the death of Richard. William lived about five months after Richard's death, but we do not see that his failure to come to California during this period, and look after his property, when he might have ascertained what had been done, puts him in fault. The averments show reasonable and proper diligence on the part of plaintiff Julia K. Duff. The other plaintiff was an infant of tender years, and no negligence, under the circumstances appearing in the complaint, can be attributed to her.

But it may be urged that the grantees in the deeds executed by Richard Duff under the letter of attorney could act upon the presumption that Richard had kept William informed of all his acts, and of his conveyances to the defendants. On this point we are of opinion that, conceding the fraud and collusion attributed to the defendants by the allegations of the complaint, (which must be conceded on this demurrer,) they must stand on the fact as it is, that no such information was given to the principal by his agent and attorney. We think the complaint sufficient.

It is further urged that this is an action in equity, and a court of equity has no jurisdiction, because it appears that the remedy at law, to recover possession by ejectment, is complete and adequate, for the reason that the con-

veyances to the defendants under the letter of attorney, as they were made without consideration, were utterly void, and they constitute no defense to an action of ejectment; and we are referred, to sustain this contention, to *Dupont* v. *Wertheman*, 10 Cal. 354, and *Mott* v. *Smith*, 16 Cal. 533. In the case of *Dupont* v. *Wertheman*, where there was a recovery in ejectment, the above rule was declared. But the complaint sets forth a case of fraud, and of fraud according to the principles laid down in *People* v. *Houghtaling*, 7 Cal. 348, of which a court of equity had jurisdiction. In that case an action in equity was sustained for a specific fund of money declared to be a trust fund, though the action for money had and received could have been maintained for the money, and the recovery would have been the same in the latter action as in the former. We do not think we would be justified in holding that a court of equity would have no jurisdiction.

The jurisdiction in equity in matters of fraud is very broad; and, although it has been held in various of the states that the jurisdiction in equity will not be exercised when the remedy at law is certain, complete, and adequate, still the jurisdiction is not denied. Upon the facts alleged in the complaint, showing that there has been a great lapse of time since the conveyances assailed herein were executed, from which it might well be inferred that the statute of limitations would be invoked as a defense, we must hold the contention not maintainable.

For the errors above pointed out the case must go back for a new trial. As the issues of fact will have to be tried again, we refrain from saying anything on the point that they were not sustained by the evidence. But we think it proper to remark that the first finding is not as definite as it should be. It states that "upon August 4, 1863, William R. Duff was the owner of the legal title of the lands," etc. It should be found that he was the owner of the lands; and as facts are averred in the answer from which it would seem that the purchase of most, if not all, of the land in suit was made, and the purchase money paid by others, who caused the conveyance of the legal title to be made to William R. Duff, by which a resulting trust in favor of the parties paying the money was created, we think there should be a finding on the issue so made. The mere finding that William R. Duff did not acquire the legal title in trust for other persons is not sufficient.

The ninth finding is not sufficient. It states that William R. Duff, in his life-time, had no *actual* knowledge or information of any deeds, etc. The finding should be that he had no knowledge or information of any kind on the subject, if the evidence establishes the fact that he had no knowledge or information of any circumstances to put him on inquiry as to the deeds, etc. As the finding now stands, there is an implication that circumstances were known to William R. which should have stimulated him to inquiry.

The thirteenth finding is a finding of evidence, not of the fact that the property mentioned in it was held in trust as stated in it. The finding should be that the property referred to in the letter was held in trust in the manner and proportions mentioned in the letter.

If the court finds that the cause of action is not barred by the statute of limitations, it should so find, and not merely facts from which it may be inferred. This court is not authorized to infer facts from facts found. That is the province of the trial court. On the facts found this court determines questions of law arising on them, not facts by inference from facts found. We intend to say that, *in addition to the facts found* on the issue joined in regard to the defense of the statute of limitations, the court below should have found whether the cause of action was barred by the statute or not.

The judgment and order are reversed, and the cause remanded for a new trial. So ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J.

NOTE.

STATUTE OF LIMITATIONS—FRAUD. The statute of limitations does not commence to run, against an action based on fraud, until the discovery of the fraud. Traer v. Clews, 6 Sup. Ct. Rep. 155; S. C. 10 N. W. Rep. 838; Rosenthal v. Walker, 4 Sup. Ct. Rep. 382; McAlpine v. Hedges, 21 Fed. Rep. 689; Dicken v. Hays, (Pa.) 7 Atl. Rep. 58; Hughes v. First Nat. Bank, (Pa.) 1 Atl. Rep. 417; Vigus v. O'Bannon, (Ill.) 8 N. E. Rep. 778; O'Dell v. Rogers, (Wis.) 30 N. W. Rep. 229; Tompkins v. Hollister, (Mich.) 27 N. W. Rep. 651; O'Dell v. Burnham, (Wis.) 21 N. W. Rep. 635; Perry v. Wade, (Kan.) 2 Pac. Rep. 787.

In Kentucky no action for relief from fraud can be brought after the lapse of 10 years from the perpetration of the fraud. King v. Graham, 1 S. W. Rep. 822; Dorsey v. Phillips, Id. 667. In Missouri the statute begins to run at the time of the discovery, within 10 years, of the facts. Leavenworth Co. v. Chicago, R. I. & P. Ry. Co., 18 Fed. Rep. 209.

The question of knowledge or discovery of the fraud is one of fact. Rosenthal v. Walker, 4 Sup. Ct. Rep. 382; Johnson v. Powers, 13 Fed. Rep. 315; Barlow v. Arnold, 6 Fed. Rep. 351.

See, also, Kirby v. Lake Shore & M. S. R. Co., 14 Fed. Rep. 261.

71 Cal. 545

McCue v. Superior Court of Marin Co. (No. 11,802.)

(*Supreme Court of California.* January 14, 1887.)

Review—Writ of—When It Lies.

A writ of review will not lie where an appeal lies which is not available because the time for taking it has elapsed.

In bank. Writ of review.

James S. McCue, in pro. per., for petitioner. *Joseph Kirk*, for respondent.

BY THE COURT. The writ must be dismissed. The writ will not lie where there is an appeal; and, if there is an appeal, but the time for taking it has elapsed, the writ will not lie. *In re Stuttmeister*, 12 Pac. Rep. 270; *Miliken* v. *Huber*, 21 Cal. 166; *Bennett* v. *Wallace*, 43 Cal. 25.

Writ dismissed.

MCFARLAND, J., (*concurring.*) I concur in the judgment; but, in my opinion, there might be a case where, on account of unusual circumstances, a writ of review would lie, although there had been, at one time, a right of appeal, as intimated in *Kimple* v. *Superior Court of San Francisco*, 66 Cal. 136; S. C. 4 Pac. Rep. 1149.

2 Cal. Unrep. 736

PEOPLE *v.* FRINK. (No. 20,251.)

(*Supreme Court of California.* January 15, 1887.)

CRIMINAL LAW—APPEAL—DELAY IN PERFECTING—DISMISSAL.

Under Pen. Code Cal. § 1246, requiring the clerk with whom the notice of appeal is filed, within 10 days thereafter, or within 10 days after the settlement of the bill of exceptions, to transmit to the clerk of the appellate court a copy of the record, an appeal will be dismissed on a showing by certificate of the clerk below that four years have elapsed since the taking of the appeal; that defendant has never requested the clerk to make up a transcript; that the bill of exceptions has never been filed, though settled; and that no transcript has been sent to the supreme court.

In bank. Appeal from supreme court, Stanislaus county.

Defendant was adjudged guilty of libel, sentenced, and took an appeal from the judgment and order denying a new trial. Respondent moved, on certificate of the clerk of court below, for a dismissal, showing that more than four years had elapsed since appeal taken; that defendant had never requested the clerk to send up a transcript of the judgment and proceedings; that the bill of exceptions had never been filed by defendant, though settled, and no transcript had been sent to the supreme court by the clerk of the superior court.

Section 1246, Pen. Code Cal., requires the clerk with whom the notice of appeal is filed, within 10 days thereafter, or within 10 days after the settlement of the bill of exceptions, to transmit to the clerk of the appellate court a copy of the notice of appeal, record, bills of exception, and instructions given and refused; and section 1249, Pen. Code Cal., empowers the appellate court to dismiss the appeal, if section 1246 is not complied with.

P. J. Hazen and *Wright & Hazen*, for appellant. *T. A. Coldwell*, Dist. Atty., for the People.

BY THE COURT. Motion to dismiss appeal granted.

71 Cal. 541

LOVELAND *v.* GARNER and others. (No. 11,374.)

(*Supreme Court of California.* January 14, 1887.)

1. CORPORATIONS—MINING COMPANIES—REPORTS—LIABILITY OF DIRECTORS—ACTS CAL. 1880, PAGE 134.

The California statute (Acts 1880, p. 134) regulating the conduct of mining business, and requiring the directors of corporations organized for that purpose, under a joint and several penalty of $1,000, recoverable by any stockholder, to post in a conspicuous place in the office of the company, on the first Monday of each month, a duly-verified and itemized account or balance-sheet for the preceding month, is penal in its character; and, as it does not specifically declare that the penalty may be recovered for *each* failure to comply with its requirements, there can be but one recovery for all such failures prior to the commencement of suit.

2. Qui Tam and Penal Actions—Pleading—Statutory Duties.
The joining in one action of several matters of fact which show as many failures to perform a duty enjoined by law, and claiming the legal right, as a conclusion of law, to recover a penalty for each, when the law itself allows the recovery of only one penalty for one and all of such violations, is not a joining of several distinct causes of action.

3. Appeal—Waiver—Pleading—Amendment after Demurrer Sustained.
Where a demurrer to a complaint has been sustained, if the plaintiff files an amended complaint, in which he unites and pleads anew in one count all the causes of action which he had pleaded in his first complaint in separate counts, he waives his right, on appeal from an order sustaining a demurrer to the amended complaint, to object to the ruling on the demurrer to the original complaint.

Commissioners' decision.

In bank. Appeal from superior court, San Bernardino county.

Hargrave & Gray, for appellant. *Byron Waters* and *Harris & Allen*, for respondents.

Foote, C. The plaintiff brought his action to recover from the defendants $7,000, as liquidated demands, for their seven distinct failures to comply with the provisions of a certain act of the California legislature in reference to the carrying on and conducting the business of mining. The act referred to is to be found in St. 1880, p. 134.

The complaint first filed in the action contained seven distinct counts upon as many alleged causes of action, each claiming the right to recover of the defendants a penalty of $1,000 for their separate failures, on the first Mondays of seven different months, "to have the reports and accounts current made and posted," as in the first section of the act provided. The defendants demurred to that complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and because the causes of action as set out were improperly united with each other. The demurrer was sustained.

The plaintiff then filed an amended complaint, in which was charged in one count seven distinct failures on the part of the defendants, on the first Mondays of as many different months, "to have the reports and accounts current made and posted," as required by the statute heretofore mentioned; and demand was made for the recovery of a penalty of $1,000 for each failure on the part of the defendants to comply with their alleged obligations under that statute. That pleading also was demurred to, on the ground that it did not state facts sufficient to constitute a cause of action, and that several causes of action were improperly united, and the court sustained the demurrer.

The plaintiff declining to amend his pleading, judgment for costs was rendered for the defendants, and from that this appeal was taken.

The ruling sustaining the first demurrer cannot now be attacked, for the reason that afterwards the plaintiff filed an amended complaint, in which he united and pleaded anew in one count all the causes of action which he had in his first complaint pleaded in separate counts, and thus waived his right to object to such action of the court. *Hagely* v. *Hagely*, 9 Pac. Rep. 305.

The further contention of the defendants is that, upon a fair construction of the statute upon which the action was predicated, it will be found to contain no warrant for a recovery of more than one penalty of $1,000, even if they should have neglected for any number of months to comply with its requirements, and that the amended complaint is demurrable because it states, joined together, several instances of their violation of that statute, and demands judgment for $1,000 for each violation.

So much of that act as is necessary to be considered for the purposes of this controversy reads as follows:

"Section 1. It shall be the duty of the directors, on the first Monday of each and every month, to cause to be made an itemized account or balance-sheet for the previous month. * * * Such account or balance-sheet shall be

verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company. * * *"

"Sec. 3. In case of the failure of the directors to have the reports and accounts current made and posted as in the first section of this act provided they shall be liable, either severally or jointly, to an action by any stockholder, in any court of competent jurisdiction, complaining thereof, and, on proof of such refusal or failure, such complaining stockholder shall recover judgment for one thousand dollars liquidated damages, with costs of suit."

It will be perceived that this act is, in its nature, penal, and does not specifically declare that for *each* failure to comply with its requirements a penalty may be recovered. Nor does it declare that each refusal or neglect of that kind shall render the directors liable for a penalty. It would therefore seem that, under its provisions, the stockholder or stockholders might, at their election, either proceed against the directors for a single delinquency, or might forbear to do so until more than one dereliction of duty on the part of their trustees (so to speak) had occurred; but in neither event could more than one penalty be recovered.

But, while this is the reasonable and unstrained view to be taken of the law relative to the extent of the liability of the directors, it does not follow that the amended complaint did not contain a sufficient statement of facts to constitute a cause of action, or that the demurrer should have been sustained on the alleged ground that several causes of action were in that pleading improperly joined. The joining of several matters of fact together which show as many failures to perform a duty enjoined by law, and claiming the legal right (which is but a conclusion of law) to recover a penalty for each, when the law itself only allows the recovery of one penalty for one and all of such violations, is not a joining of several distinct causes of action.

The plaintiff is entitled to recover if he has alleged, and can prove, the defendants to have been guilty of failure, on the first Monday of any one month, "to have the reports and accounts current made and posted as in the first section of this act provided," or if they have so failed on the first Monday of any other or all other months; and hence the statement of seven violations of the statute of the same kind, although he may join them together in his complaint, and claim to recover a penalty for each, is, under the statute, a statement of but one cause of action. In other words, as the statute in terms provides for but a single penalty of $1,000, no other or greater sum can be recovered, although violations of the statute may have been frequent. But it does not follow from this that the plaintiff may not join together in one count several of such alleged violations, and prove any one of them in his power, as they constitute separately or together but one cause of action.

We are therefore of opinion that the judgment should be reversed, and the cause remanded; the defendants to be allowed, if so advised, to answer the amended complaint.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with leave to defendants to answer the amended complaint.

71 Cal. 537

HANCOCK *v.* HUBBELL. (No. 11,501.)

(*Supreme Court of California.* January 14, 1887.)

1. DAMAGES—BREACH OF CONTRACT—PLEADING—EVIDENCE.

In an action for a breach of contract by defendant, to give plaintiff a certain time in which to take up tax certificates, by reason of which breach a third person has obtained tax deeds of the land, and caused the same to be recorded, and has brought an action against plaintiff to quiet the title to said land, in the absence of an

allegation in the complaint that plaintiff has lost possession of it, it is incompetent to introduce proof tending to show the value of the rents and profits of such land, as a foundation for a judgment against the defendant for the loss of its possession.

2. SAME—PROXIMATE CAUSE—SPECIAL DAMAGE.
The action to quiet title was not a proximate or necessary result of the breach, and, no special damages being pleaded, evidence of expenses and attorney's fees in that cause is inadmissible.

3. TRUSTS—EVIDENCE TO ESTABLISH.
A trust to purchase lands at tax sale, and restore them to their owner, is not established by an agreement, just before the time of redemption expired, to extend the period of redemption a month beyond the statutory limit.

4. PLEADING—AMENDMENT DURING TRIAL NECESSITATING CONTINUANCE.
After a trial has been in progress several days, and the plaintiff had been fully advised early in the proceedings that the defendant considered the complaint defective, it is not an abuse of the court's discretion to refuse the plaintiff an amendment which, if granted, would have necessitated a continuance.

5. NONSUIT—PLAINTIFF ENTITLED TO NOMINAL DAMAGES.
Where, in an action to recover damages for breach of contract, no damages are proven, but a breach is established, the plaintiff is entitled to a judgment for nominal damages and costs, and it is error to order a nonsuit.

In bank. Appeal from superior court, Los Angeles county.

Plaintiff alleges that, February 21, 1880, he was the owner and in the possession of certain real estate; that, about the time it was to be sold for delinquent taxes, plaintiff agreed to let it be sold therefor, and that defendant should buy it in, and hold the title in trust for plaintiff; that it was accordingly sold February 24, 1880, to defendant; that on February 21, 1880, defendant agreed to give plaintiff till March 24, 1880, to redeem; that March 23, 1880, plaintiff delivered the amount due, but defendant refused to accept the tender, and had in fact assigned the certificate to John Anderson, in violation of his contract; that Anderson obtained the tax deeds, which were recorded; that the title of record still stands in Anderson, who has brought suit to quiet title; and that the value of the land is $50,000; and prays for damages in the sum of $50,000. The instrument on which the trust was supported is as follows:

"LOS ANGELES, February 21, 1880.

"It is understood and agreed that Henry Hancock may redeem the land assessed to Sylvester Bryant, [state of,] and that assessed to John Hancock, for the fiscal year ending June 30, 1880, in San Bernardino county, purchased at the last tax sale, on or before March 24, 1880, by paying the amount paid out, and 20 per cent. thereon; but the said time shall not extend beyond said date, to-wit, March 24, 1880, time being the essence of this agreement.

"S. C. HUBBELL."

On the third day of the trial plaintiff asked leave to amend his complaint so as to set forth special damages, money paid out for counsel fees, and costs in suit to quiet title. The defendants objected, on the ground that, if they are allowed to amend, it necessitates a continuance. Motion denied.

L. Quint and *Barclay & Wilson*, for appellant. *Chapman & Hendrick*, for respondent.

FOOTE, C. This is an appeal from a judgment of nonsuit and an order refusing a new trial. We have carefully examined the record and all the authorities cited by counsel. The complaint alleged that the plaintiff was in possession of certain lands involved in this controversy, but did not aver that he had ever lost possession thereof, therefore it was not competent to introduce proof tending to show the value of the rents and profits of such land, as a foundation for a judgment against the defendant for the loss of its possession.

No special damages were pleaded; hence the evidence offered of expenses, attorney fees, etc., which were not the proximate result of the violation of

the contract, or which, in the ordinary course of things, would not have been likely to result therefrom, was properly excluded.

The trust alleged was not proved by competent and legal evidence, as the written agreement, which was the only legal proof of its existence offered, did not tend to establish it.

The court did not abuse the discretion vested in it by law in refusing the plaintiff's application to amend his complaint. The trial had been in progress for several days, the plaintiff was fully advised early in the course of the proceedings that the defendant considered the complaint defective, and the latter made that fact evident by repeated objections to the introduction of evidence tending to prove damages claimed to have been suffered by the former. It is plain that a continuance would have been the result had leave been granted to amend, which result would not have been caused by any fault of the defendant. *Graham* v. *Stewart*, 9 Pac. Rep. 555.

But the plaintiff claims that it was his right to have the jury pass upon the question whether or not, upon the evidence before them of a breach of contract, he was entitled to a verdict for nominal damages. We think the evidence did show a violation by the defendant of his contract with the plaintiff to permit the latter to redeem certain lands sold at tax sale; the former having possession of the certificates of such sale at the time the contract was entered into, such redemption to take place within a certain specified time. Although the record does not show that any proof was offered, which was admissible under the pleadings, that any actual damages were suffered by the plaintiff from the breach of the contract on the part of the defendant, yet, as the contract was proved to have been violated, the former was entitled to have the jury determine, upon a proper charge of the law by the court, whether or not they would render a verdict for nominal damages in his favor. And, if they had returned a verdict for the plaintiff for nominal damages, a judgment therefor would have been proper. *Browner* v. *Davis*, 15 Cal. 9–11; Sedg. Dam. (7th Ed.) 71, 72, note B, and cases cited. The judgment of nonsuit was therefore wrong, and the court should have granted a new trial upon the plaintiff's motion.

The judgment carried with it the right of the defendant by legal process to enforce payment from the plaintiff, or satisfaction by sale of his property, of the sum of $232.90, recovered by the former against the latter for costs. To that extent the plaintiff's rights were prejudiced; but it is apparent from the record that the plaintiff, upon a new trial, would not be entitled to anything more than a judgment for nominal damages, which, while it would relieve him of the payment of costs to the defendant, would not give him the right to enforce the payment of his own costs from the latter.

For these reasons we are of the opinion that the order denying a new trial should be reversed, unless the defendant will remit the sum of $232.90, which he has recovered for his costs, etc., against the plaintiff; but, upon that being done by the defendant, the order should be affirmed.

The appeal from the judgment, not having been taken within the statutory period of time, cannot be considered.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed. Order reversed, unless defendant, within 30 days, remits the sum of $232.90, which being done, the order should stand affirmed. Said remittance to be filed with the clerk of this court.

71 Cal. 481

BRALY v. HENRY. (No. 11,521.)

(*Supreme Court of California.* December 29, 1886.)

PROMISSORY NOTES—PROOF OF PAROL CONTEMPORANEOUS AGREEMENT—CONSIDERATION.

In an action on a promissory note, by the payee, or by one taking it with full knowledge of the facts, the maker may, by way of defense, prove a parol contemporaneous agreement that, though the face of the note showed a sum certain, the note having been given for the price of a stack of hay, if the value of such hay at a fixed price per ton did not amount to the face of the note, a rebate and credit was to be made in the maker's favor of the difference between the actual value of the hay and the face of the note, and that, under such agreement, a less sum is due than that sued for; following former decision, 11 Pac. Rep. 385.[1]

In bank. Appeal from superior court, Fresno county.

On rehearing. Action on promissory note. See 11 Pac. Rep. 385.

Grady & Merriam and *E. E. Calhoun*, for appellant. *Nourse & Church*, for respondent.

SEARLS, C. This is an action upon a joint and several promissory note, made by defendant and one W. E. Henry, on the twenty-sixth day of October, 1883, for $1,364, and interest at 12 per cent. per annum, payable four months after date, to T. E. Hughes or order, and averred to have been indorsed to plaintiff before maturity, and upon which there is claimed to be due the sum of $321.15, and interest thereon at 12 per cent. per annum from November 24, 1884. Plaintiff had a verdict and judgment as prayed for in his complaint; from which judgment, and from an order denying a new trial, defendant appeals. The cause was decided by department 1 of this court, in an opinion reversing the judgment and order appealed from. 11 Pac. Rep. 385. On petition of respondent, a reargument was ordered in bank, and the cause again comes up for consideration. The facts essential to an understanding of the question involved are set out in the former opinion, and need not be reproduced here.

Upon a review of the record, in the light of the scrutiny invoked by the proceedings had in the cause subsequent to the decision referred to, we see no just cause to doubt the soundness of the views expressed in the opinion, or

[1] See note at end of case.

for changing the conclusion reached therein. It is true that, as a general rule, parol evidence is not admissible to control, contradict, or vary a written instrument. It is equally true that there are certain legal presumptions indulged in favor of negotiable paper, with a view to facilitate its use and negotiation in commercial transactions, among which are: (1) That, until the contrary appears, every negotiable bill or note is presumed to be founded upon sufficient legal consideration; (2) that the holder and possessor of a bill or note is the true owner; (3) that paper, properly indorsed, was so indorsed before due; (4) that the holder of a bill or note took it in the usual course of business, before maturity, for value; (5) that the maker of the note is the primary debtor, and that the acceptor of a bill of exchange is primarily liable thereon.

These and other presumptions, indulged by the process of artificial reasoning known as conclusions of law, and formulated for the advantage of commercial interests and intercourse, are not conclusive, but are liable to be rebutted by parol evidence that the facts are different from what the law in their absence presumes. The burden of proof in such cases is upon the party who wishes to rebut the presumption. It is not received to contradict or vary the instrument, but to repel the presumptions of law which, in the absence of such proof, arise in its favor.

As between the original parties to a promissory note, or as to one taking it with notice of the facts or after maturity, a consideration is as essential to its validity as in case of other contracts. The maker may, as to such parties, defeat the note *in toto*, by showing there was no consideration whatever, or, by showing that there was only a partial consideration, may *pro tanto* defeat a recovery. Story, Prom. N. § 187.

In making proof of the want of consideration in such cases, the maker of the instrument, in effect, says that he made the instrument, but that the presumed legal effect does not follow, because it lacked the consideration essential to uphold all contracts, whether verbal or in writing. It no more changes the contract than does proof of payment or any other defense, which admits its execution and avoids its legal effect. A want of consideration must not be confounded with mere *inadequacy* of consideration. The latter cannot be set up to defeat a note. To illustrate: A. sells to B. 10 horses, at $100 each, and takes his note. B. cannot, in an action on the note by the payee, in the absence of fraud, show the horses to have been worth less than the agreed price, and thus abridge the recovery, as it would only establish an inadequacy of consideration, but he may show that none of the horses were delivered, and thus defeat the recovery; or he may show that five only of ten horses were delivered, and defeat a recovery *pro tanto*.

Apply the doctrine to the present case. Defendant, according to the testimony offered, purchased a given number of tons of hay, at a given price per ton, and gave his note for the amount. The quantity when weighed proved to be less by a number of tons, which multiplied by the price per ton, equaled $321.15. If the proffered evidence stopped here, defendant, as against the plaintiff, if the latter took with notice, would have been entitled to a proportionate reduction upon the sum called for by the note; and we are unable to see how defendant's rights are abridged by the fact that the parties, not knowing the quantity of hay, agreed that, if it fell short of the estimated or supposed quantity, a corresponding credit should be given on the note.

We are of opinion the judgment of reversal heretofore entered should stand as the judgment in the case.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, and in the opinion of department 1, (11 Pac. Rep. 385,) the judgment and order are reversed, and cause remanded for a new trial.

NOTE.

PROMISSORY NOTES. FAILURE OF CONSIDERATION, total or partial, or the want of consideration, constitute a good defense to an action on a promissory note between the original parties to it, Lancaster Co. Nat. Bank v. Huver, (Pa.) 6 Atl. Rep. 141; Fleetwood v. Brown, (Ind.) 9 N. E. Rep. 352; Blacker v. Dunbar, Id. 104; Fritzler v. Robinson, (Iowa,) 31 N. W. Rep. 61; Security Bank v. Bell, (Minn.) 21 N. W. Rep. 470; Maltz v. Fletcher, (Mich.) 18 N. W. Rep. 228; Kennedy v. Goodman, (Neb.) 16 N. W. Rep. 834; Brooks v. Hiatt, (Neb.) 14 N. W. Rep. 480; Torinus v. Buckham, (Minn.) 12 N. W. Rep. 348; Kansas Manuf'g Co. v. Gandy, (Neb.) 9 N. W. Rep. 569; Dicken v. Morgan, (Iowa,) 7 N. W. Rep. 145; Search v. Miller, (Mich.) 1 N. W. Rep. 975; State Sav. Ass'n v. Barber, (Cal.) 11 Pac. Rep. 330; Davis v. Wait, (Or.) 8 Pac. Rep. 356; Estudillo v. Aguirre, (Cal.) 5 Pac. Rep. 109; Staab v. Ortiz, (N. M.) 1 Pac. Rep. 857; and parol evidence is admissible to show the true consideration, Buscher v. Knapp, (Ind.) 8 N. E. Rep. 263; Maltz v. Fletcher, (Mich.) 18 N. W. Rep. 228; Dicken v. Morgan, (Iowa,) 7 N. W. Rep. 145; Talmadge v. Stretch, (Cal.) 4 Pac. Rep. 15.

71 Cal. 546

PEOPLE v. MORE. (No. 20,267.)

(*Supreme Court of California.* January 17, 1887.)

CRIMINAL LAW—APPEAL—DISMISSAL BY COURT OF ITS OWN MOTION—PEN. CODE CAL. § 1385.

The court, in directing, of its own motion, the dismissal of a criminal prosecution, as it is authorized to do under Pen. Code Cal. § 1385, performs the office of the attorney general of England, and the state attorneys in many of the United States, in entering a *nol. pros.;* and there is no appeal from such dismissal under the California constitution, giving the supreme court appellate jurisdiction in all criminal cases.

In bank. Appeal from superior court, Santa Barbara county.

Information for manslaughter. For the facts in this case, see 9 Pac. Rep. 461.

J. J. Boyce and *W. T. Williams*, for the People. *McNulta & Oglesby, Geo. Flournoy*, and *R. B. Canfield*, for respondent.

MCFARLAND, J. This is an appeal taken in the name of the people from an order made by the superior court of the county of Santa Barbara, of its own motion, dismissing a criminal action in which respondent herein was defendant. The order was made under the power granted in section 1385 of the Penal Code, which is as follows:

"Sec. 1385. The court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

The respondent moves to dismiss the appeal, upon the ground that the order is one from which no statutory right of appeal is given to the people. It is certainly not one of the enumerated cases in which a right of appeal is given by section 1238 of the Code, and there is no other statutory provision giving such right.

It is contended, however, by appellant that, as the constitution gives this court appellate jurisdiction of questions of law arising "in all criminal cases prosecuted, by indictment or information, in a court of record," therefore there is jurisdiction here, although no statutory machinery for the appeal has been provided, as held in *People* v. *Jordan*, 65 Cal. 644; S. C. 4 Pac. Rep. 683. But the order in question is, in its nature and character, one from which the people cannot appeal. The power under which the order was

made is substantially the same as that held by the attorney general in England, and by the prosecuting officer in many of the American states, to enter a *nolle prosequi*. The court, for the purposes of the order of dismissal, takes charge of the prosecution, and acts for the people. It holds the power to dismiss, as the attorney general in England holds the power to enter a *nolle prosequi*, by virtue of the office and the law; and it is exercised upon official responsibility. The court, having acted for the people, and under express power granted by them to so act in their criminal prosecutions, there is no appeal on their part from such action. Of course, if a defendant should appeal from such an order, as he well might if it were made after the impaneling of a jury, a different case would be presented. *Com.* v. *Tuck*, 20 Pick. 365.

Appeal dismissed.

We concur: THORNTON, J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

PEOPLE *v.* MORE. (No. 20,266.)

(*Supreme Court of California.* January 17, 1887.)

In bank. Appeal from superior court, Santa Barbara county.

Information for manslaughter.

J. J. Boyce and *W. T. Williams*, for the People. *McNulta & Oglesby*, *George Flournoy*, and *R. B. Canfield*, for respondent.

BY THE COURT. In accordance with the views expressed in the opinion in *People* v. *More*, *ante*, 631, (No. 20,267,) this day decided, the appeal herein is dismissed.

71 Cal. 550

HALL *v.* SUPERIOR COURT, EL DORADO CO. (No. 11,013.)

(*Supreme Court of California.* January 18, 1887.)

1. APPEAL — FROM JUSTICE'S COURT — FILING AND SERVICE OF NOTICE AND UNDERTAKING—CODE CIVIL PROC. CAL. §§ 974, 978.
 Under Code Civil Proc. Cal. §§ 974, 978, it is not necessary that the notice and undertaking on appeal from a justice's court to the superior court should be filed before service thereof.
2. CERTIORARI—WRONGFUL DISMISSAL OF APPEAL.
 If an appeal from a justice's court is erroneously dismissed by the superior court, the error may be remedied, and the cause reinstated by *certiorari*.

Commissioners' decision. In bank. On *certiorari*.

Geo. C. Blanchard and *Chas. A. Swisler*, for petitioner. *Irwin & Irwin*, for respondent.

FOOTE, C. On the nineteenth day of November, 1885, this court ordered the issuance in this cause of an alternative writ of *certiorari* to the superior court of El Dorado county. 8 Pac. Rep. 6, 509. Upon the return of the

certified transcript of the proceedings had by that court in the case of *Went* v. *Hall*, it appears that the appeal pending therein from a justice's court was dismissed upon motion, because the former court was of opinion that it did not have jurisdiction to hear and determine the said cause upon its merits. It further appears that the opinion was based upon the view entertained by the court that, as prerequisites to the validity of such appeal, it was necessary that the notice thereof should have been *filed* in the justice's court *prior* to the *service* of a copy of the same upon the adverse party, and that the undertaking should have been *filed simultaneously* with said *notice*, notwithstanding that all of those jurisdictional acts had been performed within 30 days of the date of the rendition of the original judgment.

This construction of sections 974 and 978, Code Civil Proc., was clearly erroneous, as this court held in *Coker* v. *Superior Court*, 58 Cal. 177. The superior court of El Dorado county had jurisdiction to hear and determine the case before it upon its merits, and the arbitrary dismissal of it upon motion was an improper divestiture of its rightful jurisdiction. Where such is the case, the writ of *certiorari* is a proper proceeding to annul the order dismissing the appeal. *Levy* v. *Superior Court*, 66 Cal. 292; S. C. 5 Pac. Rep. 353. The order of dismissal should be annulled, and the cause reinstated, heard, and determined upon its merits by the superior court of El Dorado county.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order of dismissal is annulled, and the cause ordered reinstated, to be heard and determined upon its merits.

71 Cal. 557

HEINLEN *v.* HEILBRON and others. (No. 11,410.)

(*Supreme Court of California.* January 18, 1887.)

1. NEW TRIAL—NOTICE OF MOTION—FORM OF—CODE CIVIL PROC. CAL. §§ 657, 659.
 Under Code Civil Proc. Cal. § 657, providing that "the former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes," etc., and section 659, requiring service upon the adverse party of notice of intention to move for a new trial, designating the grounds upon which the motion will be made, the notice need not specify that the mover will ask that the former verdict or other decision be vacated.
2. ACTION—MISJOINDER OF PARTIES—DEFENDANTS IN TORT.
 At the trial of an action *ex delicto*, a nonsuit having been granted as to certain defendants, for want of evidence to sustain the allegations as against them, and the complaint having been amended by striking their names from it, the other defendants are not entitled to a nonsuit on the ground of misjoinder of parties defendant.
3. APPEAL—BILL OF EXCEPTIONS—SPECIFICATION OF ERROR IN.
 Upon appeal from the judgment is an action to recover damages from defendant for diverting the waters of a water-course from plaintiff's land, error committed by the court in finding plaintiff to be the owner of certain lands, including lands not described in the complaint, and awarding damages upon that basis, may be availed of, although the error is not specified in the bill of exceptions, as it appears on the face of the record independently of the bill of exceptions.

Commissioners' decision. In bank.

Appeal from superior court, Tulare county.

Action to recover damages for diversion of water. Plaintiff had judgment against certain defendants, who appealed.

Brown & Daggett and *D. S. Terry*, for appellant. *Atwell & Bradley* and *G. A. Heinlen*, for respondents.

SEARLS, C. This is an action to recover damages for the diversion of water from Cole slough or King's river, and for a perpetual injunction restraining the defendants from diverting the waters thereof. The cause was tried by

the court, a jury having been waived, findings in writing filed, upon which judgment in favor of plaintiff was rendered for $100 damages, and awarding a perpetual injunction against defendants, restraining them from maintaining any dam or dams in Cole slough, or the channel thereof, or from in any manner interfering with the waters thereof, or obstructing or diverting the same from their natural channel, etc. From this judgment, and from an order denying a new trial, defendants appeal.

It is objected on the part of the respondent that the notice of motion for a new trial (a copy of which is inserted in the bill of exceptions, and thereby made a part of the record) is insufficient, in that while it notified respondent that defendants would "make and submit to said court above named a motion for a new trial of said cause," and designated the grounds of said motion, yet did not specify that they would ask that the former verdict or other decision be vacated, etc. The statute (Code Civil Proc. § 657) provides that "the former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes," etc. The section quoted does not make provision for a notice of the motion, but section 659 requires that "the party intending to move for a new trial must, within ten days after the verdict of the jury, or after notice of the decision, * * * file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made," etc.

In *Bauder* v. *Tyrrel*, 59 Cal. 99, it was said: "The section regarding the notice of motion for a new trial does not require that the notice shall, in terms, contain a notice of motion that the decision should be vacated. The order granting a new trial does of itself vacate the decision. That must be its necessary effect, for how can there be a new trial if the former decision stands?"

In *Kimple* v. *Conway*, 10 Pac. Rep. 189, a notice of motion for "a rehearing or new trial" was construed to be a notice of motion for a new trial, and that the words "rehearing" and "new trial" were used as synonymous.

The language used in the notice indicated clearly the intention of the moving party. Such notice was not defective in any of the specific requirements of section 659, and was therefore sufficient.

The complaint charges all the defendants jointly with having wrongfully built dams, head-gates, etc., in Cole slough, and a water ditch or canal therefrom, and thereby diverting a large portion of the waters thereof from plaintiff. There were two answers filed in the cause,—one by the defendants James and Burrell, and another by the defendants composing the firm of Poly, Heilbron & Co., in each of which answers said defendants pleaded a misjoinder of parties defendant. At the trial a motion for nonsuit was made on the part of defendants James and Burrell, who had answered separately, which motion the court at first overruled, but subsequently granted, upon the ground that there was no sufficient evidence against them to make a case either for damages or for an injunction. Thereupon, upon motion of the plaintiff, leave was granted by the court to amend the complaint by striking therefrom the names of said James and Burrell as defendants.

Defendants Heilbron and others, of the firm of Poly, Heilbron & Co., who had answered separately, also moved for a nonsuit, upon the ground that it appeared from the evidence that there was a misjoinder of parties defendant, in that the acts as proved showed separate and distinct wrongs and injuries committed by defendants James and Burrell from those proven against these defendants, and that no collusion or joint injuries by all the defendants was proven, etc. The court denied the motion, and its action is assigned as error.

Misjoinder of parties defendant. In actions *ex contractu*, if too many parties were made co-defendants, under the common-law rule, advantage could be taken of the misjoinder, (1) if the defect appeared on the face of the

record by demurrer; (2) by motion for nonsuit at the trial; (3) by motion in arrest of judgment; or (4) by writ of error. *Mansell* v. *Burredge*, 7 Term R. 352; 1 Chit. Pl. 50, and cases cited.

In actions *ex delicto* no advantage could generally be taken by the defendant of a misjoinder of parties defendant, and the only effect of a misjoinder was that the parties who should not have been included in the action were entitled to a verdict at the trial. Archb. Pl. 72. To this general rule there was, however, the exception that where the tort could not, in point of law, be joint, as in the case of slander and some others, the misjoinder was ground for demurrer, or, after verdict, for motion in arrest of judgment, or writ of error. But in these exceptional cases the objection was aided by the plaintiff's taking a verdict against one only, or, if several damages were assessed against each, by entering a *nolle prosequi* as to one after verdict and before judgment. 1 Chit. Pl. 16, (Amer. Ed. 97,) and cases cited.

If several persons jointly commit a tort, the plaintiff, in general, has his election to sue all or some of the parties jointly, or one of them severally, for the reason that a tort is in its nature a separate act of each individual. It is consequently held that in actions in form *ex delicto*, as trespass, trover, or case for malfeasance, against one only for a tort committed by several, he cannot plead the non-joinder of the others in abatement or bar of the action, or give it in evidence under the general issue; for the plea in abatement can only be adopted in those cases where the parties *must* be joined, and not where the plaintiff *may* join them or *not* at his option. The rule as to the misjoinder and non-joinder of parties plaintiff, in actions *ex delicto*, was quite different from that governing the matter of defendants. We need not define it here, and only refer to it for the purpose of saying that the case of *Gillam* v. *Sigman*, 29 Cal. 639, relied upon by appellants, was one in which there was an alleged misjoinder of plaintiffs. Our Code has so far modified the common-law rules on the subject that all objections to the misjoinder or non-joinder of parties, either plaintiff or defendant, must be taken by demurrer or answer, and, if not so taken, they are waived. In the present case the defendants set up in their answer the matter of which they complained. Had the proofs shown the defendants guilty severally of distinct wrongful acts, and had the court held them jointly or severally liable therefor, the question involved in *Keyes* v. *Little York, etc., Co.*, 53 Cal. 734, and *Hillman* v. *Newington*, 57 Cal. 56, would arise.

But the action of the court below in granting a nonsuit as to the defendants James and Burrell, whom the testimony failed to show as joint tort-feasors with the other defendants, eliminated this question from the case, and, as there was testimony sufficient to hold the other defendants, there was no error in refusing the motion for nonsuit as to them. In other words, the nonsuit as to James and Burrell was granted because the latter were not shown to have been guilty of the wrongful acts charged in the complaint, and a failure of proof against a defendant charged jointly with others does not support a plea in abatement, based upon the theory that defendants are *several* and not *joint* trespassers.

It is next objected that the findings do not support the judgment; and, among other objections thereto, is one that the court finds the plaintiff to be the owner of, say, 2,000 acres of land, not described in his complaint, and awards damages to plaintiff for diverting water therefrom. Turning to the complaint, and comparing it with the findings, we discover: (1) That plaintiff describes the land of which he is seized and possessed by legal subdivisions, aggregating some 10,000 acres, a portion only of which the court finds him to own. (2) The court finds the plaintiff to be the owner of sections 5, 21, W. $\frac{1}{2}$ of section 9, W. $\frac{1}{2}$ of W. $\frac{1}{2}$ of section 16, E. $\frac{1}{2}$ and S.W. $\frac{1}{4}$ of section 28, in township 19 S., range 20 E., aggregating over 2,000 acres, not described in the complaint, or claimed by the plaintiff. The court further

found that defendants had obstructed Cole slough so as to turn away and divert the waters thereof from the lands of plaintiff, and that, by reason of the wrongful acts of the defendants in diverting the water, plaintiff has been damaged in the sum of $100, for which sum judgment was rendered, etc.

A party who seeks to recover damages to land of which he avers himself seized and possessed, and who only succeeds in establishing ownership to a part thereof, may have his damages for injury to such part; but we know of no rule by which he can show ownership of land, and recover damages for an injury thereto, which is not described in his complaint or claimed by him. The findings as to such lands were without the issues, and the defendants were not sued for injury to them. The plaintiff can only recover upon the cause of action set out in his complaint, and not upon some other which the proofs may develop. *Mondran* v. *Goux*, 51 Cal. 151; *Heinlen* v. *Fresno Canal, etc., Co.*, 8 Pac. Rep. 513.

It was said in *Morenhout* v. *Barron*, 42 Cal. 605: "A finding is useless and idle unless the facts found are within the issues, and a judgment based upon such facts cannot be sustained." It is urged by respondent that appellants cannot avail themselves of the supposed error, for the reason that they failed to specify the same as error in their bill of exceptions. Where a motion is made for a new trial on the ground that the findings are not sustained by the evidence, the statement must specify the particulars in which the evidence is insufficient. Code Civil Proc. § 659; *Bate* v. *Miller*, 63 Cal. 233.

So, too, when the notice designates, as the grounds of the motion, errors of law occurring at the trial and excepted to by the moving party, they must be specified in the statement, and, if no such specifications are made, the statement is to be disregarded. The error complained of is one which appears upon the face of the judgment roll, and, if we disregard the bill of exceptions, it remains equally patent. The appeal is from the judgment as well as from the order denying a new trial, and the error complained of is one which might have been inquired into had no motion for a new trial been made. It appears of record, and requires no statement or bill of exceptions to make it apparent.

A decision and judgment in favor of a party upon a cause of action for which he has not sued is a decision against law, and, if not apparent on the record, may be corrected by a motion for a new trial, in which the statement performs the office of making a record of that which was not so before; but where the facts are all of record, an inquiry may be had in this court into the regularity of the proceedings, equally without as with a motion for a new trial, provided, as here, there is an appeal from the final judgment. The case of *Putnam* v. *Lamphier*, 36 Cal. 151, is in point. The court said: "The point is made that the judgment is not authorized by the pleadings. This objection may be taken upon the judgment roll alone, whether there is a statement on motion for a new trial or not. It is sometimes included among the grounds of the motion, but without any necessity, as it derives no support from the statement, and its omission, in stating the grounds of the motion, raises no presumption that it is waived." The appellate court will take notice of errors appearing in the judgment roll, even if not named in the specification of errors in the statement. *Shepard* v. *McNeil*, 38 Cal. 72; *Patterson* v. *Sharp*, 41 Cal. 133; *Sharp* v. *Daugney*, 33 Cal. 505.

For the error indicated, we are of opinion the judgment and order of the court below should be reversed, and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

71 Cal. 555

LUCO and others *v.* SUPERIOR COURT, TUOLUMNE CO. (No. 11,597.)

(*Supreme Court of California.* January 18, 1887.)

1. ACTION — VENUE—CHANGE OF ACTIONS IN SUPERIOR COURTS OF CALIFORNIA ON APPEAL FROM JUSTICES' COURTS.

 Under section 5, art. 6, Const. Cal., providing that "superior courts shall have appellate jurisdiction in such cases arising in justices' and other inferior courts as may be prescribed by law," that part of section 980, Code Civil Proc. Cal., declaring that "the provisions of this Code as to changing the place of trial * * * are applicable to trials on appeal to the superior court," is unconstitutional; and where an action tried in a justice's court of a county is appealed to the superior court thereof, such court has jurisdiction of the action, and will refuse an application to transfer it to the superior court of another county, on the ground that the defendants are residents of such other county.

2. SAME—PERSONAL ACTION—NON-RESIDENT DEFENDANT—WAIVER OF OBJECTION TO JURISDICTION.

 Where, in a personal action, the defendants are not residents of the county where the action is brought, and make a motion to dismiss for lack of jurisdiction by reason of that fact, and then voluntarily withdraw the motion, and go to trial on the merits, they waive the question of jurisdiction. Code Civil Proc. Cal. § 848.

Commissioners' decision. In bank.

H. P. Irving, for petitioners. *F. W. Street*, for respondent.

FOOTE, C. From the certified copy of the transcript brought here in response to the requirements of the alternative writ of mandate issued from this court to the superior court of Tuolumne county, it appears that on the ninth day of February, 1885, one Isaac T. Holland commenced an action in a justice's court of Tuolumne county against Juan M. Luco, I. N. Thorne, and S. F. Ambler,—all of said defendants being non-residents of said county; that on the sixth day of March following, defendants Thorne and Luco (Ambler not having been served with process) filed in the justice's court affidavits and a motion to dismiss the action, on the ground of a want of jurisdiction in the court to try the cause, also separate answers to the complaint; that on twenty-first day of December, 1885, the case was tried in said justice's court, but before the trial commenced Thorne and Luco, by consent, withdrew the motion to dismiss the action. Judgment was then rendered against them, and from that they appealed to the superior court of Tuolumne county, on questions both of law and fact.

After the filing of the papers on appeal in said superior court, the defendants Thorne and Luco moved, upon affidavits, for a change of the place of trial of the cause to the superior court of the city and county of San Francisco, upon the ground that their residence then, and at the time of the commencement of the action, was at the latter place. The court overruled their motion. And it is to compel its action to transfer the case for trial as demanded by their motion that the present proceedings were instituted.

The fact that the defendants voluntarily, by consent, withdrew their motion to dismiss the case, and went to trial on the merits in the justice's court, was a waiver of the question of jurisdiction raised on the motion, under section 848, Code Civil Proc., the action being in its nature personal. The action undoubtedly arose in the justice's court of Tuolumne county, and therefore no other superior court save of that county had appellate jurisdiction to hear and determine it; and, as the superior court of the city and county of San Francisco was without jurisdiction so to do, it was proper for the court below to have refused, as it did, to transfer the cause, as requested by the defendants.

This construction of the provisions of section 980, Code Civil Proc., relative to a change of place of trial, and of article 6, § 5, of our state constitution, as bearing upon the constitutionality of that former section as applicable to

cases like the one under consideration, is sustained in the case of *Gross* v. *Superior Court*, *ante*, 264, (decided by this court in bank, December 7, 1886.)

For these reasons the writ of mandate should be denied, and the petition therefor dismissed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the application for a writ of mandate is denied, and petition dismissed.

71 Cal. 565

PEOPLE *v.* ROGERS. (No. 20,236.)

(*Supreme Court of California.* January 18, 1887.)

1. HOMICIDE—MURDER—EVIDENCE—COMMISSION OF OTHER OFFENSE.

On the trial of an information for murder, evidence of the commission of two burglaries by the accused is admissible, notwithstanding the rule that such evidence is objectionable as, in effect, trying the accused for an offense not charged in the information, and as prejudicing the jury against him, when the evidence tends to show that the person who killed the deceased gained entrance to his house by means of a knife and chisel taken in one of the burglaries, and killed him with a pistol taken in the other.

2. SAME—INSTRUCTION.

Evidence tending to show the prisoner guilty of the crime charged is properly admitted, although it also tends to show him guilty of other offenses, when the jury are properly instructed that they are not to convict the defendant because the evidence shows him a man of bad character in having committed the other offenses, and are only to consider the evidence in its connection with the offense for which the prisoner is on trial.

3. SAME—NEW TRIAL—THE JURY—PRESUMPTION AS TO EXERCISE OF JURISDICTION.
The court having properly instructed the jury as to how evidence is to be considered by them, it is a presumption of law that they exercised their jurisdiction correctly.

4. SAME—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.
The question of the sufficiency of evidence to connect the prisoner charged with murder with burglaries is for the jury, after the court has determined that the evidence is admissible.

5. SAME — REFUSING TO GIVE PROPER INSTRUCTIONS — LAW GIVEN IN OTHER INSTRUCTIONS.
It is not error to refuse instructions asked, when the legal propositions of such instructions are embraced in others given.

Commissioners' decision. In bank.

Appeal from superior court, Humboldt county.

H. J. Smith and *A. J. Monroe*, for appellant. *The Attorney General*, for the People.

FOOTE, C. The defendant was convicted of the crime of murder in the first degree. From the judgment therein, and an order refusing him a new trial, he has appealed. He contends that the prosecution was allowed, over his objection, to introduce evidence which tended to show that, prior to the night on which he is alleged to have murdered Kimball, the deceased, while burglarizing the latter's house, another burglary had been committed of a saloon belonging to Knight & Pardee, situated some 12 miles distant from the place of Kimball's murder, and that, from the saloon, a pistol, a small nugget of gold, with some other articles, were then and there stolen; that the nugget of gold was found in a box, with a piece of cloth around it, other jewelry being also in the box; that the pistol was found in the woods with a sack, which contained articles of food and a cup, and that, near the spot where the pistol was found, was also discovered a quilt, which the evidence tended to show was the property of the defendant; that evidence was also allowed to be introduced, notwithstanding his objection, to the effect that the house of J. S. Connick had been burglarized the night previous to the killing of Kimball, and articles of food, a small sack, and shirt taken therefrom, and that the defendant had been seen in that neighborhood about the time of the commission of the burglary.

It appeared in evidence, in addition to the matters just stated, that the box containing the jewelry and nugget of gold was found by the witness Peterson near by the spot at which the defendant was arrested, in a certain road; that this box had been on the next morning delivered to one T. M. Brown; that after such delivery he asked the defendant where he got "that jewelry," or "the jewelry that is in the box," to which the defendant answered that he got it from Dan (who Dan was not being shown;) that Mr. Knight identified the pistol as being one taken from the burglarized saloon, and Mr. Pardee identified the nugget of gold which was in the box when delivered to Mr. Brown as having been taken at the same time with the pistol. It was also shown that the person who entered Kimball's dwelling and killed him used, to effect his burglarious entrance, a knife and a chisel, and that said articles, some food, a cup, a shirt, and a sack had been taken from the burglarized house of Connick, and belonged to him; that around the box containing the jewelry and nugget of gold was a piece of cloth similar in color, texture, and general appearance to the shirt of Connick thus taken.

The evidence also strongly tended to make it apparent that Kimball was killed with a pistol, and that, in accomplishing his murder, three shots were fired; that the pistol ball taken from the body of the deceased was the same in size as those carried by the pistol produced in evidence; and that such weapon, when stolen from the saloon, had five chambers thereof loaded, and when found had but two. It therefore became a most material question in the

case whether the defendant ever had that pistol in his possession. Therefore the existence of that fact became a relevant subject of inquiry, and, having become a relevant fact, any evidence which tended to prove it became also relevant. Reynold's Steph. Ev. art. 9, p. 15. It is very clear that it was proper to show that the defendant admitted the possession of a nugget of gold, which had been taken at the same time as the pistol. The other facts and circumstances claimed as having been improperly admitted in evidence tended necessarily to explain and throw light upon those above stated, and were therefore relevant, whether in favor of or against the defendant.

But it is claimed for him that the admission of such facts and circumstances, if they proved him to have committed the burglaries of the saloon and Connick's house, was erroneous, because it involved substantially a trial of offenses not charged in the information upon which he was then being tried, and would prejudice the jury against him as a hardened criminal. As a general proposition the point contended for might be well taken. But it must be borne in mind in this case the evidence objected to tended directly to show that the defendant had committed the crime of which he stood charged, and must, therefore, have been relevant and competent; and, if it also tended to induce the belief that he had been the perpetrator of other crimes, he cannot be heard to complain, since his own acts, in multiplying his offenses against the laws of the land, ought not to be permitted to diminish the volume of competent evidence. *State* v. *Adams*, 20 Kan. 319; *People* v. *McGilver*, 67 Cal. 56; S. C. 7 Pac. Rep. 49.

The jury were well and clearly instructed that the evidence claimed as erroneously admitted could only be considered by them "for the purpose of passing upon the question as to whether the pistol in evidence had been in the possession of the defendant, and used by him to kill said Kimball as charged." And they were, in language full and explicit, forbidden to convict the defendant because the evidence showed him to be a man of bad character, as having committed the burglaries of the saloon and Connick's dwelling. It is a presumption of law that the jury exercised its jurisdiction soundly, after the court had performed its duty, as it did, in instructing them correctly as to the applicability of the evidence before them. *State* v. *Watkins*, 9 Conn. 54.

The defendant urges further that the trial court left the question of the sufficiency of the evidence connecting him with the burglaries of Connick's house and the saloon to the jury; that this was a matter of law for the court to determine, and not for the jury. As it seems to us, the duty of the court in that particular was well and correctly performed. It admitted the evidence as being pertinent and relevant, and left the jury to determine its weight, under proper instructions as to the law governing its applicability. The circumstantial evidence in the case, taken in connection with the testimony of the widow of the deceased, satisfy us that the jury were fully warranted in believing, as they did, that the defendant and no other person was the murderer of Kimball.

The legal propositions contained in instructions 2, 5, 6, 8, and 11, asked for by the defendant, and refused, were all of them plainly and sufficiently enunciated in the charge of the court to the jury, and nothing contradictory to or conflicting therewith was otherwise given.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 578

HART and others *v.* FINIGAN. (No. 9,355.)

(*Supreme Court of California.* January 20, 1887.)

PARTNERSHIP—ACCOUNTING—PLEADING—FINDINGS.

In an action for an accounting between partners, based upon the alleged existence of a partnership which is denied by the defendant, the court may, in a trial without a jury, find facts which partly sustain the plaintiff's allegations of partnership, but show such a dissolution before action brought as would defeat a judgment in the plaintiff's behalf.

Commissioners' decision. In bank.

Appeal from superior court, city and county of San Francisco.

Mesick & Maxwell and *Geo. N. Williams*, for appellants. *W. H. L. Barnes*, for respondent.

FOOTE, C. This cause was tried by the court without a jury. A judgment was rendered for the defendant. In the complaint it was alleged by the plaintiffs that they and the defendant, about the fifteenth day of April, A. D. 1872, entered into a joint venture for profit in the purchase of 100 shares of the capital stock of the Consolidated Virginia Mining Company, which venture continued to July 1, 1874, at which time this action was instituted for an accounting, and that the defendant meantime might be restrained from disposing in any way of the stock so claimed as partnership property, and that a receiver be appointed to take charge of the same to abide the final decree of the court, etc. The defendant answered, denying all the material allegations of the complaint. From the judgment and order denying a new trial the plaintiffs appeal.

The points relied on here by them for the reversal of the judgment and order, and obtaining a new trial, are that the trial court failed to find on the material issues made by the pleadings, and that the findings on which the judgment is based, are outside of the issues in the case, and not supported by the evidence.

As it appears to us, the court found certain facts, mainly ultimate, which did not sustain precisely, according to the language employed, the allegations of the complaint, or the defendant's denial of them; yet those facts, as found, made it evident that the court passed upon all the material issues made by the pleadings, and none other; and such findings being based, to some extent, upon contradictory evidence, should be upheld.

Under the facts as found, upon the testimony admissible under the issues as made up, it appears that the conclusions of law of the court are correct. When such is the case, it would seem to subserve no useful purpose to reverse a judgment, because the court below upon the evidence, conflicting as it was, has not found as a matter of fact that the contention of plaintiffs, or its denial by the defendant, are absolutely true in all respects in the language of the pleading.

That tribunal has certainly passed upon and considered the material issues as presented by the pleadings, and its action cannot be called in question if, upon the evidence as adduced, it has not fully agreed with the language of the plaintiffs' forcible allegations, or that of the defendant's emphatic denials. Grant that a partnership existed, as the plaintiffs contend, which the court does not find to be exactly so, as charged, yet the partnership is found by that tribunal to have been dissolved by mutual consent at the end of 30 days from its inception, and long before this suit was brought, the defendant taking the entire interest in the property, as well as all the risks attendant on the venture, and that no profit had resulted to the partnership during its existence, and, as a consequence, no action such as the one brought could be successfully maintained for an accounting or injunction. Where such an action is instituted, based upon the alleged existence of a partnership, which is flatly de-

nied by the defendant in his answer, as in this case, it is not permissible to say that a court must be precluded from finding facts which partly sustain the plaintiffs' allegation of partnership, but show such a dissolution before suit brought as would defeat a judgment in the plaintiffs' behalf.

Parties bringing suit state the facts constituting their cause of action. Defendants deny such facts, which is entirely proper. But a court, in passing upon the issues as made, must find the facts ultimately, or such probative facts as that ultimate facts may be inferred. Where, as in this case, such action is had by the court, and the facts as found show beyond doubt that the conclusions of law arrived at are correct, the judgment should not be reversed because the findings do not positively negative either the plaintiffs' or defendant's allegations in their pleadings in all respects as they are worded, but do so substantially.

It sufficiently appears that the court below did pass on all material issues as made in this cause by the pleadings, and that the facts as found entitle the defendant to the judgment he obtained. As has been before stated, the evidence was in some respects conflicting, and therefore we cannot say that the findings were not thereby supported. The latter support the judgment, and it and the order denying a new trial should be affirmed.

We concur. BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 737

GREEN and another *v.* STATE. (No. 11,169.)

(*Supreme Court of California.* January 20, 1887.)

1. WATER AND WATER-COURSES—CANAL—SACRAMENTO AND AMERICAN RIVERS—ACT OF CALIFORNIA MARCH 12, 1885—LIABILITY OF STATE.
 The California act of March 12, 1885, (St. Cal. 1885, p. 107,) authorizing suits to be brought against the state for damages caused by the destruction of property from the cutting of a canal by order of the levee commissioners, for the purpose of diverting the waters of the American river into the Sacramento river, by virtue of the California act of April 9, 1862, had merely the effect of submitting the state to the jurisdiction of the courts, and did not create any new ground of liability against the state.

2. SAME—EMINENT DOMAIN—TAKING LAND FOR PUBLIC USE.
 Under the language of the California constitution, as it existed prior to the adoption of the new constitution of 1879, if, in pursuance of an act of the legislature, the channel of a river be turned or straightened where it empties into another river, so that the land on the opposite side of the river is destroyed or injured, the damage thus sustained is not a taking of the land for public use; following *Green* v. *Swift*, 47 Cal. 536.

Commissioners' decision. In bank.

Appeal from superior court, Sacramento county.

A. L. Hart and *C. T. Jones*, for appellants. *E. C. Marshall*, Atty. Gen., and *John T. Carey*, for the State.

SEARLS, C. This cause was decided by Department 1 of this court, in an opinion filed July 14, 1886, affirming the judgment of the court below. 11 Pac. Rep. 602. A rehearing in bank was thereafter ordered, and the case again comes under review.

1. The act of March 12, 1885, authorizing the commencement of this action by plaintiffs against the state, simply empowered them to bring a suit, and to make the defendant a proper party thereto. It did not create for them a cause of action, or waive, on the part of the defendant, any defense which it had to such action. The state submitted itself to the jurisdiction of the court, subject to its right to interpose any defense which, as a sovereign

state, it might lawfully urge to the action when instituted. The contention that the act of March 12, 1885, (St. 1885, p. 107,) amounts to a legislative concession of the liability of the state, is not supported by sound reason. Were the state to pass a general law permitting all persons at will to institute suits against it, surely it would not be contended that such an act conceded the existence of a cause of action in favor of all persons bringing suits.

Ordinarily, and in theory, a sovereign state is presumed to be ready and willing to do justice to the citizen, without the necessity of invoking the assistance of the judicial arm; but, in exceptional and intricate cases, the legislative department finds itself inadequate to balancing and adjusting claims, depending upon the solution of abstruse questions of law. In such cases it is eminently proper that the question of legal obligation and the measure of damages be submitted for adjustment to that department of the government whose peculiar province it is to investigate and determine questions of like character. How such submission to the courts can be construed into a recognition of the existence of a cause of action we cannot comprehend.

It may be the legislature could, in a proper case, determine the liability of the state, and then refer the question of the amount of compensation to the courts, if it saw fit so to do. But in the present case it has not pursued that course. The language of the statute does not bear any such construction. We quote: "If it appears, upon the trial of any said actions, that damage has been done to the plaintiff by any act for which the state is legally liable," etc. To hold that this expression of legislative intent is to be construed as admitting a right to recover, is to beg the question, and do violence to the statute. By authorizing the plaintiffs to bring suits against the state, the legislature simply remanded them to the courts for a determination of their rights, and no argument in favor of the liability of the state can be drawn therefrom which may not with equal force be urged in favor of any plaintiff against the defendant whom he is authorized to sue at law.

2. The whole question of the right of plaintiffs to recover was necessarily involved in the determination of *Green* v. *Swift*, 47 Cal. 536.

Agreeing, as we do fully, with the views expressed by Justice McKINSTRY in the former decision of this cause, we are of opinion the judgment heretofore rendered, affirming the judgment of the court below, should stand as the judgment of the court herein.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

THORNTON, J. I dissent from the judgment in the above entitled action.

TODHUNTER *v.* STATE. (No. 11,283.)

(*Supreme Court of California.* January 20, 1887.)

Commissioners' decision. In bank.

John Heard and *Freeman, Johnson & Bates*, for appellant. *E. C. Marshall*, Atty. Gen., and *John T. Carey*, for respondent.

SEARLS, C. The judgment in this cause should be affirmed, upon authority of *Green* v. *State*, *ante*, 683.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 582

MASSMAN v. SUPERIOR COURT. (No. 11,836.)

(*Supreme Court of California.* January 21, 1887.)

NEW TRIAL—AFTER NONSUIT—APPEAL FROM JUSTICE'S COURT.

The superior court, after a nonsuit in the trial of an appeal from a justice's court, can grant a new trial.

Commissioners' decision. Department 2.

An action was brought in a justice's court of San Francisco for $299 damages, for injuries caused by alleged negligence of defendant therein. Appeal taken from judgment to superior court, which latter court, on plaintiff's testimony, granted a judgment of nonsuit. Plaintiff subsequently moved for a new trial (as to all of the steps taken towards which motion defendant objected) on the grounds of "error in law occurring at the trial, and excepted to by plaintiff," and "that the said order directing a judgment of nonsuit was a decision against law." The superior court ordered a new trial, which was had, and judgment rendered in favor of plaintiff for $150. Application now to supreme court for writ of review.

Ladd & Finlayson, for petitioner. No appearance for respondent.

BY THE COURT. Application for a writ of review. The application must be denied. The superior court, in our opinion, had jurisdiction to grant a new trial in the case of a nonsuit on the trial of an appeal to it from a justice's court. Code Civil Proc. § 980.

Ordered accordingly.

71 Cal. 583

BAKER v. SUPERIOR COURT OF SHASTA CO. (No. 11,942.)

(*Supreme Court of California.* January 22, 1887.)

1. CERTIORARI—PARTIES—SERVICE.

In *certiorari* brought by the plaintiff in an action in the superior court, the superior court was alone made respondent, and service of the alternative writ was made upon the judge of that court and the defendant. *Held*, that the service was sufficient, and the proper parties were before the court.

2. PLEADING—TIME—CODE CIVIL PROC. CAL. § 1054.

Extension of time to answer or demur being limited by Code Civil Proc. Cal. § 1054, to 30 days, an order granting until the receipt of a *remittitur* in another case pending on appeal is erroneous.

3. CERTIORARI—WHEN IT LIES.

Certiorari is the appropriate remedy in such case.

4. SAME—MODIFYING ORDER.

Such erroneous order can be modified by the supreme court on *certiorari*, and it is not necessary to determine whether or not it is totally void.

Department 2. *Certiorari.*

The copy of alternative writ and petition was served on attorneys of defendant, Banks, in the action mentioned in opinion, and also on the judge of the superior court. The superior court was the only party respondent to the writ.

Frisbie & Wiley, for petitioner. *Eugene B. Cushing*, for respondent.

MCFARLAND, J. We think that the service in this proceeding was sufficient, and that the proper parties are before the court, and therefore the motion to quash is denied. The return to the writ of review in this proceeding shows that in the case of *L. H. Baker, Petitioner Herein*, v. *William Banks, Defendant*, pending in the court of respondent, an order was made by the court on the twenty-ninth day of December, 1886, extending the time of defendant to answer or demur until 10 days after the receipt of the *remittitur* in a certain other case of *N. J. Pehrson* v. *John B. Hewitt*, then pending on appeal from the court of respondent to this court. The order also contained

some directions about a stay of proceedings, but we treat it as being substantially an order extending the time to plead, as above stated.

It is clear that the order, so far as it attempted to extend the time to plead more than 30 days, was an excess of jurisdiction, (Code Civil Proc. 1054;) and it is equally clear that petitioner has no plain, speedy, and adequate remedy other than *certiorari*.

As this court may modify the order, we do not deem it necessary to determine whether or not it should be considered as a unit, and therefore totally void. It is therefore ordered that the order under review be modified so as to extend the time within which the defendant in said case of *Baker* v. *Banks* may plead, 30 days from and after the twenty-ninth day of December, 1886, and no further.

We concur: SHARPSTEIN, J.; THORNTON, J.

71 Cal. 124

CROGHAN *v.* SPENCE. (No. 9,611.)

(*Supreme Court of California.* September 28, 1886.)

STATUTE OF LIMITATIONS—ADVERSE CLAIM.

Action to determine adverse claim to land *held* barred.

Department 1. Appeal from superior court, Humboldt county.

J. J. De Haven, for respondent, Croghan. *J. D. H. Chamberlain*, for appellant, Spence.

BY THE COURT. There was no evidence of an actual adverse possession by defendant of any part of the premises described in the complaint. The finding against the defendant on his plea of the statute of limitations was proper.

To the cross-complaint of the defendant the plaintiff pleaded in bar sections 343 and 338 of the Code of Civil Procedure. For all purposes necessarily involved in the disposition of this case it may be conceded that defendant is entitled to a decree against the plaintiff charging him as trustee of the legal title for defendant's benefit if the defendant would have been entitled to a like decree against Minor, the grantor of plaintiff, had Minor not parted with his title.

The defendant's cause of action against plaintiff, if any he has had, arose, at the latest, August 13, 1877, when the commissioner of the general land-office adjudged (in the language of appellant's brief) that defendant "had the better right to pre-empt the land, and that Minor had acquired his patent by fraud and perjury." That was more than five years before the present action was commenced, and nearly six years before the defendant herein filed his cross-complaint. If the cross-complaint be treated as a bill for relief on the ground of fraud, the facts constituting the alleged fraud were known to the defendant long before the adjudication by the commissioner of the general land-office above mentioned.

Whether, therefore, the four-years limitation of section 343, or the three-years limitation of section 338, of the Code of Civil Procedure applies, the cause of action set forth in the cross-complaint was barred.

Judgment and order affirmed.

70 Cal. 582

PEOPLE *v.* MYERS and another. (No. 20,189.)

(*Supreme Court of California.* August 31, 1886.)

1. CRIMINAL LAW—TRIAL—EVIDENCE—ROBBERY—FOOT-PRINTS—OTHER SIMILAR FOOT-PRINTS.

On the trial of an information against men for robbery, evidence having been introduced tending to show that a peculiar boot-track had been traced from the scene of the robbery to the house of one of the defendants, it was error to exclude evidence offered by the defense to show that two men, other than the defendants, had

been seen on the third day after the robbery within three days' foot-travel of the place of the occurrence, one of whom wore a boot which left precisely similar marks to those traced to the defendant's house.

2. SAME—THE JURY—"TREATED" BY SHERIFF—SHERIFF SEEKING REWARD FOR CONVICTION OF DEFENDANTS.

Where a reward has been offered for the conviction of the parties committing a crime, and the sheriff, in hopes of obtaining it, has paid out considerable money in and about the trial, with no expectation of being repaid except in case of conviction, it is an irregularity for such sheriff, while in charge of the jury, and during the trial, to take them to saloons, and furnish them with liquors at his expense; and such irregularity is not counterbalanced by the fact that the jury was also "treated" by one of their number, and by one of the attorneys for the defendants.

In bank. Appeal from superior court, Fresno county.

Information for robbery.

Grady & Merriam and *P. Reddy*, for appellants. *The Attorney General*, for the People.

MYRICK, J. The defendants were accused by information of the crime of robbery. For two reasons the conviction must be set aside, and a new trial ordered, viz.:

1. The accused were convicted on circumstantial evidence only. The fact of the robbery was clearly proved. As a circumstance tending to show that the defendants were present at the robbery, and were the persons who committed it, the prosecution gave evidence that certain boot-marks, of peculiar characteristics, were found, the day after the robbery, at the place, and were traced from that point along a trail for about eight miles to a gate leading into a *corral* at the place of residence of defendant Myers. In no other way was a boot of that description traced to the defendants. The defendants offered to prove that on the third day after the robbery, at a place more distant than Myers' residence, but within three days' foot-travel, two men, other than the defendants, of about the same stature and of similar complexion, were seen, and that a boot worn by one of them left marks precisely similar to those found on the trail. This evidence was objected to. We copy from the transcript:

"*The Court.* If you say your object in introducing this testimony is to identify or show that it was the defendants, or either one of them, that was there at that time, the court will permit the evidence.

"*Defendants' Counsel.* That we were there with that peculiar track? No, we don't do that. Our purpose is to show that it was not the defendants who robbed the stage.

"*The Court.* Taking that view of it, the court will certainly sustain the objection."

In other words, if needed in order to more clearly present the ruling, if the evidence offered would tend to show the guilt of the defendants, it was admissible; but if to show their innocence it was inadmissible.

2. The jury was during the trial placed in charge of the sheriff. A reward had been offered for the conviction of the defendants, and the sheriff hoped to obtain the reward. He paid out some considerable money in and about the trial, and had no expectation of being repaid therefor except in case of conviction. During the trial, and while the jury was in his charge, on at least two occasions the sheriff conducted the jurymen to public saloons in the town, and furnished them liquors at his expense. This manifest irregularity is not counterbalanced by the fact that the jurymen on one occasion were "treated" by one of their own number, and on another occasion by one of the attorneys for the defendants.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: MORRISON, C. J.; MCKEE, J.; SHARPSTEIN, J.; THORNTON, J.

71 Cal. 548

PEOPLE *v.* COPSEY. (No. 20,229.)

(*Supreme Court of California.* January 17, 1887.)

1. JURY—CHALLENGES—HYPOTHETICAL QUESTIONS BASED ON THE THEORY OF THE PROSECUTION, ADMISSIBLE.

 Where, on an information charging defendant with an assault with intent to commit murder, the defendant's counsel, in challenging the jury, has put to them hypothetical questions based on his theory of the case against the objection of the district attorney, the district attorney may, in cross-examining them, ask hypothetical questions based on his theory of the case.

2. WITNESS—IMPEACHMENT OF—RELIGIOUS BELIEF—CONST. CAL. ART. 1, § 4; CODE CIVIL PROC. CAL. § 1879.

 A question put by defendant's counsel to a prosecuting witness seeking to impeach him by showing him to be an atheist may well be objected to under Const. Cal. art. 1, § 4, and Code Civil Proc. Cal. § 1879.

Commissioners' decision. In bank.

Appeal from superior court, Lake county.

The information in this action charged the defendant with committing an assault upon the person of one Fred. Sonsberry with a deadly weapon, with intent to commit murder. At the trial the district attorney, after defendant, against his objection, had put hypothetical questions based upon his theory of the case, asked each juryman, during his examination on *voir dire:* "If you saw your brother struggling with a stranger, and your brother was sitting on the ground, and that the stranger was face down in his lap, and your brother had his arm across the neck of the stranger, holding him down so that he could not move, and your brother had a pistol in his right hand, and the stranger had no weapon, and an officer of the law was standing over both in such a position that neither could do the other harm, that you would have the right to go up and shoot him?" Each juror stated he did not think he had the right to shoot under the circumstances. Before the district attorney made his opening speech, defendant objected to and challenged the entire panel on the ground that the district attorney had stated to each juror his theory of the facts of the case, and had obtained an expression of the opinion of each juror on such statement, which challenge the court denied, and the defendant duly excepted.

In cross-examination of the prosecuting witness, the defendant's counsel asked him if he was not an atheist, and an unbeliever in any God, or anything of that sort; counsel stating he expected to prove thereby, and by other witnesses, that such witness was an atheist, and did not believe in any future state. Upon objection by the district attorney that such evidence was immaterial, the court refused to allow the question. Judgment of conviction was rendered, from which defendant appeals.

E. C. Marshall, Atty. Gen., for the People. *R. W. Crump,* for appellant.

FOOTE, C. The defendant was found guilty, by the verdict of a jury, of an assault with intent to commit murder. From the judgment of conviction, and an order refusing him a new trial, he has appealed.

The first error assigned by the defendant is that the court did not sustain his challenge to each and all of the entire panel of trial jurors, on the ground that they were biased against the defendant. The existence of this bias was alleged to have been shown from the fact that the jurors had each stated, on their *voir dire*, that if certain hypothetical facts related to them by the district attorney, as his theory of the case, were true, they would not regard the defendant as innocent of the crime charged against him.

It appears that the jury had previously had put to them by the defendant's counsel hypothetical questions based upon his theory of the case, and had been permitted to answer them, over the objection of the district attorney, in a manner favorable to the defendant. The cross-examination, therefore,

by the district attorney was, as it seems to us, strictly legitimate, and we perceive nothing in the record which warrants even a suspicion that the jury were in any way prejudiced or biased against the defendant. The different theories of the case hypothetically put to them by each side—that on the part of the defendant first, and on the part of the people last—left the jury perfectly free to determine the guilt or innocence of the prisoner on trial before them, under the fair and clear instructions of the court, from the facts and circumstances adduced in evidence before them.

As to the objection made that the evidence did not warrant the jury in convicting the defendant, because it showed an absence on his part of all *intent to commit murder*, we have simply to say that the jury, with the evidence before them, have determined the issue submitted to them against him, and upon reviewing that evidence we are not disposed to question the justness of their verdict.

The defendant sought to impeach the witness Sonsberry, by showing him to be a person who entertained no religious belief. To a question put to the witness on the part of the defendant, with that purpose in view, the court sustained an objection, of which the former complains. But his contention is not based upon any meritorious ground, as we think a reference to the constitution of California, art. 1, § 4, and section 1879, Code Civil Proc., abundantly demonstrates.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 552

DECLEZ *v.* SAVE. (No. 11,434.)

(*Supreme Court of California.* January 18, 1887.)

1. APPEAL—WEIGHT AND SUFFICIENCY OF EVIDENCE—VERDICT.
 Where, in the trial of a cause, there is a substantial conflict in the evidence, the verdict will not be disturbed upon the ground of insufficiency of evidence to justify it.
2. NEW TRIAL—WEIGHT OF EVIDENCE—VERDICT AGAINST LAW.
 Where the weight of testimony is with a party applying for a new trial, but it is not so clearly in his favor as to warrant the conclusion that, in view of the testimony and under the instructions, the verdict is against law, an order of the trial court denying the application will be sustained.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

George J. Denis and *Chapman & Hendrick*, for appellant. *J. Brousseau*, for respondent.

SEARLS, C. This is an action to recover damages in the sum of $5,000 for slanderous words alleged to have been spoken by the defendant of and concerning plaintiff. Defendant had a verdict and judgment, from which judgment, and from an order denying a new trial, plaintiff appeals.

Objection is made by respondent to the statement on motion for a new trial, in that it fails to contain a sufficient specification of the errors relied upon. In the view we take of the case, this objection is not of practical importance. There was such substantial conflict in the evidence that the verdict cannot be disturbed upon the ground of insufficiency of the evidence to justify the verdict.

The main objection to the verdict is that it is against law, in that it is in disregard of the admissions of the pleadings and the instructions of the court. The answer is a general denial of each and every allegation of the

complaint, and no justification is pleaded. The contention of appellant is that the slanderous words are in effect admitted by defendant's testimony,—no justification attempted. There being no dispute as to how the words uttered by defendant were understood by those who heard them, and the court having instructed the jury as to the slanderous character of the language, the verdict is against law.

A verdict in disobedience to the instructions of the court upon a point of law is a verdict "against law." *Emerson* v. *Santa Clara Co.*, 40 Cal. 545; *Bunten* v. *Orient Mut. Ins. Co.*, 4 Bosw. 262.

The complaint shows that the plaintiff and defendant were directors of an association engaged in publishing a newspaper in Los Angeles. The association was in possession of a part of Merced Hall as sublessees thereof. Plaintiff, by authority of the board of managers or directors, and with the knowledge of defendant, contracted for and procured the construction of a partition through the hall, at an expense of $75.86, which sum was paid therefor. At a meeting of the directors held thereafter and on the fifth day of January, 1885, the defendant, in speaking of the partition, accused the plaintiff with having pocketed the money, and averred the partition had not cost what plaintiff claimed it had, etc. The complaint contains apt words showing that defendant meant to charge, and was understood by those who heard him to charge, plaintiff with embezzling the funds of the association, etc.

The testimony on behalf of the plaintiff tended to establish substantially, but not very accurately, the charges as laid.

On behalf of defendant there was testimony tending to show that a portion of Merced Hall was occupied by a club, of which plaintiff was an officer; that plaintiff, defendant, and a third person were appointed to put up the partition in question, and, after measurement and estimates, concluded it could be done for $45 to $50, and thereupon defendant told plaintiff to have the job performed at an expense not exceeding that sum; that the partition was made different from the proposed plan for the benefit of the club, and at a greater expense than was necessary; and that the substance of defendant's charge was that plaintiff had taken the money of the newspaper company, and expended it for the benefit, not of that company, but of the club.

The parties are Frenchmen, and the testimony was in the French language, and may have suffered in the translation. At all events, it is lacking in explicitness and certainty; and, while we may think the weight of testimony was with the plaintiff, we cannot say that it was so clearly in his favor as to warrant the conclusion that, in view of such testimony and under the instructions of the court, the verdict is "against law."

The instructions were correct as propositions of law, and applicable to the case as presented.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed

71 Cal. 594

WALKER *v.* MCCUSKER. (No. 9,720.)

(*Supreme Court of California.* January 25, 1887.)

1. MORTGAGE—FORECLOSURE—RIGHT OF PURCHASER TO RENTS AND PROFITS—CODE CIVIL PROC. CAL. § 707.

The purchaser of real property at a sheriff's foreclosure sale, from the time of the sale until a redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, by section 707, Code Civil Proc. Cal. This right on the part of the purchaser is not lim-

ited to cases where there has been a redemption, but begins at the time of the purchase, and continues until a redemption is made, or, if there be no redemption, until the time allowed for redemption has expired.

2. SAME—ASSUMPSIT FOR USE AND OCCUPATION.

In an action by the purchaser at a mortgage foreclosure sale against a defendant as tenant in possession to recover the value of the use and occupation of the mortgaged property from the time of sale to the expiration of the period of redemption, where it appears that, at the time of the sale, the defendant was the owner in fee and in possession of the property, and that she had been joined as defendant with the mortgagor in the foreclosure suit, *held*, that the owner in fee was a tenant in possession, within the meaning of section 707, Code Civil Proc. Cal., and liable to the purchaser in *assumpsit* for the rents and profits, or the value of the use and occupation of the property, and not as a trespasser.

3. SAME—PARTY PLAINTIFF.

Where a person bids in property at a mortgage foreclosure sale, and receives the certificate of sale and the sheriff's deed in his own name, and thereby becomes the purchaser, he may bring suit in ' is own name against the tenant in possession of the property to recover the value of the use and occupation thereof from the time of sale to the expiration of the period of redemption, and without alleging or proving that he bid in the property as trustee for a third person.

Commissioners' decision. Department 2.

Appeal from superior court, Monterey county.

N. A. Dorn and *T. H. Laine*, for appellant. *A. S. Kittredge*, for respondent.

BELCHER, C. C. Franklin McCusker executed a mortgage upon certain real property to the Bank of Watsonville. The money being unpaid, the bank foreclosed its mortgage, making the defendant a party to the action, and, under the decree obtained, caused the mortgaged property to be sold. The plaintiff was the purchaser at the sale, and in due time obtained a sheriff's deed. The purchase was, however, not made for himself, but at the request and for the sole use and benefit of the bank. At the time of the sale, defendant was the owner in fee and in possession of the property, and she retained the exclusive possession of it until the sheriff's deed was executed.

This action was commenced to recover from the defendant, as tenant in possession, the value of the use and occupation of the property from the time of the sale until the expiration of the time allowed for redemption. In the court below the plaintiff recovered judgment, and from that judgment the defendant has appealed.

1. In this state the purchaser of real property at a sheriff's sale from the time of the sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. Section 707, Code Civil Proc. This right on the part of the purchaser to receive the rents and profits, or value of the use and occupation of the property sold, is not limited to cases where there has been a redemption. It begins at the time of the purchase, and continues until a redemption is made, or, if there be no redemption, then until the time allowed for redemption has expired. Several cases of this character have been maintained in this court where there had been no redemption of the property. *Reynolds* v. *Lathrop*, 7 Cal. 43; *McDevitt* v. *Sullivan*, 8 Cal. 592; *Harris* v. *Reynolds*, 13 Cal. 514; *Hill* v. *Taylor*, 22 Cal. 191; *Webster* v. *Cook*, 38 Cal. 423.

2. In *Page* v. *Rogers*, 31 Cal. 293, it was held that, during the period which elapses between the sale of land on execution and the expiration of the time for redemption, the statute regards the purchaser as the owner in equity of the land, subject only to the right of redemption, and gives him the rents and profits, or the value of the use and occupation; in short, the entire beneficial interest, except the actual possession.

In *Harris* v. *Reynolds*, *supra*, it is said: "The phrase 'the tenant in possession' is a generic term, intended to designate the class of persons from

whom the purchaser was to receive the rents. The language is not that, when a tenant of the debtor is in possession, the tenant shall pay the purchaser, or that the debtor, when in possession, shall not, but the phraseology designed evidently to fix a general right, applying to all cases of tenancy, for none are excluded." And in that case it was held that the judgment debtor was a tenant in possession, and required to pay the rents and profits to the purchaser; the court further saying: "The owner in fee in possession is no less, in legal contemplation, a tenant, than the man who occupies under him. The definition of tenant is: 'One that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will.'"

It has also been held that the mortgagee of the judgment debtor, the trustee and his successor in interest under a trust deed from the judgment debtor, and the administrator of the estate of the judgment debtor, when they were in possession after a sheriff's sale, were tenants in possession, and liable to the purchaser for the rents and profits or value of the use and occupation of the property. *Knight* v. *Truett*, 18 Cal. 113; *Shores* v. *Scott River Co.*, 21 Cal. 135; *Walls* v. *Walker*, 37 Cal. 425.

In this case it does not appear when or from whom the defendant obtained the title to the mortgaged property; but, as she was a party to the action of foreclosure, it was conclusively determined by the judgment that she held the title subject to the payment of the mortgage debt. After his purchase the plaintiff was the owner in equity; and thereafter, subject to her right of redemption, she held the title for him. Holding, then, the legal title for plaintiff, and having the exclusive possession, she was, within the meaning of those words, as used in the statute, the "tenant in possession" of the property, and liable to account to plaintiff for the value of its use and occupation.

But it is said there was no contract relation between the parties, and the defendant, if liable at all, was liable as a trespasser, and should have been sued as such, and not in *assumpsit*. The answer is that the defendant was not a trespasser in any sense. She was rightfully in possession, and could not be treated as a tort-feasor. Her liability is statutory, and the law implies a promise on her part to comply with its requirements. It is true, the action for use and occupation is founded on privity of contract, but it will lie as well upon an implied as upon an express contract. *Osgood* v. *Dewey*, 13 Johns. 240; *Stockett* v. *Watkins*, 2 Gill & J. 326.

3. It is further argued for the appellant that plaintiff is not the real party in interest, and no facts are stated in the complaint showing him to be the trustee of an express trust, and, therefore, his action cannot be maintained. We think the complaint sufficient, and the action properly brought. A trustee of an express trust is a person with whom, or in whose name, a contract is made for the benefit of another, and he is authorized to sue without joining with him the persons for whose benefit the action is prosecuted. Section 369, Code Civil Proc.

The plaintiff bid in the property, and received the certificate of sale and sheriff's deed in his own name, and thereby became the purchaser. As between him and the bank, he was a trustee of an express trust, but that fact did not concern the defendant. As to her he was the real party in interest, and might sue without alleging or proving his trusteeship. It has been so held in several analogous cases. *Corcoran* v. *Doll*, 32 Cal. 90; *Walsh* v. *Soule*, 66 Cal. 443; S. C. 6 Pac. Rep. 82; *Lewis* v. *Adams*, 11 Pac. Rep. 833; *Hoagland* v. *Trask*, 48 N. Y. 686. And see Pom. Rem. §§ 175–178.

It follows that the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 588

FLOYD and others *v.* FORBES and others. (No. 9,503.)

(*Supreme Court of California.* January 24, 1887.)

CHARITIES AND CHARITABLE USES—DEED—CREATING ONE FUND—SEVERAL TRUSTS—INVESTMENTS.

A deed of trust conveying property in trust for the following purposes: "*First*, to enter into possession of, have, receive, and recover the property and rents and profits thereof, (except as herein excepted,) and to let and lease, (until sale,) and to sell, convey, and dispose of the same, and to convert the same into money (except as herein excepted) as rapidly as judicious management will permit, and out of the proceeds to make the payments hereinbelow directed;" *then* designating various payments to be made by the trustees and some expenditures; and, *third*, to expend the sum of $700,000 for the purpose of purchasing land, and erecting thereon a powerful telescope and observatory, and to turn over the same, when completed, together with any surplus left of the said sum of $700,000, to the regents of the University of California: *held*, that the proceeds of the trust property constituted one fund, out of which the trustees were to execute several trusts specified in said deed, and that the profits arising from investments of money in their hands were to be treated as a part of such fund, and not as accruing for the benefit of any of said trusts in the execution of which a definite sum is required to be paid or expended, so as to increase the amount of such payment or expenditure.

In bank. Appeal from superior court, city and county of San Francisco.

John B. Mhoon and *McAllister & Bergin*, for appellants. *Cope & Boyd* and *Jarboe & Harrison*, for respondents.

TEMPLE, J. This action was instituted to obtain the construction of a deed of trust made by James Lick to certain trustees, the plaintiffs herein. The deed was executed September 21, 1875, but the trustees were changed, and those now acting were selected in April, 1876.

James Lick died in October, 1876. After his death the heirs manifested a disposition to contest the validity of the deed. This led to a compromise, the validity of which compromise was tested in a suit brought for that purpose, which was decided in December, 1879. The complaint in this suit was filed in August, 1884. Judgment was entered answering the various questions propounded by the trustees, and from that judgment this appeal is taken by the board of regents of the University of California. All the other beneficiaries of the trust seem to be satisfied with the judgment.

The deed conveys the property in trust for the following purposes: "*First*, to enter into possession of, have, receive, and recover the property, and rents and profits thereof, (except as herein excepted,) and to let and lease, (until sale,) and to sell, convey, and dispose of the same, and to convert the same into money (except as herein excepted) as rapidly as judicious management will permit, and out of the proceeds to make the payments hereinbelow directed." The deed further proceeds to designate various payments to be made by the trustees and some expenditures. Some of the payments were to be made at once, and in the eighteenth subdivision the trustees are directed, "after discharging the trusts and making the payments hereinbefore mentioned, in the order hereinbefore set forth, (except as herein otherwise directed,) to make over and transfer the residue of the proceeds of the property hereby transferred and conveyed, and intended to be, in equal proportions to the California Academy of Sciences and the Society of California Pioneers."

The third subdivision is the one in which the appellant is specially interested, and reads as follows: "*Third.* To expend the sum of seven hundred thousand dollars ($700,000) for the purpose of purchasing land, and constructing and putting up on such land, as shall be designated by the party of the first part, a powerful telescope, superior to and more powerful than any telescope ever yet made, with all the machinery appertaining thereto and appropriately connected therewith, or that is necessary or convenient to the most powerful telescope now in use, or suited to one more powerful than any yet

constructed, and also a suitable observatory connected therewith. The parties of the second part hereto, and their successors, shall, as soon as said telescope and observatory are constructed, convey the land whereupon the same may be situated, and the telescope and the observatory, and all the machinery and apparatus connected therewith, to the corporation known as the 'Regents of the University of California;' and if, after the construction of said telescope and observatory, there shall remain of $700,000 in gold coin any surplus, the said parties of the second part shall turn over such surplus to said corporation, to be invested by it in bonds of the United States, or of the city and county of San Francisco, or other good and safe interest-bearing bonds, and the income thereof shall be devoted to the maintenance of said telescope, and the observatory connected therewith, and shall be made useful in promoting science; and the said telescope and observatory are to be known as 'The Lick Astronomical Department of the University of California.'"

The portion of the judgment to which the appellant objects is the fourth instruction, which reads as follows: "*Fourth.* That the proceeds of the trust property constitute one fund, out of which the trustees are to execute the several trusts specified in said deed, and that the profits arising from investments of money in their hands are to be treated as a part of such fund, and not as accruing for the benefit of any of the said trusts, in the execution of which a definite sum is required to be paid or expended, so as to increase the amount of such payment or expenditure."

The appellant denies the correctness of this construction. It asks the court to say that the evident intention of James Lick was that the trustees should proceed with reasonable diligence to sell the property, and, as soon as sold, as much of it as was required should be appropriated to the different specific benefactions; that, where the beneficiary could not at once receive the amount, (as was the case with the appellant,) it would constitute a fund which might have been put at interest for the advantage of the beneficiary; that, for instance, there should have been a fund created, for the purposes of the trust set out in the third subdivision of the deed, of $700,000; that this amount, if not immediately required in performance of such trusts, could have been placed at interest for the benefit of the fund; on the contrary, the property was not sold when it ought to have been, and thereby large amounts have been received as rents and profits; that, under the construction placed upon the deed by the court below, the residuary beneficiaries will receive the increment, some portion of which in justice and equity ought to have gone to the other beneficiaries; that now, in view of this fact, the court should regard that as done which ought to have been done, and, by a just division of such increment, place the parties as near as may be in the position they would have been in had the trustees faithfully and diligently performed their duty.

Some of the donations have to be paid immediately. Such beneficiaries would certainly have better grounds for insisting upon the equitable principle contended for than the appellant. We understand that as to them the trusts have been fully performed. At all events, they make no complaints. We shall consider the matter solely with reference to the rights of the appellant.

A very large amount of property is involved in the trusts, which are quite numerous, and vary greatly in character. The trustees were to pay the debts of the donor then existing, and whatever debts he might require in his support, expenses, and the improvement of his homestead. They were to erect a group of bronze statuary, well worth $100,000, and various monuments. They were to expend, under the direction of certain named persons, $150,000 in the erection and maintaining free baths. They were to found an institute called the Old Ladies' Home at a cost of $100,000. They were to found and endow, at a cost of $540,000, the California School of Mechanical Arts, under the direction of certain named persons. It will be seen that they were directed to expend the sum of $700,000 for the purpose of purchasing land, and con-

structing and putting up a powerful telescope, superior to and more powerful than any ever yet made, and all the machinery appropriate or convenient to the most powerful telescope now in use, or suited to one more powerful than any yet constructed, and also a suitable observatory. When constructed, all should be conveyed to the regents of the university; and, if there should remain of said $700,000 in gold coin any surplus, it should be turned over to the regents, to be by them invested.

It is evident, in the first place, that the active duties here enjoined upon the trustees could not be performed within any definite period, and certainly the donor must have known that it would require many years to accomplish the difficult task imposed upon them. Yet he directs a precise sum in gold coin to be expended, and, when the work shall have been performed, he directs that the surplus, if any remaining of that sum, be turned over. This, evidently, would not have justified the trustees in expending more than that precise sum, under the claim that there was a fund which was entitled to share an increment. The direction to turn over the surplus remaining of the precise sum in gold coin is not in apt language if the desire was that the surplus remaining from a fund should be turned over. Although he must have known that it would be a long time before all this money could be expended, yet no language is used indicating that it is to be invested so that any increment will accrue until the entire work is done; and then he expressly directs that the surplus, if any, shall be invested so as to produce an income.

It is also a significant circumstance in this connection that, as to the residuaries, the deed directs that, after discharging the trusts and making the payments in the order named, the residue be transferred to the residuaries. If the construction contended for by the appellant were the correct one, there appears no good reason why the residuaries should not receive their residue as soon as the property was sold, and the different funds created. It is evident that the donor intended that the entire property should remain as security for the different trusts in the order named. We therefore think the judgment should be affirmed.

It may be well to remark, however, that this judgment is only a construction of the trust deed. It does not pass upon the question whether, if there has in fact been unnecessary or great delay, in consequence of which the residuaries had received profits which, upon a proper performance of the trust, would have been received by the specific beneficiary, a court of equity cannot make a fair adjustment of the matter. The trustees did not admit delay, and ask for instructions in view of such fact. The appellant in its answer did not charge there had been such delay. Should such a controversy ever arise, the only effect of this judgment would be that the right of the beneficiary complaining to be compensated would be determined in view of the construction here given the deed. Judgment affirmed.

We concur: McKinstry, J.; McFarland, J.; Paterson, J.; Thornton, J.

71 Cal. 599

Comstock *v.* Yolo Co. (No. 11,641.)

(*Supreme Court of California.* January 25, 1887.)

Ways—Levy of Road Tax—County Board of Supervisors—Mode of Procedure—California County Government Act, § 25, Cl. 1, Subds. 4, 13, 35.

Subdivisions 4, 13, and 35, cl. 1, § 25, California county government act, providing that the county boards of supervisors have jurisdiction to levy taxes upon taxable property of any district for the construction and repair of roads and highways, "provided, that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors, and received a majority of all the legal votes cast upon such proposition, and to do and perform all other acts and things required by law not in this act enumerated, or which may be neces-

sary to the full discharge of the duties of the legislative authority of the county government," *held* to authorize the board of supervisors to adopt any suitable mode of procedure in making the levy of a tax for road purposes; the levying of the tax being one of the duties of the legislative authority of the county government.

Commissioners' decision. In bank.
Appeal from superior court, Yolo county.
A. L. Hart, for appellant. *Frank S. Sprague*, for respondent.

BELCHER, C. C. This is an action to recover a sum of money which was paid by plaintiff, under protest, to prevent the sale of his property in satisfaction of an alleged illegal tax. The appeal is by the plaintiff from a judgment in favor of defendant, and rests upon the judgment roll.

The tax in question was levied in pursuance of the supposed authority given by the county government act, which provides: "The boards of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law, to lay out, maintain, control, and manage public roads * * * within the county; to levy taxes upon the taxable property of their respective counties for all county purposes, and also upon the taxable property of any district for the construction and repair of roads and highways and other district purposes, provided, that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors of such district, and received a majority of all the legal votes cast upon such proposition; and to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government." County Government Act, § 25, cl. 1, subds. 4, 13, 35; St. & Amend. Codes 1883, p. 304.

On the twenty-eighth day of August, 1884, the board of supervisors of Yolo county, by a resolution duly passed and entered upon its minutes, ordered that a proposition to levy a tax upon the taxable property of road-district No. 1, in that county, for the construction and repair of roads and highways therein, sufficient in amount to raise the sum of $9,000, and to be levied according to the value of the property as shown by the assessment roll of the county for that year, be submitted to the qualified electors of the district at an election to be held for that purpose on the thirteenth day of September, 1884. By the resolution, polling-places were duly fixed, inspectors and judges of the election were appointed, and the clerk of the board was ordered to issue a proclamation, under his hand and the seal of the board, calling an election in accordance therewith, and to cause a copy of such proclamation to be published in the Woodland Daily Democrat, a newspaper published in the county, and to be posted at each place fixed for holding the election, for at least 10 days before the day of said election.

In pursuance of the resolution the clerk of the board issued a proclamation, setting forth all the matters required, in due and proper form, and caused the same to be published and posted as directed. At the time named an election was held, and a majority of all the legal votes cast upon the proposition were in favor of levying the said tax. The returns of the election were duly made to and canvassed by the board of supervisors on the sixth day of October, 1884, and thereupon the board, finding that a majority of all the votes cast were in favor of the tax, proceeded to levy the same. It was ascertained by computation that to raise the sum of $9,000 on the taxable property of the district, as shown by the county assessment roll for that year, would require the rate of taxation to be 87 cents on the $100, and the board then, by its order, duly fixed and determined upon that as the rate. The county auditor then computed the tax at the rate named upon all the taxable property of the district, and entered the same upon the assessment roll of the county; the tax so entered against the plaintiff being $35.30.

It is now contended, on the part of the appellant, that the tax was illegal and void, because—*First*, there was no provision made by law for the submission to the qualified electors of a road-district of a proposition to levy a special tax for road purposes; and no election for any purpose can be held unless the time and manner of calling and holding it have been authoritatively designated in advance, either by law or by some means which the law has prescribed; and, *second*, the board of supervisors had no authority to adopt the assessment made for state and county purposes as the basis upon which to levy the tax.

It is not denied that the board of supervisors had full power to levy the tax in question, but the contention is that the power could not be exercised for the want of further legislation prescribing the mode of its exercise.

In the Code of Civil Procedure it is provided that when jurisdiction is conferred on any court or judicial officer, and the course of proceeding is not specially pointed out by the Code or the statute, any suitable mode of proceeding may be adopted. Section 187. Under this provision it has been held that, in a proper case, the probate court may set apart a homestead, though the manner in which it is to be set apart is not provided by statute. *Mawson* v. *Mawson*, 50 Cal. 539.

In the county government act, as has been seen, it is provided that the board of supervisors may "do and perform all other acts and things * * * which may be necessary to the full discharge of the duties of the legislative authority of the county government." As the levying of the tax in question was one of the "duties of the legislative authority of the county government," we think this provision sufficient to authorize the board to adopt any suitable mode of procedure in making the levy.

It is not questioned that the mode of procedure adopted was suitable and proper, if authorized, and it follows, therefore, that the judgment should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

70 Cal. 608

NICHOLSON *v.* TARPEY and others. (No. 8,439.)

(*Supreme Court of California.* September 3, 1886.)

1. SPECIFIC PERFORMANCE—PAYMENT OF PURCHASE PRICE—DELIVERY OF DEED—INADEQUACY OF CONSIDERATION—DEMURRER.

Where, in an action to reform a deed, and for the specific performance of a contract for the sale of land, the complaint shows on its face that the purchase price was accepted, and a deed delivered, a demurrer on the ground of inadequacy of consideration will not be sustained.

2. EVIDENCE—PRIMARY AND SECONDARY—SPECIFIC PERFORMANCE—ORIGINAL CONTRACT—EXECUTION AND CONTENTS OF.

In the trial of an action for specific performance, and to reform a deed, against the devisees and heirs at law of T., a witness in his deposition before the trial testified, without objection, to the contents of the written agreement between the parties. But at the trial defendant objected to it, on the ground that secondary evidence of its contents could not be introduced without proof of the loss or destruction of the original. Thereupon plaintiff showed that the contract was executed in duplicate,

one copy of which was delivered to him, and the other retained by T., and that, when the deed was executed, his copy was delivered to T., who destroyed it. The copy retained by T. was not accounted for, nor did it appear that any notice had been given for its production in court. *Held*, that defendants had a right to have the original contract introduced in evidence, if in existence and capable of being produced; but, as T., had the copy in his possession, and it could have been introduced, thus obviating the necessity for secondary evidence, the objection would not be entertained.

3. SAME—STATEMENTS OF PARTY IN HIS OWN FAVOR—ADMISSIBILITY OF—RES GESTÆ. In the trial of an action for specific performance of a contract for the sale of land, the statements made by the plaintiff in his own behalf to the assessor, when he gave in the land for taxation, in the absence of the opposite party, and constituting no part of the *res gestæ*, are not admissible in evidence.

Department 2. Appeal from superior court, Monterey county.

Action for specific performance of a contract for the sale of land. Judgment for plaintiff. Defendants appealed.

Julius Lee, for Nicholson, respondent. *D. M. Delmas*, for Tarpey and others, appellants.

BY THE COURT. 1. The demurrer to the complaint in this cause was properly overruled. In actions for the specific performance of contracts for the sale of lands, it is necessary to allege and show to the court an adequate consideration for the performance of the contract sought to be enforced, and that the same is fair and reasonable in all its parts, and of such a character as may fairly call for the interposition of a court of equity. *Agard* v. *Valencia*, 39 Cal. 292; *Bruck* v. *Tucker*, 42 Cal. 346; Fry, Spec. Perf. § 251.

In this cause, however, the complaint shows that Mr. Tarpey, with whom the contract for conveyance was made, accepted the consideration of $1,500 in such contract specified to be paid, and executed a deed of conveyance, which plaintiff herein supposed conveyed the land in question, but which, in fact, by the fraud of said Tarpey, failed to include a portion of the land agreed to be conveyed. By accepting the purchase price, and delivering of a deed, Tarpey waived all claim to inadequacy of consideration, and that question is not involved in the case.

The *gravamen* of the charge against Tarpey is that he professed to convey the whole premises, and by his fraudulent representations induced the plaintiff herein to believe that he had so conveyed, when in truth he had granted but a portion thereof, and the object of this action is to so reform the deed as to make it conform to the agreement pursuant to which it was executed.

2. There was no error in the ruling of the court admitting the deposition of George C. White. According to the record, the witness White, whose deposition had been taken previous to the trial, testified, without objection, to the contents of the written agreement between Tarpey and plaintiff for the conveyance of the land in question. At the trial defendants for the first time objected to the evidence contained in this deposition, upon the ground that secondary evidence of its contents could not be introduced without proof of the loss or destruction of the original, etc. Thereupon it was shown by the testimony of plaintiff that the contract was executed in duplicate, one copy of which was delivered to plaintiff, and the other retained by Tarpey; that, at the date of the execution to the plaintiff of the deed, his copy of the agreement was delivered to Tarpey, who destroyed it. The copy retained by Tarpey was not accounted for, nor did it appear that any notice had been given for its production in court. Defendants had a right to have the original contract introduced in evidence if in existence, and capable of being produced. The defendant Tarpey had the copy in his possession, and could have pro duced it, thus obviating the necessity for introducing secondary evidence Not having produced it, his objection should not be listened to.

3. At the trial, plaintiff, as a witness in his own behalf, testified that, after he moved to the land bought of Tarpey in 1871, he himself gave in the said

lands to the assessor of Monterey county for taxation, and was then asked by plaintiff's counsel the following question: "When you gave it in, what did you say to the assessor?" In response to which the witness replied: "I told him I had 400 acres there; that the land was unsurveyed; and that the deed called for 600 acres, giving the bounds of the deed," etc. To the introduction of which evidence counsel for defendants objected in due form, and the ruling of the court admitting such evidence is assigned as error.

The statements of a party in interest in his own behalf, made in the absence of the opposite party, and constituting no part of the *res gestæ*, are not, in general, admissible as evidence, and we perceive no theory upon which the evidence introduced was admissible. It consisted merely in the oral declarations of the party in his own behalf, and as such cannot be upheld. If it be urged that it was introduced for the purpose of showing that the property was assessed to plaintiff, and the taxes thereon paid by him, the answer is twofold: *First.* Prior to April 1, 1878, the payment of taxes upon land was not a fact essential to adverse possession. *Second.* The assessment of property, and payment of taxes thereon, are facts which, when essential to a case, are to be proven as such, and the declarations of a party, made to the assessor at the time he assesses property, do not prove, or tend to prove, the fact of assessment, or any other fact competent to be shown.

Conceding it to have been proper for plaintiff to prove as a fact that this property was assessed to him for the purposes of taxation, it does not follow that his declarations of ownership or possession, made in his own behalf, and which in nowise tended to show that an assessment was in fact made, can be received. *Schenck* v. *Sithoff*, 75 Ind. 485, and *Whitney* v. *Houghton*, 125 Mass. 451, are in point, and, we think, conclusive of the question.

The testimony thus erroneously admitted was important to the issue of plaintiff's adverse possession made in the case, and, as we cannot see that it failed to influence the decision of the cause, the judgment and order appealed from are reversed, and a new trial ordered.

71 Cal. 584

In re KNOTT. (No. 11,842.)

(*Supreme Court of California.* January 24, 1887.)

ATTORNEY AND COUNSEL—DISBARMENT—STATE COURT—FALSE AFFIDAVIT BEFORE UNITED STATES LAND DEPARTMENT.

A young and inexperienced attorney made a false affidavit in a proceeding before the general land-office at Washington, to obtain a patent, relying on the assurance of an older lawyer that he could properly make such affidavit, which it was claimed he believed to be technically true when he made it. *Held*, in a proceeding to disbar in the California court, that the offense, not having been committed within the jurisdiction of that court, was to be considered as a moral offense only, and, under the circumstances, might be attributed to youth and inexperience, and the proceedings should be dismissed, the party instituting them not objecting thereto.

In bank.

Page & Eells, for accuser. *Roger Johnson*, for respondent.

BY THE COURT. This is a proceeding to disbar the respondent for making what is claimed to have been a false affidavit in a proceeding to obtain a patent at Washington. Apparently the affidavit was one which the respondent may have believed to have been literally and technically true, but which was morally false, and was, in effect, an imposition upon the secretary, with whom it was filed. We have before had occasion to condemn the practice which is too common of making affidavits to what the affiant may claim to be the legal effect of facts not stated. They are often simply impositions upon the court. In this case the respondent was at the time young and inexperienced, and relied upon the assurance of an older and more experienced law-

yer, that he could properly make the affidavit. It was not really an act as an attorney in our jurisdiction, and could probably only be considered as affecting the moral character of the respondent. The accuser desires to have the proceeding dismissed, saying that he made the accusation under the influence of anger. We do not recognize the right of an accuser to have such a proceeding dismissed; but having examined the evidence, we are inclined, in view of all the circumstances, to attribute the fault, though a grave one, to youth, inexperience, and ignorance. The proceeding is therefore dismissed.

71 Cal. 602

PEOPLE v. BUSH. (No. 20,239.)

(*Supreme Court of California.* January 25, 1887.)

1. CRIMINAL LAW—CHANGE OF VENUE—TRANSMITTING RECORD—PEN. CODE CAL. § 1036.
 The "copy of the record, pleadings, and proceedings" required by Pen. Code Cal. § 1036, to be transmitted on change of venue of a cause, does not include a bill of exceptions taken on a former trial, nor charges to the jury given on such trial.
2. SAME—ORDERING VIEW IN CRIMINAL CASE—PEN. CODE CAL. § 1119.
 Pen. Code Cal. § 1119, giving the court power to order a view in criminal cases, does not deprive a defendant of any constitutional rights, as it should be construed to contemplate the presence of defendant and his counsel at such view.
3. SAME—ORDERING VIEW OUT OF COUNTY—POINTING OUT PLACE.
 A view may be ordered in a county other than that where the trial is had, and a person appointed by the court to show the jury the places named in the order of the court may point out and name such places to them.
4. SAME—CHARGE TO JURY—CREDIBILITY OF WITNESSES.
 It is proper for the court, upon a trial for murder, to allude to the fact of the relationship of certain of defendant's witnesses to him, as affecting their credibility.
5. SAME—HOMICIDE—MALICE—BURDEN OF PROOF.
 If a homicide is shown, the law presumes malice, and the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon defendant, unless the proof upon the part of the prosecution tends to show that it only amounts to manslaughter, or was justifiable.

Commissioners' decision. In bank.

Appeal from superior court, San Diego county.

Indictment for murder.

Z. Montgomery, Levi Chase, and *W. J. Hunsaker,* for appellant. *Wallace Leach, J. L. Copeland,* and *E. W. Hendricks,* for the People.

FOOTE, C. The defendant appeals from a judgment of conviction of murder in the second degree, and from an order refusing him a new trial, made in the superior court of San Bernardino county. He had been previously tried upon the charge of murder, and convicted in the superior court of San Diego county of that crime, in the first degree, and on appeal to this court the judgment rendered against him was reversed. 10 Pac. Rep. 169. Thereupon he obtained a change of the place of trial of his cause to the first-named county. He now claims that the superior court of that county did not have jurisdiction to try him, for the reason, as he alleges, that the certified transcript of the record sent from San Diego county, on the change of venue to San Bernardino county, did not contain certain bills of exception taken on the trial of the case in the former county, for purposes of appeal to this court, nor certain charges given to the jury on the former trial by the judge of the court then trying the cause. This position is not tenable. Such papers were not essential to give the superior court of San Bernardino county jurisdiction to try the defendant on the charge alleged against him. They are not, in the contemplation of the statute, a part of the "record" necessary to be transmitted on a change of the place of trial of such a cause *de novo.* Section 1036, Pen. Code.

This view of the meaning of the statute, viz., that the words, "copy of the record, pleadings, and proceedings," require the transmission, on change of

the venue of a cause, only such papers as may be essential to the proper trial of the defendant's case *de novo*, is strengthened by the presence in the statute of the words "including the undertakings for the appearance of the defendant and witnesses." As the undertakings might, in a certain contingency, be necessary, those words relating to them were evidently added out of abundant caution, so that not only the papers necessary to the *proper trial* of the defendant should be in the record, but also any papers which might be contingently necessary if forfeitures of the undertakings should be desired. If the words first cited meant to include the papers for which the defendant contends, the addition of the latter words would have been entirely superfluous; and we must therefore conclude that the legislature enacting the statute placed that construction on the language first mentioned, which we feel constrained to do.

We are also of opinion that it was within the jurisdiction of the trial court to make the order for the view by the jury of the place where "the offense is charged to have been committed, or in which any material fact occurred," under section 1119 of the Penal Code. Nor do we perceive any error arising from the taking of that view. Section 1119 of the Penal Code confers the right on any superior court in this state, in the exercise of a sound discretion, to cause a view to be taken, by a jury trying a criminal cause, of any "place in which the offense is charged to have been committed, or in which any other material fact occurred," and this right is there given, whether the place or places to be viewed lie in the county where the cause is then on trial, or in any other county of this state. This right, thus given clearly and without limitation, is not, as we think, in any way in conflict with the provisions of section 6 of article 6 of our state constitution. We have formerly held that the statute contemplates the presence of the defendant and his counsel at such view, in order that he may not be deprived of any of his constitutional rights to be confronted by witnesses against him, and to appear and defend in person and with counsel, and to that opinion we still adhere. *People* v. *Bush*, 10 Pac. Rep. 169.

The objection made that Thomas Bundy, the person appointed by the court to show the jury the places named in its order for the "view," pointed out and named such places to the jury, is without merit, for we cannot conceive how he could have shown the jury the two places which they were sent to view in any other way, under the statute. What is said by this court in the case of *People* v. *Green*, 53 Cal. 60, does not in any degree militate against the propriety of such a method of procedure.

We perceive no merit in the point that the court erred in not forcing the prosecution to introduce, as its own, three of the defendant's witnesses, Maud and Cora Parsons, his nieces, and Albert Bush, his son.

It is insisted that the eleventh and twelfth instructions asked by the defense, and refused, ought to have been given.

The court in its general charge, upon the same subject as that contained in said instructions, said: "If you find that the defendant committed the homicide, the law presumes it to have been done with malice, and the burden of proving circumstances of mitigation, or that justify or excuse it, devolve upon him, unless the proof on the part of the prosecution tends to show that it only amounted to manslaughter, or that the defendant was justifiable or excusable." That was a clear and explicit enunciation of the law on the point covered by the refused instructions, and the defendant was not prejudiced by their refusal.

It is also assigned for error that the court gave this instruction: "In this case Maud and Cora Parsons, nieces of the defendant, have been examined as witnesses in behalf of the defense. This is their right. It is proper, however, for the jury to bear in mind the relationship between them and the defendant, and the manner in which they may be interested by your verdict, and the

very grave interest they must feel in it, and it is proper for the jury to consider whether their position and interest may not affect their credibility or color their testimony." By that instruction the court simply informed the jury of certain facts and circumstances in the case before them, which they would, perhaps, as men of ordinary observation, have been bound to know, and this was within a proper latitude of observation from a court in its charge to a jury. *People* v. *Wong Ah Foo*, 10 Pac. Rep. 375, 377; Bish. Crim. Proc. §§ 982–1064.

Upon the whole case, we perceive no prejudicial error, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 569

PEOPLE v. GONZALES. (No. 23,233.)

(*Supreme Court of California.* January 19, 1887.)

1. HOMICIDE—EVIDENCE—DECLARATIONS OF DEFENDANT'S PARAMOUR.
 In a prosecution for murder, where it appeared that the deceased suspected defendant of being his mother's paramour, and that he was killed by defendant in an affray resulting from an attempt by deceased to eject defendant from the mother's house, *held* that, even if there was evidence tending to show that the mother conspired with defendant to kill her son, yet her declarations regarding the homicide, made subsequent thereto, in the absence of defendant, were not admissible against defendant.
2. SAME—PARAMOUR'S DAUGHTER.
 So, also, similar declarations of a sister of deceased, are inadmissible.
3. SAME—INSTRUCTIONS—GUARDING AGAINST POSSIBLE ERROR BY JURY.
 Defendant *held* not entitled to an instruction that, although warned by the son to leave the county, he cannot be said to have voluntarily sought a place of danger in afterwards going to the mother's house, on her invitation, and not thinking there was any danger; there being nothing to suggest to the jury's mind the idea sought by this instruction to be excluded.
4. SAME—SELF-DEFENSE—INSTRUCTION.
 An instruction that "a defendant cannot, in any case, justify killing another by a pretense of necessity, unless he was wholly without fault in bringing that necessity on himself," is erroneous.
5. SAME—NECESSITY.
 An instruction that "the necessity must be apparent, actual, imminent, absolute, and unavoidable," is contradictory and misleading.
6. SAME—DUTY TO AVOID ENCOUNTER.
 A man who expects to be attacked is not always bound to employ all the means in his power to avert the necessity of self-defense.
7. SAME—DANGER—DEFENDANT'S BELIEF.
 To render a homicide justifiable on the ground of self-defense, not only must defendant be in apparently imminent danger, but he must believe that he is so.
8. SAME—MEANS OF DEFENSE—DEFENDANT'S BELIEF.
 An instruction excluding from the jury the consideration of the question whether or not defendant had apparently, to his comprehension as a reasonable man, the means at hand to avoid killing deceased, without incurring imminent danger of great bodily harm, is erroneous.

Commissioners' decision. In bank.

Appeal from superior court, Del Norte county.

Indictment for murder. Defendant convicted, and appeals.

R. W. Miller and *R. G. Knox*, for appellant. *The Attorney General*, for the People.

FOOTE, C. The defendant was convicted of murder in the first degree From the judgment therein, and an order denying him a new trial, he has appealed. His first contention is that the court erred in allowing the state

ments of a Miss Umphlet, and of her little daughter, (made to divers persons after the alleged crime had been committed by the defendant, and when he was not present,) to be given in evidence by those who had heard Miss Umphlet and the daughter make them.

The declarations, as detailed by Dr. Thorworth, at page 40 of the transcript, were: "Miss Umphlet [that is, the deceased's mother] appeared at the door, was there, and some others. I asked them to move the man into the house. The door was closed, and it seemed rather strange that his mother was not by him. I knew nothing of the facts of the matter. I opened the door, and she appeared. I asked if she had any objection to having the injured man brought into the house. She said that she had no particular objection, but that she would not remain there; she would leave. I told her I did not care where she went, so that the boy was brought into the house. She afterwards returned, after an hour or two, and remained there all night."

By Lewis Lockwood, on page 84: "Yes; she [that is, Miss Umphlet] said that first she asked her daughter what she was doing there. She told her she had come to see me or Lew. Miss Umphlet says: 'The professor [meaning the defendant] has shot George, [the deceased,] and I hope Frank Thraine has got his belly full.'"

By Alonzo Winton, at page 95: "In a very short time after I got up there Miss Umphlet came in with her daughter. I told her there was nobody there but Mrs. Storver's little boy and me. She asked where she was, and I told her she was at my house, and was going to stay all night. She turned around, and said, 'All right,' and gave her head a toss, and went out."

By Lillie McVay, at page 97: "Some one asked her if George was dead. She said 'No.' Joe Otto asked her if he soon would be. She said she guessed so. She then told us this story: She said George came to the door. She asked who was there, and George said, 'Me.' She opened the door, and he came in. He jumped for the professor, and she jumped between them. She said that she knew he would not shoot her. She said that she knew if the professor ever got a bead on him he would fetch him 'so quick,' (snapping her fingers.)"

By Chauncey Messenger, at pages 107, 108, and 109: "She [meaning Miss Umphlet] told me about the boys coming there, and disturbing them. They were playing cards. She said that she thought the boys would have done better to have attended to their own business, and cleaned up their own dirty work, than to be meddling with hers. * * * She said that they took the professor out doors, and when they got him out he broke loose, and ran back in the house, and turned around and shot George. * * * She said that she thought it was a good thing that it happened; that it would learn people to keep their nose out of other people's business; and that the professor did right, she thought, because he had been told by the officer not to leave; that he did not have to leave, and that she did not think that they could do anything with him. * * * She did not say she had another pistol. I was talking to her about the way she was talking around the house. I told her she had better go a little slow, and kind of behave herself; that she might be arrested herself. She threatened to put me out of the house, and called me some pretty rough names. I told her she had better behave herself, that she was liable to get into trouble herself. She said that she was not afraid of the sons of bitches; that she was heeled herself."

By Pat Gay, at pages 111, 112: "When I got there Frank Thraine was crying around there, and she called him a bellowing calf, and told him he ought to be locked up in the cooler. She said she knew if the professor ever got a bead on one of them he would catch him. He had been a soldier, or something like that. That was after I went into the house. Somebody said that 'hanging was too good for her,' and she said she knew where another pistol was, and some of them would get it if they didn't watch out."

By Lizzie Higgins, at page 129: "She came in and asked for a bed, and Lillie told her that she could not give her a bed until her mother came. She sat down and took off her things. Joe Otto asked her how the trouble began. She said George and Frank Thraine came there, and they rapped on the door. She asked who was there, and George said it was him. She went and opened the door, and they rushed in. When Frank Thraine started to come in she pushed the door to keep him out. George came in with a pistol in his hand. She got between him and the professor, and told him not to shoot, but he shot a bullet through the floor. Frank Thraine got hold of the professor, and pulled him through the door. While they were out there, professor got a bead on him, and she said he brought him down as quick as that, (snapping her fingers.)"

By James Trimble, at page 141: "I did not hear Miss Umphlet say anything about it. At another time the little girl came into the house, just after the shooting where I was, and says: 'I think they have killed my brother; the professor shot poor George.' Then she said they came pretty near shooting me. She said the bullet went about so far from me, and she held up her hands about that far apart. This happened before I went out of my brother's house." He stated the same, in substance, when recalled, at page 185.

According to the record, the deceased, George Kirkham, was the son of the person called Miss Umphlet. She had, before the killing, been divorced from her husband, and had but lately moved into the dwelling where she resided at the time of the homicide. It seems that certain reports had reached the ears of the son relative to a supposed intimacy between his mother and the defendant; that, indignant, as may be supposed, at that which he believed was the guilty conduct of the pair, the son had determined, in conjunction with a companion, one Frank Thraine, to put a stop to the disgraceful conduct which he believed existed, and that the defendant was warned by one or both of the companions to leave the town where he was then residing, and visiting Miss Umphlet; that he sought advice of an officer, who told him he had a right to stay where he was; that he did stay, and procured a pistol, as he claims, for purposes of self-defense; that the two young men, Kirkham and Thraine, came at night to Miss Umphlet's house, one of them (Kirkham) with a pistol in his hand, and ordered the defendant to leave, which he proceeded to do, aided in his retirement by Thraine, who held him by the hair and conducted him to the gate; that there he got loose, and ran back to the house, where he shot the deceased.

There is evidence in the record tending, in some degree, to show that such a connection existed between the defendant and the deceased's mother, Miss Umphlet, as he (Kirkham) apprehended. There is also evidence tending to show that the defendant armed himself expecting an attack from those parties, and went to the house of Miss Umphlet supposing it might be made on him there. There were also facts and circumstances developed in evidence which tended to prove that Miss Umphlet knew of the defendant's intentions, and did not dissuade him from putting them into execution, but rather encouraged him.

It was perhaps desired by the prosecution to bring out fully before the jury the fact that Miss Umphlet was the paramour of her son's slayer, and that she sympathized with him rather than her son, and approved of the killing of the latter. For this purpose they may have sought to show the acts and declarations of Miss Umphlet after the killing, and when the defendant was not present. A portion, at least, of the several statements of the above-named witnesses, narrating as they did the alleged declarations of Miss Umphlet, certainly tended to exhibit her and the defendant, as regarded their relations, in no enviable light before the jury, and as both being hostile to the deceased, and we cannot say that they may not have proved prejudicial to the defendant. Miss Umphlet was not a witness before the jury, and her

alleged declarations, being made after the full accomplishment of the homicide, were not a part of the *res gestæ*. Even admitting that other evidence in the record tended to demonstrate that she had conspired with the defendant unjustifiably to slay George Kirkham, yet her narrations (made after the crime with which the former was charged, had been fully consummated) were not admissible against him. Prejudicial error was therefore committed in allowing them to go to the jury. *People* v. *English*, 52 Cal. 212; *People* v. *Aleck*, 61 Cal. 137–139.

The daughter's statement, made after the killing, and without the presence of the defendant, and related by Trimble, was not admissible; it was mere hearsay.

The defendant further complains that two of the instructions which he asked to be given by the court to the jury were refused. They are as follows:

"If the jury find from the testimony that at the time of the killing of deceased the defendant had been assailed by the deceased and one Thraine, in a violent and threatening manner, and that deceased at the time of the assault held in his hand a deadly weapon, to-wit, a revolver, and if you find that such assault was made with intent to forcibly evict the defendant from the house of Ellen Umphlet, where the killing was done, then I charge you that such assault was unlawful; and, if the circumstances attending it were such as to cause a reasonable man to believe that he was in danger of receiving great bodily injury at the hands of his assailant, then I charge you that he was justifiable in taking the life of his assailant."

"If the jury find from the testimony that defendant had been warned to leave the county of Del Norte, or any place within said county, and that he subsequently made diligent inquiry as to the existence of danger, and from such investigation reasonably believed that he had no occasion to fear assault, and that defendant acted in good faith, upon such reasonable belief, then I charge you that the visiting of the house of Ellen Umphlet, upon her invitation, was not an unlawful act, and that a person acting under such circumstances cannot be said to have voluntarily sought a place of danger."

In the first instruction the jury were not told, as they should have been, that they must be of opinion, from the evidence, that the defendant *believed* he was in imminent danger of death, or some great bodily harm, then about to be done him at the moment of the killing by his assailants; for it is not enough that the jury may believe one killing his adversary has an apparent and reasonable ground then and there to apprehend great bodily harm or death at the hands of his adversary; they must further be of opinion, from the evidence before them, that the defendant entertained such belief, and acted upon it.

The defendant seems to be of opinion that his second instruction should have been granted, because, as he claims, the prosecution had shown in evidence that the defendant had been warned by the deceased and Thraine to leave the county, and had not done so, and had gone to Miss Umphlet's house in defiance of such order; and that in consequence of such evidence the jury, without such an instruction as he sought, might have been led into the error of believing that the defendant, in not obeying the order and going to Miss Umphlet's, unlawfully sought the difficulty. There was no charge of the court given upon its own motion, or by request of the prosecution, which instructed the jury that such was the law, and we cannot conceive how any man of ordinary intelligence could be otherwise led to such a belief as a juryman. The instruction was also quite obscure in its language, enunciated no clear proposition of law, and was calculated to mislead the jury.

The defendant further urges upon our attention, as an improper act committed by the trial court to his prejudice, the granting, over his objection, of instructions propounded by the prosecution, and numbered seventh, eighth, tenth, eleventh, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth.

The tenth instruction does not enunciate a correct proposition of law, where it declares that one "cannot in any case justify killing another by a pretense of necessity, unless he was wholly without fault in bringing that necessity on himself;" for cases may, and frequently do, occur, in which the aggressor, although primarily in fault, has really and in good faith sought to avoid further conflict before the mortal blow was given; and when this is apparent, and he slay his antagonist in the necessary defense of his own life, he is not guilty of any crime.

The seventeenth instruction, in the first sentence thereof, which reads thus: "But the necessity must be apparent, actual, imminent, absolute, and unavoidable,"—is contradictory and misleading. It should have been expressed in the following or like language: "But the necessity must be actually or apparently imminent, absolute, and unavoidable." For it is not necessary that a defendant should show that danger to him of loss of life, or danger of some great bodily harm then about to be done him, actually existed; for actual, real, and imminent danger, to his comprehension as a reasonable man, is sufficient. *People* v. *Anderson*, 44 Cal. 65–69.

The eighteenth instruction excludes from the jury the consideration of the proposition whether or not, from the evidence, the defendant had apparently, to his comprehension as a reasonable man, the means at hand to avoid killing the deceased, without incurring imminent danger of losing his own life, or imminent danger of having great bodily harm done to his person.

The nineteenth instruction is clearly wrong. A man who expects to be attacked is *not* always compelled to employ all the means in his power to avert the necessity of self-defense, before he can exercise the right of self-defense; for one may know that if he travels along a certain highway be will be attacked by another with a deadly weapon, and be compelled in self-defense to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack. In this case the defendant had a right to go to Miss Umphlet's house, if invited there by her, even if he expected there to be attacked, and the fact that he did go there did not, of itself, take away from him the right of self-defense, if unlawfully attacked.

The other instructions assailed as incorrect are neither so accurate or intelligible as they might well have been, but they are not so clearly erroneous, when taken in connection with the rest of the charge, as to demand, on that account alone, the reversal of the judgment and order. Yet, for the reasons heretofore given, they should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

SHIPMAN and others *v.* SUPERIOR COURT, etc. (No. 11,985.)

(*Supreme Court of California.* January 28, 1887.)

INJUNCTION—REVERSAL OF JUDGMENT ON DEMURRER—AMENDED COMPLAINT—EFFECT OF. Where a temporary injunction is granted on a complaint subsequently held insufficient on appeal, an amended complaint operates to continue the injunction obtained previously.

Department 1.

Application for a writ of prohibition to restrain proceedings in the court below for an alleged contempt in violating a preliminary injunction issued in the case of *Roman Catholic Archbishop* v. *Shipman*. Upon an appeal taken in that case, (11 Pac. Rep. 343,) the decision of the court below, overruling the de-

murrer to the complaint, was reversed, and, after filing the *remittitur*, an order was made and entered by the court below, sustaining the demurrer to the complaint. Plaintiff in that action, by leave of court, then filed an amended complaint, but did not apply for or obtain any order reviving or renewing the injunction, and no other injunction was issued. Subsequently an order of sale was made in the action, and placed in the hands of the sheriff by Mr. Wood, attorney for Alice Dorland. The property was advertised for sale. Application was then made by plaintiff in the case, and granted, that Wood show cause why he should not be punished for contempt in violating the injunction issued at time of commencing suit. Petitioners herein claimed that the reversal of the judgment set aside the temporary injunction, and from the time of the entry of the order in the superior court, the case stood without any restraining order or bond; respondents, that the injunction is still in force, notwithstanding the reversal of the judgment.

J. C. Bates, for petitioners. *Wilson & Wilson*, for respondents.

By the Court. Application denied, on authority of *Barber* v. *Reynolds*, 33 Cal. 497.

71 Cal. 611

People *v.* Demousset. (No. 20,253.)

(*Supreme Court of California.* January 29, 1887.)

1. Abduction—Defense—Unchaste Conduct of Child—Pen. Code Cal. § 267.
 The gist of the offense of abduction of a female under the age of 18 for the purpose of prostitution, under Pen. Code Cal. § 267, is the taking away of the child against the will of the person having lawful charge of her, and it is no defense that the child has previously been guilty of unchaste conduct, and evidence of such conduct is not admissible.
2. Same—Taking by Force—Inducement.
 To constitute the crime of abduction, under Pen. Code Cal. § 267, it is not necessary that the taking should be by force, but it will be sufficient if the child was induced by the defendant to leave the custody of her mother
3. Same—Evidence.
 In an indictment for abduction under Pen. Code Cal. § 267, where the girl abducted testified that the defendant suggested to her that she should leave home, because he was afraid that her mother would find out the relations existing between the defendant and her, and that she should leave on the false pretense that her stepfather was trying, or had tried, to have sexual intercourse with her, and that she left home solely on the suggestion and in consequence of the threats of the defendant, and the girl's mother testified that she consented to the girl going away from home on account of this charge, and that the defendant supported its truth, evidence that the girl had in fact had sexual intercourse is immaterial, as bearing solely on a collateral question, and therefore inadmissible. Paterson, J., dissenting.
4. Criminal Law—Trial—Instructions—General Charge—Particular Point.
 Where the court has charged, in general terms, that if the jury find that any witness has willfully sworn falsely upon any material point, the entire testimony of such witness is to be distrusted, it need not instruct the jury that testimony upon a particular point is material, and that, if a certain witness has sworn falsely upon that point, his entire testimony is to be distrusted.

In bank. Appeal from superior court, Los Angeles county.

Indictment for abduction under Pen. Code Cal. § 267.

Lucien Shaw and *James M. Damron*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

By the Court. The defendant was convicted of the crime of abduction for the purposes of prostitution, and sentenced to serve a term of five years in the state prison, under section 267 of the Penal Code, which reads as follows: "Every person who takes away any female under the age of eighteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution,

is punishable by imprisonment in the state prison not exceeding five years, and a fine not exceeding one thousand dollars."

The court instructed the jury as follows: "If, from the evidence, the jury believe that Augustine Coela was a female child under eighteen years of age, in the legal charge of her mother, and that the defendant took her away, as alleged in the information, for the purpose of prostitution, they should find the defendant guilty as charged."

It is claimed that this instruction is erroneous because it omits the element of the previous chaste character of the female, and because it does not inform the jury that the taking must have been without the consent of the parent. It will be observed that the section says nothing about the chastity of the female. The law is intended to protect the chaste and reclaim the erring; to protect parents and guardians in their custody and care of minor females, without regard to the character of such female for chastity, and the family from sorrow and disgrace. We are not disposed, in the construction of this section, to interpolate any phrase that will detract from its effectiveness in this regard.

In other portions of its charge the court said to the jury: "Before you can convict the defendant, you must be satisfied, to a moral certainty, not only that the defendant took the girl away from her parents without their consent, but also that he took her away for the purpose of prostitution. The word 'prostitution' in the statute does not mean sexual intercourse with some particular man, or with one man only, but it means to offer freely and openly, to an indiscriminate, common intercourse with men." This charge, in connection with the language of the instruction objected to,—"took her away as alleged in the information,"—is a sufficient answer to the second ground of objection.

The court further instructed the jury: "The law does not require that the taking must be by force. If the child was induced by the defendant to go away from the custody and care of her mother, it is a sufficient taking away under the statute." It is said that this instruction is erroneous, in that it leaves out of the case all question of the character of the inducements, and does not even require that they should have been used fraudulently. We think that the instruction, read in connection with the preceding instruction, was correct. The court immediately before had said to the jury: "The gist of this offense is the taking away of the child against the will of the person having lawful charge of her for the purpose of prostitution." It is seldom possible for the court to give the whole law of the case to the jury in one sentence. The charge must be read in its entirety. In this instruction the court simply said to the jury that a physical carrying away is not required to constitute the taking, but that inducements are sufficient.

The girl had given evidence to the effect that the defendant had administered drugs to her in order to cause her to submit to sexual intercourse, some days prior to the time of the alleged abduction. The court was asked by the defendant to instruct the jury that this alleged giving of drugs was material, and that, if she testified falsely upon that point, she was to be distrusted as to her whole testimony. The court refused to give such instruction, on the ground that it was calculated to mislead the jury, and was not supported by the evidence. The court, however, did instruct the jury: "If you find that any witness has willfully sworn falsely upon any material point, then the entire testimony of such witness is to be distrusted." We think this was sufficient. The jury may or may not have considered the conduct of the defendant, on the occasion referred to, as in any way bearing upon the question of guilt or innocence of the crime here charged. The court is not required to instruct the jury as to the materiality of particular circumstances. The ruling of the court on the admissibility of the evidence was a sufficient action on its part. It will be presumed the jury gave it proper consideration. As coun-

sel for defendant states in his brief: "The circumstance did not necessarily prove any element of crime."

The defendant offered to show that the girl, Augustine Coela, had, prior to the alleged abduction, had sexual intercourse with a number of men. The offer was rejected, and an exception was reserved. We are unable to see how such testimony could be material. Want of chastity is no defense, and if the defendant could show that the girl made the first proposal, and went willingly with him, it would be immaterial; for the gist of the offense, as the court told the jury, "is the taking away of the child against the will of the person having lawful charge of her, for the purpose of prostitution."

The defendant further offered to show that the girl had had illicit intercourse, from time to time, with the step-father, but the court excluded it. The girl had testified, in substance, that the defendant suggested to her that she should leave home, because he was afraid, if she stayed there, her mother would find out what they had been doing; and that she should leave on the false pretense that her step-father was trying, or had tried, to have intercourse with her; and that she made all the trouble that arose on account of this charge because she was afraid of the defendant, and without any real foundation for it, but solely on the suggestion and in consequence of the threats of the defendant. The girl's mother testified that she consented to the girl going away from home because of this charge, and that the defendant supported, or acquiesced in, the truth of the charge.

The defendant claims that he never made any such proposition to the girl, but, on the contrary, that the girl voluntarily told him of it, and that he was much shocked to hear it; that her step-father threatened to kill her on account of her statement to her mother that the step-father had attempted to have illicit intercourse with her; and that he (defendant) assisted her to get away, because the step-father might kill her.

During the cross-examination of the girl's mother, counsel for defendant proposed to show that she (the mother) had permitted her daughter to sleep with the step-father, at the store, during seven or eight months in the year 1885, and to follow that up by showing that illicit relations existed between them, and that he wanted, at this point, to show the condition of things that existed. The offer was excluded, and the defendant excepted.

Caspar Shaffer, a witness, called on behalf of defendant, was asked this question: "State to the jury if, during the month of January, 1885, while you were at the shop kept by yourself and Mr. Lorraine, you saw anything of an improper relation existing between the witness Augustine Coela and Mr. Lorraine, her step-father." The question was objected to, the objection sustained, and an exception taken by the defendant.

Defendant offered to show by another witness that Augustine and her step-father had had sexual intercourse with each other during the month of September or October, 1885. The same ruling was made by the court, and an exception taken by the defendant.

We see no error in the exclusion of the testimony offered. The question to which it was addressed was collateral to the issue involved, and the evidence was accordingly immaterial.

The evidence supports the verdict.

The judgment is affirmed.

PATERSON, J. I dissent. Upon the testimony in the case it became a most pertinent inquiry for the jury whether the girl was taken by the defendant to save her from the alleged criminal assaults by her step-father, or for the purpose of prostitution. The girl had said to her mother that she would not remain, and had written to her that she would not return, because she was afraid the father would "bother her again." On the witness stand she said that her former statements in that regard were untrue, and that the story had

been concocted by the defendant. On which occasion did she tell the truth? Did the defendant frighten her into the assertion of a false charge? The mother testified that she heard the step-father say he would kill the girl if she told such things about him. Did this threat of the step-father frighten the girl into giving false testimony by denying the truth of the charge she had made? Upon the determination of these inquiries must have depended largely the question of the defendant's motives, as well as the question of the mother's consent, and anything tending to show which statement was correct must be material. The conduct which was imputed to the step-father was most unreasonable, unnatural, and debased, and the story was correspondingly improbable and incredible. Upon its face it carried the badge of falsity. The jury would be slow to believe that the girl ever told the defendant such a story. If, however, the jury knew, as a matter of fact, that the statement was true, and that the mother knew it, much less weight would be given to the testimony of the mother and daughter upon the most important questions in the case, viz., whether the girl went with the consent of the mother, and whether defendant took her for the purpose of indiscriminate prostitution. If the defense of the defendant had been that he took the girl to save her from cruel and inhuman punishment, such as burning or tying up by the thumbs, and similar questions of veracity between himself and the girl had arisen, can it be doubted that the truth of the fact claimed might be proved to show that, however improbable and incredible his statement as to his reasons might appear to be, it is nevertheless true? While lewd conduct is no defense, it may often be an important and material circumstance tending to explain the taking away, as well as to show the credibility of the witness upon some material matter to which she has testified, and to explain the motives of the defendant. I think that the evidence offered to show the relations existing in fact between the step-father and the daughter was most material for these purposes, and should have been admitted.

71 Cal. 618

PEOPLE, etc., *ex rel.* CLOUGH *v.* LEVY. (No. 11,771.)

(*Supreme Court of California.* January 29, 1887.)

1. APPEAL—TRIAL WITHOUT JURY—CONFLICT OF EVIDENCE.
 Where a case has been tried in the superior court without a jury, and there is evidence on the point at issue sufficient to cause a substantial conflict, the supreme court will not reverse the judgment of the lower court, even though it might appear that the finding of such court is contrary to the weight of the testimony.
2. EVIDENCE—INSANITY—INTIMATE ACQUAINTANCE—DISCRETION OF COURT.
 Where the sanity of a person is in issue, it is within the discretion of the trial court to determine whether a witness is sufficiently acquainted with the party to enable him to speak, and the supreme court will not interfere with its decision, where there is no abuse of discretion.
3. WITNESS—IMPEACHING—FOUNDATION—CODE CIVIL PROC. CAL. § 2052.
 Where no attempt is made to contradict a witness, he may be questioned as to previous statements inconsistent with his testimony, although no foundation has been laid for his impeachment, as required by Code Civil Proc. Cal. § 2052.

In bank. Appeal from superior court, city and county of San Francisco.

Quo warranto.

Langhorne & Miller, for appellant. *C. L. Ackerman* and *David McClure*, for respondent.

PATERSON, J. This is an action, in the nature of *quo warranto*, to oust the defendant from the office of judge of the superior court in and for the city and county of San Francisco, into which it is alleged he has intruded, and to reinstate the relator therein. The relator was elected to said office for the term of six years from and after the first Monday of January, 1883. After his election he duly qualified as such judge, took possession of and held

the office until the twenty-eighth day of August, 1885. On the eleventh day of August, 1885, the relator signed and delivered to one McCourtney, his court-room clerk, and instructed him to deliver to the governor, the following paper.

"*To His Excellency, George Stoneman, Governor of California*—DEAR SIR: I herewith tender you my resignation as superior judge of the city and county of San Francisco, state of California. Failing health will no longer permit me to perform the duties thereof.

Respectfully yours, F. M. CLOUGH, Judge."

McCourtney handed the document to Mrs. Clough, who thereafter delivered the same to T. J. Clunie, by whom it was delivered to Gov. Stoneman on or about the twenty-eighth of August, 1885. Appellant claims that at the time said resignation was signed, and thereafter, until it was delivered to the governor, the relator, Clough, was insane, and that his acts in relation to said resignation are void; and this is the principal ground of contention on this appeal.

The cause was tried before the superior court, sitting without a jury, and the court found as facts "(14) that said relator was, on the said eleventh day of August, 1885, and at the time of making and delivering the said resignation, in a fit and proper condition for the proper transaction and understanding of business, and he was at the said time of sound mind and memory;" "(20) that at the time of signing said resignation said relator well knew the purport and effect of the same, and did voluntarily sign said resignation;" "(22) that said relator was, at the time of the delivery aforesaid, of sound mind, and well able to understand the effect of his said act of delivery."

It is claimed, however, by appellant, that said findings are not supported by the evidence.

Mr. McCourtney, the relator's court-room clerk, of whom it is alleged in the complaint that "the relator reposed great confidence in his truthfulness and friendship," testified as follows: "I did not notice anything wrong with him. He talked the same that day [August 11th] as he did in his court-room. I have observed the conduct of Judge Clough in his court-room during the time that I have been there, and have known him for three or four years. He talked the same that day as he did in his court-room. I did not see any difference. He signed the state demands also, besides the city warrants. I am very familiar with his handwriting and his signature. I can see no difference in the signature on the warrants here shown and the signatures in the court-room. He signed the word 'Judge' at the bottom. I did not ask him to sign it. He put it there of his own volition. He said: 'Now, I have resigned. Forward that to the governor of the state.' He asked if he would get this month's salary, and I said, 'Certainly, you will get that.'"

W. Fitzgerald, who had known the relator for about three years, testified that he saw him the next day after he came down from Stockton, on August 8th. "I remained with him after that about six or seven weeks. I had mostly charge of him. I spent nearly all the time, except when I would run down town during the day-time, with him all those weeks. I should think most of the time, to the best of my opinion, he was sane all the time I was with him. He was sane, and not out of his mind, except when he got excited. His mental condition was good. I could not see any change. * * * He seemed to talk very rationally. I was there when the resignation was signed. He had a conversation after, with McCourtney. He signed it right off. I don't know whether he read it. I should say he was understanding what he was doing."

Dr. Buckley, an expert witness, testified, in answer to hypothetical questions: "I should consider a person who signed a document, after all this reasoning *pro* and *con* relative to the subject, was perfectly sane in mind."

This evidence shows that, whatever may be the weight of the evidence against it, there is a substantial conflict as to the sanity of the relator at the time he executed the resignation, and delivered it to McCourtney, on the eleventh day of August, 1885.

The most serious question, it is claimed, in the case is as to the condition of his mind from the eleventh day of August to and including the twenty-eighth, or until the appointment of the respondent to fill the vacancy.

Although it might seem to us that the finding of the court is contrary to the weight of testimony, it is sufficient to say that there was evidence enough to cause a substantial conflict therein. It is true there is no direct evidence as to his sanity during each and every day of the period referred to, but, if the question be material, there is testimony indicating sanity during a portion of the time, and from which the court was justified in finding him to be sane during the whole period. Judge Maguire, an intimate friend and associate of the relator, testified that he visited him on several occasions. He says: "I think it must have been between the fifteenth and twenty-fifth of August that I saw him, but I cannot place closely the first visit I made. I met Judges Lawler and Rearden there. Judge Clough then and there conversed with me and the other judges. He said that he desired to speak about his alleged resignation, and the appointment of Levy. We asked him about it, talked about it, and he made some statements concerning it. * * * He seemed to me to be weak physically, and not very strong mentally, but still so rational as to surprise me, from his former condition and conversation. I should say that he had very greatly improved at that time; improved so far as to seem to be rational, if not disturbed. * * * During that time he seemed to be quite rational, and quite sane, barring the weakness that was incident to sickness of that character. I would regard him to be of sane mind. I would consider that he talked quite rationally upon all other subjects that were discussed at that time, barring the weakness and the nervous excitement at times, which he checked, as I say."

McCourtney testified: "I went there again, for the purpose of getting his warrant signed. It was in the latter part of August or the first part of the next month. He came and greeted me, and shook hands with me. It was about the time that Judge Levy was appointed. I think it was before Judge Levy took his seat. He came in, and shook hands with me, and I told him, I said: 'Well, judge, I have brought you out your demand; I suppose it is the last you will get.' He said: 'Yes, I don't know whether I have any right to sign it or not.' I did not stay over five or six minutes. He acted just as he always did in court."

Mrs. Clough testified: "So, then, August 28th, I telegraphed the governor, and told him that the judge was much better, and he had not resigned. * * * He commenced to recover, I think, about a week or ten days after he came from Stockton, August 7th. He was better that week than he had ever been,—the week that he went up there in September,—and I thought probably he was well enough to get his discharge; but the ride up and down upset him, and after that he commenced being nervous again. * * * Dr. Hayne said he was well enough to go and get his discharge, and he was seemingly very well. I did not see anything out of the way. He talked rationally and intelligently. This was about the middle of September. After that he was not violent."

This testimony, which is all there is bearing on the point in connection with his acts in relation to the demands and warrants for salary, created, in our opinion, a substantial conflict in the evidence. Appellant claims that the resignation was procured through fraud, and upon the respondent's offer to share with the relator or his family a part of the salary of the office, in the event of the respondent's appointment thereto, and therefore that the resignation was void as against public policy. But the court found that no such

offer was made, and that there was no fraud in procuring the resignation. Upon this question there was also a conflict of testimony, and the same is true of all the findings about which there is any controversy.

The hypothesis upon which defendant's counsel based his question calling for the opinion of Dr. Buckley was warranted by the evidence, and we cannot say that the facts stated were insufficient to render it competent.

During the cross-examination of Mrs. Clough, she was asked whether she had stated to the attorney general that the judge was much better. To this question counsel for plaintiff objected, on the ground that the proper foundation had not been laid for impeachment, as required by section 2052, Code Civil Proc. The objection was overruled, and plaintiff excepted. Inasmuch as no attempt was made to contradict the witness, there was no error in the ruling.

It is claimed that the witness McCourtney ought not to have been allowed to testify concerning the sanity of relator, because he was not shown to be an "intimate acquaintance," within the meaning of the statute. It is often a difficult question to determine whether the witness is sufficiently acquainted with the party to entitle him to speak. That the witness should be familiar with the temperament and habits of mind of the person whose soundness is in question there is no doubt, but the determination of the competency of the witness is within the discretion of the court below, with the exercise of which, there being no abuse, this court will not interfere. *People* v. *Pico*, 62 Cal. 53.

Other errors are assigned, but we see nothing prejudicial in any of them. Judgment and order are affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

MCKINSTRY, J. I concur in the judgment.

71 Cal. 608

Ex parte ROBINSON. (No. 20,275.)

(*Supreme Court of California.* January 29, 1887.)

1. CONTEMPT—REFUSAL TO OBEY ORDER OF COURT TO PAY ALIMONY—DECLARATION IN COURT—AFFIDAVITS.

The defendant, in an action for divorce at the instance of his wife, was ordered to pay her a sum for costs. The money was not paid, and no affidavit was filed showing non-payment, but the defendant appeared in court to show cause why he should not be punished for contempt. The court, having heard the evidence as to his ability, decided that he was amply able to pay. The defendant thereupon declared that he would not pay; that he "would be locked up,"—meaning that he would go to jail rather than obey the order. *Held* that, although failure to obey such order would not ordinarily be punishable except upon affidavit, yet, the defendant having refused to pay in the presence of the court, he might be imprisoned without affidavits.

2. APPEAL—REHEARING—HABEAS CORPUS.

In the California supreme court, a petition for rehearing in a *habeas corpus* case will not be allowed.

In bank. Petition for a writ of *habeas corpus*.

W. H. H. Hart and *Aylett R. Cotton*, for petitioner. *Sawyer & Burnett*, for respondent.

PATERSON, J. The petitioner was adjudged guilty of contempt in the superior court of Del Norte county for refusing to pay certain sums of money which the court had directed him to pay, as costs and attorney's fees, in an action for divorce therein pending between his wife and himself. In the action referred to the plaintiff, wife of petitioner, had been awarded a decree of divorce, the defendant had moved for a new trial, and prepared and served his bill of exceptions. The plaintiff, having no means to present her defense to said motion, applied to the court for an order requiring the defendant to

pay the cost of transcribing the short-hand notes, and a sufficient fee to enable her to employ an attorney to attend to the proceedings for a new trial. After hearing the matter upon affidavits, the court directed the defendant to pay the plaintiff or her counsel the sum of $160 within two days after service of the order, or show cause thereafter, to-wit, on the fourth day of November, 1886, why he should not be punished for contempt. The money was not paid. No affidavit showing non-payment was presented, but on said fourth day of November the defendant and his counsel appeared before the court to show cause why he should not be punished for contempt. The court heard the evidence of the parties as to the ability of the defendant to pay, and decided that the defendant had been and then was amply able to pay the said sum. Immediately upon learning the decision of the court the defendant refused to pay the money, saying he "would be locked up;" meaning, of course, that he would go to jail before he would obey the order of the court. Thereupon the court adjudged him guilty of contempt, and ordered that he be confined in the county jail until he complied with the order for the payment of the $160.

Petitioner claims that the court exceeded its jurisdiction in making the order adjudging him guilty of contempt, and that the order is therefore void, and his detention thereunder unlawful. It is contended that the contempt, if any, was committed without the presence of the court, and that the court could not lawfully make any order requiring him to show cause, except upon affidavit being first presented showing his failure to comply with the order for the payment of the money. In support of this proposition petitioner relies upon the case of *Batchelder* v. *Moore*, 42 Cal. 412. In that case the contempt alleged was clearly one which was not and could not be committed in the presence of the court. The affidavit upon which the proceedings were based was defective in the most important particular, and it resulted that the court had no authority to proceed. We are not disposed to question the correctness of that decision, and if the petitioner herein had contented himself with answering the question why he had not complied with the order of the court,— whether his reasons were good or bad,— or if he had objected in any way to the proceedings, or if he had voluntarily appeared, and said nothing, we should hold that the court below, in the absence of an affidavit showing failure to comply with the order, had no authority to convict him of contempt. The defendant, however, did not content himself with excuses, good or bad, nor did he object to the proceedings of the court, nor did he keep that silence which would have been circumspect; but he went further, and showed his defiance of the court, and its lawful order, by a declaration plainly indicating that he never intended to obey the order, and that, if imprisonment was the *ultimatum*, he was ready for it. We think that this direct challenge to the authority of the court was a contemptuous defiance of a lawful order, *in the presence of the court*, and that he was properly adjudged guilty of contempt therefor. It was a repetition *in the presence of the court* of the offense for which the court had, without authority, cited him to appear and answer.

It is claimed that, since the issuance of the writ herein, a compliance with the order of the court has become unnecessary, because the proceedings on motion for new trial have lapsed or have been dismissed, and there is no longer any necessity for the payment of the money. If this be true, the court below may discharge the prisoner; but, as the order for payment is still in force, we remand the petitioner.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

(February 8, 1887.)

ON REHEARING.

BY THE COURT. Petition for rehearing denied. There is no practice here allowing petitions for rehearing in cases of *habeas corpus*.

71 Cal. 627

Boys' & Girls' Aid Soc. *v.* Reis, Treas., etc. (No. 9,914.)

(*Supreme Court of California.* January 31, 1887.)

1. Reform School—Constitutionality of Pen. Code Cal. § 1388.
 Pen. Code Cal. § 1388, authorizing courts to suspend final judgment in any conviction against a minor for a misdemeanor or felony, to commit him to the custody of the managers of a non-sectarian charitable institution conducted for the purpose of reclaiming minors, and, in their discretion, to direct payment of the expense of his custody in such institution to be made from the funds of the county where the criminal proceeding is pending, is constitutional; and is not in conflict with Const. Cal. art. 4, § 22, prohibiting the payment of money from the *state* treasury for the benefit of institutions not under the exclusive control of the state as a state institution; nor with article 9, § 8, prohibiting the appropriation of public money for the support of any school not under the exclusive control of the officers of public schools, such provision having reference to common and public schools, as spoken of in the constitution, such as are organized for the sole purpose of disseminating knowledge, and imparting scholastic instruction; nor with article 11, § 13, prohibiting the delegation of municipal power.
2. Same—Police Court—Jurisdiction.
 A tribunal presided over by a police judge is a "court," within the meaning of the California constitution, and may exercise the jurisdiction granted by Pen. Code Cal. § 1388, authorizing the committal of juvenile criminals to reform schools.
3. Same—Expense of Custody—Board of Supervisors.
 The discretion imposed upon the court by section 1388 of Pen. Code Cal., to allow payment of the expense of keeping a minor, in an institution for the reformation of minor criminals, from the funds of the county in which the criminal proceeding is pending, must be exercised personally, and, when properly exercised, the board of supervisors is not required to supervise the action of the court before payment may be made from the county treasury.

Appeal from superior court, city and county of San Francisco. *Mandamus.* Commissioners' decision. In bank.

John L. Love, for appellant. *E. F. Swortfiguer* and *John A. Stanly*, for respondent.

Foote, C. This is an appeal from a judgment ordering a peremptory writ of mandate to issue commanding the defendant, treasurer, etc., forthwith to pay out of the treasury of the city and county of San Francisco certain sums of money. The defendant urges that the statute enacted by the legislature, dated the fifteenth day of March, 1883, adding a new section to the Penal Code, to be known as section 1388, is unconstitutional. The said act is to be found in the Statutes of 1883, p. 377. He also contends that the statute in question does not contemplate that the treasurer of said city and county should have incumbent on him, as a mere ministerial duty, the payment of the demands on the treasury by the direction of the court.

Section 1388 of the Penal Code is as follows: "Final judgment may be suspended on any conviction, charge, or prosecution for misdemeanor or felony, where, in the judgment of the court in which such proceeding is pending, there is a reasonable ground to believe that such minor may be reformed, and that a commitment to prison would work manifest injury in the premises. Such suspension may be for as long a period as the circumstances of the case may seem to warrant, and subject to the following further provisions: During the period of such suspension, or of any extension thereof, the court or judge may, under such limitations as may seem advisable, commit such minor to the custody of the officers or managers of any strictly non-sectarian charitable corporation, conducted for the purpose of reclaiming criminal minors. Such corporation, by its officers or managers, may accept the custody of such minor for a period of two months, (to be further extended by the court or judge should it be deemed advisable;) and should said minor be found incorrigible and incapable of reformation, he may be returned before the court for final judgment for his misdemeanor. Such charitable corporation shall accept

custody of said minor, as aforesaid, upon the distinct agreement that it and its officers shall use all reasonable means to effect the reformation of such minor, and provide him with a home and instruction. No application for guardianship of such minor by any person, parent, or friend shall be entertained by any court during the period of such suspension and custody, save upon recommendation of the court before which the criminal proceedings are pending first obtained. Such court may further, in its discretion, direct the payment of the expenses of the maintenance of such minor during such period of two months, not to exceed, in the aggregate, the sum of twenty-five dollars, ($25;) which sum shall include board, clothing, transportation, and all other expenses, to be paid by the county where such criminal proceeding is pending, or direct action to be instituted for the recovery thereof out of the estate of said minor, or from his parents. Such court may also revoke such order of suspension at any time."

In support of his first contention the defendant argues that the act is in contravention of section 22, art. 4; section 8, art. 9; section 13, art. 11; and section 11, art. 1,—of the constitution of this state.

They are as follows, respectively:

Sec. 23, art. 4. "No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the comptroller; and no money shall ever be appropriated or drawn from the state treasury, for the use or benefit of any corporation, association, asylum, hospital, or other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state: provided, that, notwithstanding anything contained in this or any other section of this constitution, the legislature shall have power to grant aid to institutions conducted for the support and maintenance of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances, such aid to be granted by a uniform rule, and proportioned to the number of inmates of such respective institutions: provided, further, that the state shall have at any time the right to inquire into the management of such institutions: provided, further, that whenever any county, or city and county, or city, or town, shall provide for the support of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances, such county, city and county, city, or town, shall be entitled to receive the same *pro rata* appropriations as may be granted to such institutions under church or other control. An accurate statement of the receipts and expenditures of public moneys shall be attached to and published with the laws at every regular session of the legislature."

Sec. 8, art. 9. "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this state."

Sec. 13, art. 11. "The legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever."

Sec. 11, art. 1. "All laws of a general nature shall have a uniform operation."

We do not perceive that the section of the Code under consideration is in conflict with section 22 of article 4 of the constitution. That section has exclusive reference to the legislative power to appropriate or draw money from "the state treasury for the use and benefit of any corporation," etc. Under section 1388 of the Penal Code no money can be, or is in any manner

sought to be, taken from the *state* treasury, and it does not affect the revenue of the state, as such. Nor has the legislature, by that statute, attempted to direct any absolute payment from a county treasury. It has vested in a court, in the exercise of its wise and proper judicial discretion, the right to order payment out of that treasury, to a limited extent, and in strict accordance with the letter of that law, certain sums of money in each given case, where such an order could be legally made according to the terms of the statute. It is not in conflict with section 8 of article 9 of the constitution, for that section has reference to *schools*, as such, in the ordinary acceptation of the term; that is, *common* and *public* schools, as spoken of in the constitution,—such as are organized for the sole purpose of disseminating knowledge, and imparting scholastic instruction.

The Boys' & Girls' Aid Society, as constituted, appears to be a corporation which "is strictly non-sectarian and charitable, conducted for the purpose of reclaiming minors;" and we do not see why the legislature might not as well allow a judge of a proper court to confide to the managers and directors of the corporation the custody of a minor, who has been convicted of an infraction of the penal laws of the state, for a certain specified time, and to order the proper sum necessary to his maintenance while in such custody out of a proper fund provided for the purpose and in the treasury of the proper county, as to order his imprisonment in the county jail, and the costs of his maintenance there to be paid out of said treasury. Both laws would have for their common object the reformation of the criminal, and the prevention of crime, and would be necessarily constitutional, being the exercise of the "police power" essentially existing under the constitution as a legislative attribute; nor do we perceive what "municipal power" is delegated under the act, which is prohibited by section 13 of article 11.

The municipality of the city and county of San Francisco is a political corporation, and its functions are only such as are necessary to fulfill the purpose of its existence. The creation of that municipality for the purpose of engaging in the charitable and praiseworthy labor of reclaiming and reforming criminal minors was not within the contemplation of the legislature which enacted the consolidation act, and other laws which govern and control the city and county of San Francisco as a municipal corporation, for such power is not therein expressly granted, or necessarily implied from such grant, and it cannot otherwise exist. *Wallace* v. *Mayor of San Jose*, 29 Cal. 186; *City of Oakland* v. *Carpentier*, 13 Cal. 546; *Argenti* v. *City of San Francisco*, 16 Cal. 283; Boone, Corp. § 287; *In re Lee Tong*, 18 Fed. Rep. 259; Dill. Mun. Corp. § 89; Cooley, Const. Lim. 194.

It is not unconstitutional to apply the word "court" to a tribunal presided over by a police judge. It is an inferior court, which the legislature may establish in any incorporated city or town, or city and county. Const. art. 6, § 1. Nor is the order of such court, for the payment out of the city and county treasury of the sum mentioned in the statute, an exercise of the right of "taxation without representation." The statute under which it is to be done contemplates the expenditure of such money, out of a fund to be provided for that purpose. It is alleged in the affidavits filed by the corporation respondent, admitted by the defendant, and found by the trial court, "that said treasurer of said city and county, on said third day of October, 1884, had then, hitherto has had, and still has, ample funds provided by law for the payment of said orders;" meaning the orders made by the police court of said city and county, which the defendant refused to pay. The benefits of the reclamation of minors intended by the statute would be enjoyed by the whole community, and no inequitable burden cast upon any person.

The police judge of any incorporated city or town, or city and county, may be elected by only a part of all the qualified voters thereof, and yet he would be the judge of an inferior court such as the constitution (article 6, § 1) con-

templates, and any such court could exercise the jurisdiction granted by section 1388 of the Penal Code, and that would not be a violation of the constitution where it declares: "All laws of a general nature shall have a uniform operation." Article 1, § 11, Const.

The statute says: "Such court may further, in its discretion, direct the payment of the expenses of the maintenance of such minor during such period of two months, not to exceed in the aggregate the sum of twenty-five dollars, ($25,) which sum shall include board, clothing, transportation, and all other expenses, to be paid by the county where such criminal proceeding is pending," etc. We know of no other way for such payment to be made than out of the treasury of the county where the "proceeding is pending." The order made herein, in each case, directs the payments to be made "out of the treasury of the city and county of San Francisco," where each and all of the "proceedings were pending." To the judge of the proper court the statute commits the discretion of making the orders for such payments. Where such a discretion is by law conferred upon a specific officer, such officer must exercise that discretion personally, (Boone, Corp. § 310; *Richardson* v. *Heydenfeldt*, 46 Cal. 68; *City of Stockton* v. *Creanor*, 45 Cal. 646,) and, when properly exercised, the board of supervisors is not required to supervise the action of the court, (*Ex parte Reis*, 64 Cal. 243, 244.)

The demand in controversy is not one of those that is to be first approved by the board of supervisors, for section 85 of the consolidation act includes only such demands as are mentioned in that act, and are authorized by it. Sections 97, 98, Consolidation Act; *Ex parte Reis*, *supra*, 239. The statute under consideration does not attempt to repeal said section 85, nor does it affect the act itself, for the provisions of the consolidation act are left untouched. Its officers exercise the same functions under it after as before the enactment of the statute. It does superadd a duty on the treasurer, that of paying the demand mentioned, under the order of the judge of the police court; but that does not affect any power or duty vested in him by the consolidation act. *Ex parte Reis*, *supra*, 240.

The judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

71 Cal. 626

HOME & LOAN ASSOCIATES *v.* WILKINS and others. (No. 11,582.)

(*Supreme Court of California.* January 31, 1887.)

APPEAL—UNDERTAKING—TWO APPEALS, AND ONE UNDERTAKING REFERRING TO NEITHER—FILING NEW UNDERTAKING—CODE CIVIL PROC. CAL. § 954.

Where an appeal is taken from two orders, and one undertaking on appeal filed, which refers to neither of them, so that it cannot be determined for which it is intended, the appellant will not be allowed to file a new undertaking, under section 954, Code Civil Proc. Cal., as that act only allows such proceeding when the undertaking is insufficient; but this is no undertaking at all.

Department 2.

Appeal from superior court, city and county of San Francisco.

E. A. & G. E. Lawrence, for appellant. *J. R. Brandon*, for respondents.

THORNTON, J. Motion to dismiss appeals. In this case appellant took appeals from two orders, and filed one undertaking on appeal, not distinctly referring to either appeal. The language used in the undertaking filed recites only one appeal, without distinguishing which of the two appeals was referred to. The undertaking so filed is no undertaking at all. It is so ambig-

uous that it must be regarded as if none had been filed. *People* v. *Center*, 61 Cal. 191; *Corcoran* v. *Desmond*, 11 Pac. Rep. 816.

An application is made to this court by appellant to be allowed to file the proper undertakings under section 954, Code Civil Proc. The section referred to does not authorize it. It only authorizes a new undertaking when the one filed is insufficient. But in this case there has really been none filed. To allow new ones to be filed would be, in effect, to permit a new appeal to be perfected after the time fixed by law. *Hastings* v. *Halleck*, 10 Cal. 31.

Application to file other undertakings denied, and the appeals dismissed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

71 Cal. 624

Ex parte GILMORE. (No. 20,246.)

(*Supreme Court of California.* January 31, 1887.)

CRIMINAL LAW—SENTENCE—VACATING ILLEGAL AND IMPOSING LEGAL SENTENCE—PEN. CODE CAL. § 241.

Under section 241, Pen. Code Cal., authorizing the sentence of one convicted of assault to fine or imprisonment for three months, a sentence to fine *and* imprisonment is illegal; and the court which rendered the sentence has power to call the prisoner before him at the term at which it was rendered, or within a reasonable time, if the court has no terms, to vacate the sentence, and impose a legal one; and six days after the first sentence is a reasonable time.

Department 2. On *habeas corpus*.

John D. Whaley, for petitioner. *J. N. E. Wilson*, for respondent.

THORNTON, J. The petitioner was regularly convicted of an assault, and sentenced to fine *and* imprisonment for three months. The sentence was one which the court was not authorized by law to impose, the statute allowing a sentence of fine *or* imprisonment not exceeding three months. Pen. Code, § 241. The petitioner applied to this court for a writ of *habeas corpus*, and, after he was heard, the court which had pronounced the illegal sentence vacated it, and imposed imprisonment for 81 days. The first sentence was pronounced on the twenty-third of October, 1886, the petitioner was heard on the twenty-eighth, and the court imposed the second and legal sentence on the twenty-ninth, of October, 1886. The second judgment was brought to our attention by a supplementary return.

We are of opinion that the first sentence or judgment was illegal, and perhaps void. As it was illegal, the court which rendered the judgment had power, during the term at which the judgment was rendered, to call the prisoner before it, vacate the illegal sentence, and impose one in accordance with law. *Ex parte Lange*, 18 Wall. 163. See prevailing and dissenting opinions. The petitioner being thus under the control of the superior court, we should have remanded the petitioner to give an opportunity to the court to do what it has done,—have the party brought before it, vacate its illegal sentence, and render a legal one. This being done, it remains only to say that the petitioner was legally held, and he must be remanded to the custody of the sheriff.

It may be urged that the superior court has no terms, and therefore the rule above cited does not apply. Conceding that such court has no terms, then it has power, within a reasonable time, to do what was done here, and the action taken by the court in passing the legal judgment was, in our judgment, within a reasonable time.

Ordered that the prisoner be remanded to the custody of the sheriff of the city and county of San Francisco.

We concur: MORRISON, C. J.; SHARPSTEIN, J.

72 Cal. 5

OAKLAND PAVING CO. *v.* TOMPKINS, City Marshal, etc. (No. 11,794.)

(*Supreme Court of California.* February 4, 1887.)

CONSTITUTIONAL LAW—AMENDING CONSTITUTION—"ENTRY" OF AMENDMENT IN JOURNALS—IDENTIFYING REFERENCE—CONST. CAL. ART. 18, § 1.

The provision of Const. Cal. art. 18, § 1, that proposed amendments to the constitution "shall be entered" in the journals of each house, after the requisite vote in favor of them, does not require them to be copied into the journal in full, but is satisfied by an identifying reference. THORNTON, J., dissenting.

In bank. Appeal from superior court, Alameda county.

This case is identical with *Oakland Paving Co.* v. *Hilton*, 11 Pac. Rep. 3, except that here the parties stipulated that the street laws of 1864, of 1870, and of 1885 were complied with. See concurring opinion of MCKINSTRY and SHARPSTEIN, JJ., Id. 20. After the above decision was rendered, this application for *mandamus* was made. The defendant is successor in office of Hilton.

C. T. Johns, for appellant. *John H. Boalt*, *Henry Vrooman*, and *C. T. H. Palmer*, for respondent.

TEMPLE, J. This case arises from a street assessment in Oakland. The only question submitted is whether the constitutional amendment No. 1, ratified by the electors at the general election in 1884, being an amendment to section 19, art. 11, was proposed by the legislature as required by section 1, art. 18, of the constitution. That section provides that amendments may "be proposed in the senate and assembly, and, if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in the journals, with the yeas and nays taken thereon," etc. The objection is that the proposed amendment was not entered in the journal of either house as required by the constitution. It was not copied into the journal, but there was entered an identifying reference, such as is always entered in regard to legislative bills; that is, it was proposed as a senate bill, and was referred to by title and number. The yeas and nays were entered as directed. It is agreed that the amendment thus proposed was submitted to the people, and received a very large majority of the votes cast.

This question is not a new one in this court. In *People* v. *Strother*, 67 Cal. 624, S. C. 8 Pac. Rep. 383, it was the only issue of any importance, and it was squarely decided that the amendment had been constitutionally adopted. This was in bank, and there was no apparent dissent. This decision was in October, 1885, and in the following May in the case of *Oakland Paving Co.* v. *Hilton*, 11 Pac. Rep. 3, an opinion was rendered by Justice THORNTON, which was concurred in by Mr. Justice MCKEE, holding to the contrary. The other members of the court who participated in that decision based their concurrence on other grounds.

It is contended that in this condition of the decisions, the question ought to be considered an open one. We do not accede to this proposition. In the case of *People* v. *Strother* the point was squarely presented, was the only one involved, and was plainly and unequivocally decided. We see no reason why it is not entitled to the usual authority of a precedent; nor do we concede that in so deciding there was error. All admit that the constitutional requirement must be strictly performed; but it does not follow from this that the language of the instrument must be understood literally. The same rules of construction must be applied to ascertain what its requirements are as though it were not mandatory and prohibitory. And we think, when an act commanded or authorized may be done in different ways, either of which would be a strict compliance with the terms of the instrument, understood in some common and popular sense, either mode may be pursued, unless some reason is discoverable for holding that one of such modes only will

answer. If, for instance, the direction to enter the amendment in the journal is complied with, in some usual and popular sense of the language, either by copying the amendment into the journal, or by placing upon the journal an identifying reference only, either will do unless the context shows a different intention.

Now, the word "enter" primarily means to go in, or to come in, but has many derivative meanings, and is often employed in elliptical expressions, and is quite apt to be so used that the literal or most obvious meaning cannot be attributed to it. We read, for instance, in the laws of congress, that citizens may enter at the land-office a tract of land, and the expression is repeated in different forms many times. We are often told that a certain horse has been entered for a race, or an animal has been entered at a fair. What is really done in each instance is to make a record of certain important facts, for preservation or notice; and such is certainly a very ordinary meaning of the word "enter," when used in this derivative sense; that is, to register the essential facts concerning the thing said to be entered. And we think it may be fully admitted that the most natural and obvious meaning of the word, when employed in this derivative sense, is to copy without greatly affecting the argument.

We find, near the title-page of nearly every book printed, that it has been *entered* in the office of the librarian of congress. What is really left with the librarian is the title-page of the proposed book, and this constitutes the entry, although, after it is printed, the author is now required to present a copy of the book for the congressional library. We sometimes read that a certain play of Shakespeare was entered at Stationers' Hall. We find that the entry really made was a brief identifying reference, preliminary to obtaining license to print. Such instances of the use of the word, and of the phrase in which it occurs, might be multiplied indefinitely, but these are enough to show that this usage is quite common. Now, if we substitute, in all these and like cases, the word "copy," or the phrase "enter at large," for the word "enter," we are conscious at once that a great change has been made. Indeed, the mere fact that the qualifying words "at large," "at length," "in full," do so often accompany the word "enter," is proof that all feel that it is not a synonym of the word "copy."

The language, however, had been construed under the old constitution, which contained the same words, and under which amendments had been adopted in the mode pursued in this case. The practice of both houses of the legislature had given this construction to similar language. The joint rules have always required, as also do the rules of the house of representatives of congress, that at a certain stage in the passage of a bill it shall be entered on the records of the house. They have always been so entered by identifying reference. The convention itself adopted Cushing's Manual, which employs similar language, which is so used that it must be similarly understood. Many statutes in force at the time the convention was in session employ the language in the same sense. Pol. Code, §§ 254, 656, 4031; Civil Code, § 324. The convention adopted the language under consideration with knowledge of the practical construction which had been given to the same words under the old constitution, and in view of the established usage of the legislature as to entries in the journals. It knew that the practice had always been to consider similar matters entered on the journals when there was made a simple identifying reference. It knew, also, of the common usage to which we have referred; and it is fair to presume that it intended the same meaning. Otherwise it would have used some language which would indicate that a different entry was required from that which was habitually made in the journals. In addition to this we have the authority of both houses, which have declared the proposal duly made, and the amendment duly adopted; of the executive, who submitted it to the people; and whatever force there be in the fact that

the people acted upon and ratified it. This is sufficient to uphold the amendment, unless we can see from the context that something else was meant. We perceive no such intent. The evident purpose of the entire provision doubtless was to preserve a record of the vote. As a majority controls the journals, it may have been apprehended that it might be made to appear that the proposal was duly passed although lacking the requisite majority, and so it was required that the yeas and nays be entered. But, however this may be, the principal thing is the record of the yeas and nays, and this purpose is accomplished as perfectly by the entry made as it would be by any other.

As to preserving the identity of the amendment proposed, there is no greater difficulty in this matter than with reference to bills. That is left to be provided for by the legislature.

The parties agree that, in case the amendment was properly adopted, the judgment should be affirmed. It is stipulated that in the proceedings there was full compliance both with the street laws prior to 1880 and with the law of 1885. It is therefore not necessary to decide which law is in force. That question is really stipulated out of the case. Judgment affirmed.

We concur: MORRISON, C. J.; PATERSON, J.; MCFARLAND, J.; MCKINSTRY, J.; SHARPSTEIN, J.

THORNTON, J. I dissent.

72 Cal. 10

Ex parte MON FOOK. (No. 20,276.)

(*Supreme Court of California.* February 4, 1887.)

CRIMINAL LAW—SENTENCE—HOUSE OF CORRECTION OR STATE PRISON—ACT CAL. OF APRIL 1, 1878.

A defendant who pleads guilty of burglary, and confesses to prior convictions thereof, cannot be sentenced to the house of correction, under California act of April 1, 1878, providing that no person who may be sentenced to the state prison shall be sentenced to the house of correction, if he has been once before convicted of felony, and that the fact of previous conviction may be found by the court, upon evidence introduced at the time of sentence. TEMPLE, J., dissenting.

In bank. On *habeas corpus*.

Z. T. Cason, for petitioner. *Joseph Kirk*, for respondent.

PATERSON, J. On May 22, 1885, the petitioner, after due proceedings had in the superior court of the city and county of San Francisco, pleaded guilty of burglary, and confessed the charge of two prior convictions of felony—burglary also—to be true. The court thereupon sentenced him to serve the term of four and one-half years in the house of correction.

The act of April 1, 1878, (St. 1877–78, p. 953,) provides:

"Sec. 3. All persons appearing for sentence in the police judge's court, the city criminal court, or the municipal criminal court, of the city and county of San Francisco, who might be sentenced to imprisonment in the county jail, or in the state prison, may, instead thereof, be, by the proper court, sentenced to imprisonment in the house of correction, in said city and county, subject, however, to the provisions of the next section; and no person shall be sentenced to imprisonment in the house of correction except under the provisions of this act.

"Sec. 4. No person shall be sentenced to imprisonment in the house of correction for a shorter or a longer term than that for which he might be sentenced in the county jail, or in the state prison, and in no case whatever for a shorter term than three months, nor for a longer term than three years. No person who might be sentenced to imprisonment in the state prison shall be sentenced to imprisonment in the house of correction, if he is more than twenty-five years of age, if he has once before been convicted of a felony, or

twice before convicted of petit larceny, nor unless, in the opinion of the court, imprisonment in the house of correction will be more for his interest than imprisonment in the state prison, and equally for the interest of the public. The fact of a previous conviction may be found by the court upon evidence introduced at the time of sentence." Applicable to superior court, *Ex parte Flood*, 64 Cal. 251.

Passing over the question as to the effect of an excessive sentence, and the question of the correctness of the decision in *Ex parte Bernert*, 62 Cal. 524, we think the judgment is void because the prisoner is not within any of the classes of criminals who may, by the terms of the statute, be committed to the house of correction. That institution, as its name indicates, is designed for the reformation of youthful criminals,—those who have not yet become hardened in crime; and, as we construe section 4 of the act, no one can be committed to the house of correction who is over 25 years of age, or "who has been once before convicted of a felony, or twice before convicted of petit larceny, nor unless, in the opinion of the court, imprisonment in the house of correction will be more for his interest than imprisonment in the state prison, and equally for the interest of the public." It was the intention of the legislature to provide a place where young offenders should not be brought into contact or association with veteran criminals.

It being now too late to enter a proper judgment in the court below, (*Ex parte Gilmore, ante*, 800,) it is ordered that the petitioner be discharged from custody.

We concur: MORRISON, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

TEMPLE, J. I dissent.

72 Cal. 1

HOFFMAN *v.* REMNANT. (No. 9,835.)

(*Supreme Court of California.* February 3, 1887.)

1. EJECTMENT—DEFENSE OF PURCHASE FROM PLAINTIFF—FACTS NECESSARY TO CONSTITUTE.
 An answer in ejectment, alleging that defendant had contracted with plaintiff for the purchase of the premises, and that he had made a partial payment, and been let into possession, and that plaintiff still retains the amount paid, but not alleging payment in full, or that the remaining purchase money was not yet due, does not show a defense.

2. SAME—CROSS-COMPLAINT—FAILURE OF TITLE—REFUSAL TO RETURN PAYMENTS.
 A cross-complaint in ejectment averred a contract between plaintiff and defendant for the purchase by defendant of the premises sued for, the making of certain payments thereon by defendant, and that he had been let into possession; that, since the beginning of the action, he had discovered for the first time that plaintiff had no title to the premises, but that the title was in another person named; whereupon defendant offered to return the premises, and everything received by him under the contract, to plaintiff, and demanded back the money paid by him, but plaintiff refused to return it. *Held*, that the matter stated was not the proper subject of a cross-complaint, whether or not it would support some kind of a separate action.

In bank. Appeal from superior court, Santa Cruz county.

Ejectment. Plaintiff had judgment below.

Chas. B. Younger and *J. M. Lesser*, for Remnant, appellant. *Joseph H. Skirm* and *Warren Olney*, for Hoffman, respondent.

MCFARLAND, J. The appellant, Remnant, who was defendant in the court below, appeals from a judgment rendered against him in an action of ejectment. The grounds upon which he relies for a reversal are that the court erred in sustaining a demurrer to that part of his answer which sets up a

"further and separate defense," and also in sustaining a demurrer to a cross-complaint filed by defendant.

1. In the "separate defense" defendant merely averred that plaintiff entered into a contract with defendant to convey to the latter the premises described in the complaint, upon the payment by defendant to plaintiff of the sum of $3,410; that defendant paid $1,750 of this money, and was let into possession of the premises; and "that the plaintiff has not paid or returned to this defendant said last-named sum of money, or any part thereof, but still retains the whole thereof." The complaint in this case is in the ordinary and proper form of a complaint in ejectment. An answer to such a complaint should contain some matter of denial, or averment constituting a defense—either legal or equitable—to the action. It would have been a good answer to have averred that the remaining purchase money was not yet due, or to have stated facts showing that it had been paid, and that defendant was thus entitled to possession under the contract, and to compel the execution of a conveyance; but it is impossible to conceive how the bare fact that plaintiff had not paid back to defendant the $1,750 would constitute any defense whatever. There was no error, therefore, in sustaining the demurrer to this part of the answer.

2. The averments of the cross-complaint are, in brief, that on April 6, 1878, plaintiff represented to defendant that he was the owner in fee of the premises described in the complaint, and could convey them by a good and sufficient deed, free from incumbrances; that defendant was thereby induced to purchase, and did purchase, said premises from plaintiff for $3,410; that defendant paid plaintiff $1,750 as part of the purchase price, and then, on said sixth day of April, 1878, plaintiff and the defendant entered into a written contract, by which defendant promised to pay plaintiff $1,660 on or before the first day of July, 1879, with interest, and plaintiff agreed that, upon the payment of said money, he would execute to defendant a good and sufficient deed of said premises; that upon the making of said contract plaintiff delivered possession of the premises to defendant, who has been in possession ever since; that in October, 1878, he paid plaintiff $49.80, as interest on the unpaid purchase money, and a like sum as such interest in January, 1879; that at the time of the making of said contract said plaintiff was not the owner in fee of said premises, and was not such owner at any time afterwards, and could not have made a good and sufficient deed of the same; that in 1872 one Imus was the owner in fee of said premises, and in that year executed a mortgage thereon to a third party; that he had since died, and that at the time of the execution of the said contract a suit to foreclose said mortgage was pending against the heirs and legal representatives of said Imus; and that defendant did not discover that plaintiff was not the owner of said premises, and did not know of the existence of said mortgage, and the pendency of the proceedings to foreclose the same, until after the commencement of the present action, which was June 10, 1881. The cross-complaint then avers that immediately after this discovery "this defendant did rescind the said contract," and offered to restore to plaintiff everything of value which he had received under it, and tendered it to plaintiff for cancellation, and offered to surrender possession of the premises, and demanded the return of the $1,750, and also the interest paid on the unpaid purchase money; but that plaintiff refused, and still refuses and fails, to return said money, or any part thereof. The prayer is that defendant have judgment against plaintiff for $1,849.60, with interest from January 5, 1879.

It is clear that the demurrer to this cross-complaint was properly sustained. It presents no equitable defense to the action, and certainly no legal one. It is not necessary to inquire whether or not the facts averred would support some kind of an independent action. To allow a defendant, in an ordinary action of ejectment, to set up matters which do not constitute a defense, but

are intended merely as the foundation for a money judgment against plaintiff, would be to sanction something unknown to the principles and rules of pleading and practice.

Appellant's counsel argues that the act of bringing the suit by plaintiff was itself a rescission by him of the contract. If that extreme view of the matter could possibly be held correct, it is difficult to see how it would give the cross-complaint any better standing as a pleading to a complaint in ejectment. But if appellant was in possession under the contract, as the argument here assumes, then, upon appellant's failure to perform his part of it, the bringing of the ejectment suit was not in rescission, but in pursuance, of the contract.

We think that there was no error in sustaining the demurrer.

The court made a number of findings entirely outside the issues, but there were sufficient findings to show plaintiff's ownership and right of possession. Judgment affirmed.

We concur: THORNTON, J.; MCKINSTRY, J.; TEMPLE, J.; SHARPSTEIN, J.

71 Cal. 586

In re MAHON, Judge, and another. (No. 20,255.)

(*Supreme Court of California.* January 24, 1887.)

1. APPEAL—PROCEEDINGS AFTER REMAND—MODIFYING JUDGMENT.
When, by order of the supreme court of California, the superior court has been directed to enter a judgment, and, upon return of the cause, a judgment has been inadvertently entered which does not accord with the directions of the supreme court, the superior court has power to amend such judgment so as to make it conform to the supreme court's order.

2. SAME—DISCRETION OF JUDGE OF LOWER COURT—CONTEMPT.
When the direction of the supreme court to the superior court to enter a judgment is not specific, but leaves room for the exercise of any discretion in the court below, that court has a judicial power to determine whether an order as entered does or does not conform to the direction of the supreme court. For an error in deciding that a judgment does not accord with the direction of the supreme court, a judge of the superior court cannot be held as for a contempt.

In bank. Application for order to show cause why respondents should not be punished for contempt.

Proceedings to punish E. B. Mahon, superior judge of Martin county, California, and his clerk, for contempt in not entering interest on a judgment in compliance with the order of the supreme court in the case of *McCue* v. *Tunstead*, 65 Cal. 507; S. C. 4 Pac. Rep. 510. The order directed the court below "to enter judgment in favor of plaintiff on the findings." Judgment was rendered and caused to be entered for the possession of the property in dispute, or its value, $1,000, together with damages for its detention since the date of said findings, "or interest on said value in the sum of $490, and costs." Upon motion, an order modifying this judgment was made.

Jas. S. McCue, for petitioner. *E. B. Mahon, in pro. per.*, for respondents.

BY THE COURT. On the first appeal in *McCue* v. *Tunstead* the order of this court did not lay down, in precise terms, the judgment to be entered in the court below. It, however, determined that the plaintiff was entitled to a judgment, and (read in the light of the opinion) that the horse, the subject of the action, was exempt from execution. In other respects the form or scope of the judgment was left to the court below, with the limitation that it must be a judgment "upon" or one supported by the findings. The superior court was referred to the findings, was called on to ascertain what they were, and judicially to interpret them. This examination and interpretation of the findings, and the determination of the conclusions of law to be declared from them, involved the judicial function, and made the direction of this court something very different from a merely ministerial duty imposed upon an officer.

When, by order of this court, the superior court has been directed to enter a judgment, and, upon return of the cause, a judgment has been inadvertently

entered which does not accord with the direction of the supreme court, there can be no doubt that the superior court has power to amend such judgment so as to make it conform to our order. And when the direction is not specific, but leaves room for the exercise of any discretion in the court below, that court has a judicial power to determine whether an order as entered does or does not conform to the direction of this court. For an error in deciding that a judgment does not accord with the direction of this court, the judge cannot and ought not to be held as for contempt.

Moreover, the modification of the judgment of which the plaintiff herein complains was an amendment which, to the extent of the change, made it conform to the order of this court. In *McCue* v. *Tunstead,* 65 Cal. 507, S. C. 4 Pac. Rep. 510, it was directed that the court below "enter judgment for the plaintiff upon the findings." This mandate was not obeyed in the first instance, since there was no finding on which could be based that part of the judgment which provided for damages for the detention of the property since the date of the findings, "or interest on said value in the sum of $490," etc. There is a finding that the plaintiff had taken possession of the horse, and retained possession up to the trial, and there is no finding that he had suffered any damage by reason of the detention of the property prior to its recapture.

It is clear, from what has been said, that the clerk of the superior court was not guilty of contempt.

Ordered that the proceedings as for contempt be dismissed.

NOBMANN *v.* SUPERIOR COURT OF SAN FRANCISCO. (No. 11,809.)

(*Supreme Court of California.* February 9, 1887.)

APPEAL—UNDERTAKING—GRANTING TIME TO FILE NEW UNDERTAKING.

Upon appeal to the superior court, where an *insufficient* undertaking had been filed in time, and, upon motion to dismiss, the court granted appellant leave to file a sufficient undertaking within five days, *held*, that the superior court had power to make the order authorizing appellant to file a new undertaking in lieu of the insufficient undertaking; following *Gray* v. *Superior Court*, 61 Cal. 337.

In bank. Application for writ of prohibition.

J. J. Coffey, for petitioner. *W. B. Daingerfield*, for respondent.

BY THE COURT. Application for a writ to prohibit said court from further hearing of the action of *Nobmann* v. *Fairbanks*, on appeal in said superior court, on the ground that an undertaking on appeal was not filed within the time prescribed by law. It appears that an *insufficient* undertaking was filed in time, and, after a motion was made to dismiss the appeal on that ground, the court made an order granting appellant leave to file a sufficient undertaking within five days, which appellant did, and the motion to dismiss was denied. Petitioner contends that the court had not the power to make the order, and that the order, and all proceedings under and by virtue of it, are null. On the authority of *Gray* v. *Superior Court*, 61 Cal. 337, the application for a writ of prohibition in this case is denied.

72 Cal. 12

CRAMER *v.* TITTEL. (No. 11,723.)

(*Supreme Court of California.* February 9, 1887.)

APPEAL—UNDERTAKING—SURETY — CORPORATION — CONSTITUTIONALITY OF CAL. ACT OF MARCH 12, 1885.

The California act of March 12, 1885, authorizing the acceptance of a corporation as sole and sufficient surety in an undertaking on appeal, is a general law, and not an amendment to Code Civil Proc., and therefore not objectionable for not stating that object in its title. It is not void as against the provisions of section 25, art. 4, Const., that the legislature shall pass no special law regulating the practice of courts

of justice in cases when a general law can be made applicable, although section 941, Code Civil Proc., provides that such undertaking shall be signed by two sufficient sureties; reversing *Cramer* v. *Tittle*, 11 Pac. Rep. 852.

In bank. Appeal from superior court, city and county of San Francisco.

Motion to dismiss an appeal, on the ground of failure to file an undertaking as required by law. An undertaking was filed with one surety, viz., the Pacific Surety Company. The company was incorporated under the laws of California, and executed the undertaking under the act of March 12, 1885. St. Cal. 1885, p. 114. That act authorized the acceptance, as sole and sufficient surety, of any corporation incorporated for the purpose of making bonds and undertakings. The general statute concerning appeals requires that the undertaking on appeal be executed by at least two sureties. Section 941, Code Civil Proc. The constitution, article 4, § 25, prohibits the legislature from passing a special law regulating the practice of courts of justice, and in all cases when a general law can be made applicable.

Robert Ash, *John H. Boalt*, and *Hall & Rodgers*, for appellants. *J. J. Coffey* and *W. H. Tompkins*, for respondent.

By the Court. We are of opinion that the undertaking in this case is valid. The statute is a general law, and not an amendment to the Code of Civil Procedure in the sense of the provision of the constitution referred to. The statute is constitutional.

Motion to dismiss appeal denied.

72 Cal. 17

Rowland *v.* Madden and others. (No. 11,220.)

(*Supreme Court of California.* February 10, 1887.

Executors and Administrators—Action against—Pleading—Issue—Presentation of Claim.

In a suit against the executors of the plaintiff's deceased wife, to recover from her estate moneys belonging to the community alleged to have been misapplied by her, an allegation in the complaint that a verified claim for the amount was presented to defendants, and rejected by them, is material and must be proved. Thornton, J., dissents.

In bank. Appeal from superior court, San Francisco.

Moses G. Cobb, for appellant. *A. N. Drown* and *W. H. Fifield*, for respondent. See S. C. 12 Pac. Rep. 226.

McFarland, J. After full argument on rehearing, we see no reason to depart from the conclusion heretofore reached in this case. 12 Pac. Rep. 226. Appellant complains that the judgment heretofore rendered by this court rests too largely upon technical grounds. We are disposed to look through technical difficulties, and mere questions of pleading and practice, to the real legal merits of a case, when we can do so without violating well-settled principles; but the rule that the proofs must correspond to the averments is too grave to be totally disregarded. Appellant's real cause of action, if he has any, lies in the alleged fact that his wife, now deceased, about 13 years before her death got possession of some $3,000 in money, of community property, and secretly used it as her own separate property; appellant believing all the time that she had paid it out on certain debts which she represented the community to be owing, but which had no existence. Now, this action is brought against the defendants *as executors* of the last will of the deceased wife. The complaint charges an indebtedness of the estate, and that a creditor's claim for the same, duly verified, was presented to defendants in accordance with sections 1493 and 1494 of the Code of Civil Procedure, and was by them rejected; and its prayer is for a money judgment to be paid out of the estate in due course of administration. Clearly, in such a case, there must be proof of the presentation of the claim to the executors.

But if we were permitted to look further into the case we could see nothing to warrant a reversal of the judgment. If we could disregard the pleadings, and treat the action as one in the nature of an action of replevin to recover the money, not as a debt, but as specific community property belonging to the husband,—in which case defendants should not have been sued as executors,—then appellant would fail, because the money, or any specific property or fund to which it can be traced and identified, is not shown to have come into the possession of respondents. If the money may be considered as property subject to a trust, and it cannot be identified either in its original or in any substituted form, then, although appellant might rely upon the personal liability of the trustee, he has no special claim upon her general estate superior to that of other creditors. In that view his position towards the estate is simply that of other contract creditors, and his claim should have been presented to the executors. *Lathrop* v. *Bampton*, 31 Cal. 23.

These views of the case make it unnecessary to notice other points which are ably presented by counsel for respondents.

Judgment and order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

PATERSON, J. I concur in the judgment.

THORNTON, J. I dissent.

73 Cal. 317

CHANDLER *v.* PEOPLE'S SAVINGS BANK and others. (No. 11,524.)

(*Supreme Court of California.* February 10, 1887.)

APPEAL—PROCEEDINGS BELOW AFTER REMAND.

Where a judgment is reversed on the ground that a certain finding is not supported by the evidence, the entire case should not be tried anew, but only the issue erroneously decided. THORNTON, J., dissenting.

Commissioners' decision. In bank.

Appeal from superior court, Sacramento county.

H. O. Beatty, *Beatty & Denson*, and *A. L. Hart*, for appellant. *J. McKenna*, for respondent.

SEARLS, C. This cause was here in 1882, upon two appeals, one by the plaintiff from part of a judgment in favor of the intervenor, and the other by the intervenor from a part of the judgment in her favor, and from an order denying a new trial, in the superior court of Sacramento county. Upon the plaintiff's appeal, and as to him, the judgment was affirmed. 61 Cal. 396. Upon the appeal of the intervenor it was held that a finding of the court below as to the interest on certain monthly balances in favor of Chandler, from December, 1865, until October, 1878, amounting to $2,710, was not supported by the testimony, and therefore that the finding was erroneous, and the judgment as to the intervenor was reversed, and the cause remanded for further proceedings, according to the views therein expressed. 61 Cal. 401. The cause was brought up again in 1884, upon an appeal by the plaintiff, and from the record it appeared that certain evidence offered by the plaintiff, and tending to show that the balances in his favor were of a kind which entitled him to interest thereon, was ruled out, and this court said, in speaking of its former decision: "As we understand the judgment in the case, a reversal was ordered because the finding was not sustained by the evidence, and the cause was remanded for further proceedings according to the views expressed in the opinion. Certainly this order of the court left the inquiry as to interest open, as if no trial had been had on it. The plaintiff was at liberty in a new trial, if in his power, to show that the balances were of the kind which

bore interest. The offers of the plaintiff which were ruled out were made with this view; that is, to show that the balances were of the character which entitled him to have interest on them. Civil Code, § 1917. The court should have allowed these offers. In our view, the case was open for a new trial, subject to the views expressed by the court," etc.,—and the judgment was reversed, and the cause remanded for a new trial, subject to the views expressed by this court. 65 Cal. 498, 11 Pac. Rep. 791.

Upon the cause again coming up in the court below, the sense of the court was taken as to the extent of the new trial granted by this court under the decision last above referred to, and the court held "that a new trial was only granted as to the character of the balances mentioned in the opinion of the court on intervenor's appeal (61 Cal. 401) as to their being interest-bearing, and that the burden of the proof was on the plaintiff." Counsel for plaintiff excepted to said decision, and asked that intervenor introduce her proof in support of her complaint of intervention, which she declined to do, whereupon plaintiff moved for a nonsuit as against the intervenor, upon the ground that she had introduced no evidence, etc. The motion was overruled, and plaintiff excepted. The court then heard testimony in reference to the character of the balances mentioned in the decisions, and excluded testimony relating to other portions of the case. Written findings were filed, covering the whole case, upon which judgment was entered in favor of intervenor, ordering a sale of the mortgaged premises, and that the proceeds, to the extent of $8,435.81 and costs be paid to her, etc. The question presented is this: Was it the duty of the court below to proceed to try the entire case anew, or could it confine the testimony to the issue erroneously decided, and in other respects pass upon the issues in the light of the testimony already before it, or adopt the facts already found upon such testimony?

Under the former decision in this cause we are of opinion it was not incumbent on the court below to try the entire cause anew, and that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J., dissenting.

CALIFORNIA REPORTER

13 PACIFIC REPORTER

72 Cal. 21

PEOPLE *v.* HIBERNIA SAV. & LOAN SOC. and others. (No. 11,689.

(*Supreme Court of California.* February 15, 1887.)

ESCHEAT—PROCEEDINGS UNDER POL. CODE CAL. § 474—DISCOVERY—ATTORNEY GENERAL.

Pol. Code Cal. § 474, providing that it shall be the duty of the attorney general to institute investigation for the discovery of property which has escheated or should escheat to the state, and for that purpose empowering him to cite any and all persons before certain courts for examination, including the submission of their books and papers for inspection, contemplates an examination conducted before the court, or a referee appointed by it and none other; no right accrues against persons desired to be examined without the issue of a citation; and a judgment ordering certain defendants to permit the attorney general to examine their books and papers, upon a complaint alleging that he has made a demand on them to be allowed to do so, which demand has been refused, and upon findings in accordance with the allegations of the complaint, is erroneous.

In bank. Appeal from superior court, San Francisco.

Proceeding by attorney general under the Political Code, § 474, as amended. *Tobin & Tobin*, for appellants. *W. T. Baggett, E. C. Marshall, E. P. Cole*, and *James H. Waymire*, for respondents.

MCKINSTRY, J. It is not necessary to express any opinion as to the validity of section 474 of the Political Code. Its validity has not been attacked by counsel herein, nor has the power of the legislature under the constitution to confer the jurisdiction upon the probate or superior court been questioned. Prior to the amendment of 1880, section 474 of the Political Code read: "It shall be the duty of the attorney general to institute investigation for the discovery of all real and personal property which may have or should escheat to the state, and for that purpose shall have full power and authority to cite any and all persons before any of the probate courts of this state, to answer investigations and render accounts concerning said property, real or personal, and to examine all books and papers of any and all corporations. When any real or personal property shall be discovered, which should escheat to the state, the attorney general must institute suit in the district court of the county where said property shall be situated, for the recovery, to escheat the same to the state. The proceedings in all such actions shall be those provided for in title 8, part 3, Code of Civil Procedure. The attorney general may, for the purposes and objects of this section, employ counsel to act in his place and stead for the discovery and recovery of both personal and real property, and in

such proceedings, both in investigation for discovery or proceedings for recovery, such counsel so employed shall have the power and authority of the attorney general. The compensation for services of such counsel shall be determined by the board of examiners, and paid out of the sums so found to be escheated and recovered to the state, and not otherwise: provided, that the state of California shall in no case be responsible for any charges for attorney's fees for suits prosecuted under this act; but the attorney general is hereby authorized to pay to the person or persons discovering the same the costs and charges of prosecuting any suit or suits under this act, a sum not in any case exceeding 10 per cent. of the sums actually received, as provided in this act." The amendment of 1880 simply substitutes the words "any of the superior courts" for "any of the probate courts" in one place, and "superior courts" for "district courts," in another. While the first sentence of the section may not be entirely free from ambiguity, we think the section was clearly intended to provide for a proceeding in court for the discovery of property which had escheated or should escheat, by an examination as witnesses of persons charged to have such property in their possession or under their control, with authority in the court to require them to render accounts, and to submit their books and papers for inspection, under the supervision of the court. If the purpose of the legislature had been to empower the attorney general to examine the books of corporations at his own option and independent of any judicial action, that purpose could have been accomplished by a slight amendment of section 382 of the Civil Code. And if the strictly grammatical structure of the sentence were alone to be regarded, it would seem to be the persons cited who are "to examine" the books and papers. But the section directs the attorney general "to institute investigation for the discovery," by "citing" persons "before any of the probate [superior] courts." The succeeding portions of the section make the meaning still more apparent. The attorney general is authorized to employ "counsel" to act in his place and stead for "the discovery" of property, etc. And the *proviso* also shows the intent that *counselors at law* were to be employed to perform services as such,—as in the examination under oath of the persons cited,—and not services merely clerical, or those of accountant.

As originally passed, the section of the Political Code provided, in effect, that, on application of the attorney general, citation should issue out of the probate court. The term "citation" is only employed in the chapters of the Code of Civil Procedure which relate to the settlement of the estates of deceased persons. Citations are required to be directed to the person cited, and must contain the title of the proceedings, a brief statement of the nature of the proceedings, and a direction that the person cited appear at a time and place specified. Code Civil Proc. 1707. They must be served like a summons, and can in certain cases be issued only on the order of the judge. Sections 1708, 1709. Usually citations are issued on petition or written application, and sometimes a party is cited to appear and answer such petition. Section 1384. On the judge's own motion, or the motion of any person interested, supported by affidavits, the citation may require the person cited to appear for "examination," (section 1394;) or to show cause why further security should not be given, (sections 1398, 1403;) or may require one to appear and *make discovery under oath* as to his possession of any of the assets of the estate of the deceased person, (section 1459.) So a minor may be cited to appear and nominate a guardian, (section 1749;) an executor may be cited to render "an exhibit" showing the amount of money received and paid out by him, etc., (section 1623;) an attachment may be issued after *citation* has been issued and served on the executor to appear and show cause, (section 1628.)

In some instances the person cited may make an issue as to the matters alleged in the petition or written application for the citation; in some he is required merely to subject himself to examination under oath. Section 474 of the Political Code provides for a citation, to issue on the application of the at-

torney general, requiring the person cited to answer questions as to property subject to escheat, and to submit accounts, books, and papers, if required by the court. The section does not in terms require that the application of the attorney general shall be by petition or complaint in writing. We are inclined to believe that it should be, and that it should state in general terms the purpose to be investigation for discovery. But we are clear that the person cited cannot avoid examination by merely *pleading* that he, or it, has no property subject to escheat. The very purpose of the proceeding is the discovery of those things, knowledge of which would render the proceeding unnecessary. It cannot, therefore, have been intended that the state, or attorney general for the state, should be compelled to allege and prove the facts for the ascertainment of which the proceeding is commenced. On return of the citation the defendant is to appear, answer fully to all interrogatories, present accounts, if so ordered, and submit books and papers as evidence, if required by the court.

There is some analogy between the statutory proceeding and the former proceeding by bill in equity for discovery, when there was no prayer for other relief. At common law it was in general necessary, in order to maintain a bill for discovery, that an action should be already commenced in another court, to which it should be auxiliary. There were a few exceptions to this rule, as where the object of the discovery was to ascertain who was the proper party against whom a suit should be brought,—2 Story, Eq. (13th Ed.) § 1483,—and so, perhaps, where the bill was filed to secure evidence on which to go to law against a named person. In *Moodaly* v. *Moreton*, 2 Dick. 262, plaintiff filed his bill for a discovery, and for a commission to examine witnesses against the East India Company and their secretary, but prayed no relief. The defendants demurred that plaintiff had not brought an action. The demurrer was overruled on the ground that the facts alleged showed it could not have been known whether the company and secretary or a certain lessee of the company should be sued, until discovery was made. *Mendes* v. *Barnard*, 1 Dick. 65, came before the court on demurrer to so much of the plaintiff's bill as prayed a commission, the bill only praying the commission to enable the plaintiff to go to law. It was ordered to stand over for presentation of precedents, which being produced, the demurrer was overruled.

Whether section 474 of the Political Code authorizes the summary proceedings for discovery in cases in which a bill of discovery would not have lain at common law, it is not important to inquire, since the power of the legislature to enact the section has not here been questioned. But it is plain the section contemplates no other judgment, as the result of the investigation for discovery, than an adjudication or declaration that the person cited has, or has not, fully and fairly answered all questions propounded to him; has, if ordered to render any, rendered full, true, and just accounts; and, if so ordered, has submitted all his books and papers, without concealment. The court is armed with power to punish for contempt in case of an attempt to defraud and deceive, and with appropriate power to enforce complete discovery. When the discovery is fair and complete, the respondent or person cited is entitled to costs. If the defendant is contumacious, or appears willfully to have sought to conceal the facts, costs should not be allowed him.

We find nothing in the statute which requires the attorney general to demand that the books and papers of a corporation should be submitted to him before commencing the proceeding. In the case now before us no "citation" was issued. The attorney general filed a "complaint," in which he alleged that the people had been informed and believed that the defendant had in its possession large sums, which "have escheated or should escheat, and which defendants neglect and refuse *to turn over* to said state;" and further alleged that he had made demand to be permitted to examine the books, etc. The defendant, after moving to strike out and demurring, answered, denying that

it had in its possession any sum of money which had escheated or should escheat, or that it had neglected "to turn over" any such; denied that examination of the books was necessary, or that the attorney general had made demand. None of the officers of the defendant were examined in court; nor, so far as appears, were they called for examination; nor were they ordered to render any account or produce any books in court or before any referee to be examined under the direction of the court. The court found "that prior to the institution of this action the attorney general of the state made demand of the defendants the Hibernia Savings & Loan Society, (a corporation,) and the defendants M. D. Sweeney, R. J. Tobin, C. D. O'Sullivan, G. Touchard, Peter Donahue, D. J. Oliver, and D. T. Murphy, as directors of said corporation, that he, the said attorney general, or such counsel as he might appoint, be permitted to examine all the books and papers of said corporation, for the purpose of discovering what property in their possession had escheated or should escheat to the state; (2) that the defendants, each and every one of them, refused, and still refuse, to comply with said demand." And thereupon the superior court entered a judgment, directing and decreeing "that the plaintiff have judgment against the defendants, and each of them; that the attorney general of the state, or such counsel as he may select and appoint, be permitted to examine all the books and papers of the defendant the Hibernia Savings & Loan Society for the purpose of discovering what property is in their possession which has escheated or should escheat to the state of California." Thus the finding of the court was upon an immaterial issue, and the judgment was one which the court had no authority to render in the proceeding.

Judgment and order reversed.

We concur: MORRISON, C. J.; TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

72 Cal. 28

PEOPLE *v.* GERMAN SAV. & LOAN SOC. (No. 11,792.)

(*Supreme Court of California.* February 15, 1887.)

In bank. Appeal from the superior court of the city and county of San Francisco.

Jarboe, Harrison & Goodfellow, for appellant. *E. C. Marshall*, for respondent.

BY THE COURT. This is an appeal from a judgment directing a peremptory mandate to issue, commanding the defendant to permit the attorney general to examine all its books and papers. Plaintiffs contend that a duty is specially enjoined on defendant to allow such examination by section 474 of the Political Code. That section does not authorize the attorney general, or *counsel* appointed by him, to examine the books and papers of a corporation, except under the order and supervision of the court. *People* v. *Hibernia Sav. & Loan Soc.*, *ante*, 48. The mandate should have been denied.

Judgment reversed and cause remanded, with directions to the court below to dismiss the proceedings.

72 Cal. 29

PLUMMER *v.* WOODRUFF. (No. 9,793.)

(*Supreme Court of California.* February 16, 1887.)

1. STATE LANDS—PURCHASE—ADVERSE OCCUPATION—POL. CODE CAL. § 3495.

There is an adverse occupation of public land, within the meaning of Pol. Code Cal. § 3495, requiring from one desiring to purchase such land from the state an affidavit of no adverse occupation, if another person has inclosed three-quarters of it, has a cabin and corral on it, and uses it for a sheep pasture.

2. SAME—AFFIDAVIT.

No right accrues to an intended purchaser of state lands if he adopts a form of affidavit which is not true in fact, although the facts of his case would entitle him to purchase if correctly stated in his affidavit.

In bank. Appeal from superior court, Mendocino county.

J. W. Harding, F. R. Williams, and *J. M. Mannon,* for appellant. *J. A. Cooper,* for respondent.

McFARLAND, J. After hearing in bank, we are of the opinion that the conclusion reached on the former decision of this cause by department 1 of this court is correct. 11 Pac. Rep. 871. Respondent contends that Mr. Justice Ross, in delivering the opinion of the court in department 1, was mistaken in stating that the court below found the occupation of the land in contest by appellant to be adverse to respondent; but there was no such mistake. The court below does not expressly apply the word "adverse" to such occupation; but it finds facts which show it to be adverse. The findings are that appellant had about three-fourths of the land inclosed; that he had on it a cabin and *corral;* and that he used it as a "sheep pasture." It further appears in the pleadings and findings that he filed his affidavit and application to purchase the land on the same day on which the application of the respondent was filed; that he is desirous of purchasing the land; and that he has continuously followed up his claim to purchase it, as against respondent's claim to do the same, to this court. Under such circumstances, there seems to be no doubt that his occupation was "adverse," in the sense in which that word is used in section 3495 of the Political Code. He certainly was not holding under respondent, by lease or license, or upon any terms or conditions, which would make his possession, in the eye of the law, the possession of respondent. The doctrine that the possession of land by one not claiming title himself is presumed to be in subordination to the true title, has no applicability to this case. Each party admits the true title to the land to be in the state, and is simply contending against the other for the statutory right to purchase it.

If the court, in an action like the one at bar, disregards the requirements of the original affidavit, and the want of proof that its statements are true, it makes no difference what it may finally determine as to the ultimate rights of the parties to purchase. A man may have the right to purchase a piece of school-land, although another may be in the adverse occupation of it; but, if that be the fact, he must state it in his affidavit, together with the additional facts that the township has been sectionized three months, and that the adverse occupant has been in the occupation more than sixty days since the plat was filed in the United States land-office. Section 3495, Pol. Code. This is intended to insure the protection given to occupants by section 3497, and to allow them an opportunity to present whatever rights they may have. And it has been held by this court that the statements made in the affidavit must be shown at the trial to be true. *McKenzie* v. *Brandon,* 12 Pac. Rep. 428, and cases there cited. In the affidavit made by respondent he stated that there was no occupation of the land adverse to his. But the findings show that there was an occupation adverse to his, viz., the occupation of appellant.

Judgment reversed, and cause remanded.

We concur: TEMPLE, J.; McKINSTRY, J.; PATERSON, J.; THORNTON, J.

72 Cal. 48

WATERMAN *v.* MORRELL. (No. 9,463.)

(*Supreme Court of California.* February 17, 1887.)

JUDGMENT—FORMER RECOVERY—PENDENCY OF TWO ACTIONS AT SAME TIME.

In an action to recover an installment due on a certain contract, in which defendant pleaded a payment on account, it appeared that the same payment was pleaded and evidence of it given in an earlier action between the same parties, to recover another installment, but the trial of such earlier action was not concluded when the trial of the later action occurred. *Held,* that the defendant should not be deprived of the benefit of his plea of payment, unless the payment was allowed, as well as pleaded and proved, in the earlier action, and, as whether that was done could not have been known at the time of trial, the judgment of the lower court disallowing

the payment should be reversed, and a retrial ordered. THORNTON, J., dissenting, holds that the court should ascertain, by inspection of the judgment roll in the earlier action, whether the payment was allowed in that action, and, if so, affirm the judgment in this, in order to avoid the necessity for a new trial.

In bank. Appeal from superior court, Santa Cruz county.

S. C. Houghton and *Chas. B. Younger*, for appellants. *Bart Burke* and *Goldsby & Jeter*, for respondents.

PATERSON, J. This action was brought by the plaintiffs to recover of the defendants the value of certain lumber manufactured by them out of trees cut from land of the plaintiffs, during the months of September and October, 1882, and June, 1883, pursuant to the provisions of a certain contract in writing made by and between the respective parties on the eleventh day of April, 1881. In respect to the averments of the complaint, the answer of the defendants only put in issue the quantity of lumber manufactured by them during the months mentioned, and the plaintiffs, upon the trial, were content to rest upon the admissions in that particular. But defendants pleaded in their answer that they had paid to plaintiffs, in advance, on the thirty-first of December, 1881, the sum of $1,225.88 on account of said lumber so cut, and $75.73 in boarding an agent of plaintiffs' at defendants' mill, during the times mentioned in the complaint, and pursuant to the terms of the contract. These allegations of the answer being deemed denied, defendants at the trial proved the payment to plaintiffs, on December 31, 1881, of $1,225.88; and, in rebuttal, plaintiffs, against the objection and exception of defendants, were permitted to introduce in evidence the complaint and answer in a case, brought by the same plaintiffs against the same defendants, under the same contract, for stumpage claimed by plaintiffs to be due thereunder for the month of November, 1882, and to and including the month of May, 1883, and in which action defendants by their said answer pleaded the same payment of $1,225.88; and plaintiffs herein also gave evidence tending to show that on the trial of the last-mentioned action proof was given of the said payment.

In the present case the court below found "(5) that on the thirty-first day of December, 1881, said defendants paid to said plaintiffs, in advance, for and on account of timber to be cut under said contract and taken from said lands of said plaintiffs, the sum of twelve hundred and twenty-five dollars and eighty-eight cents; (6) which said payment was claimed by the said defendants, and allowed by the court, in a certain action numbered 636, wherein said W. W. Waterman and J. B. Waterman were plaintiffs, and said E. B. Morrell and Jacob Spidell were defendants, tried before this court on the twenty-fourth day of September, 1883, upon the same contract, for money due and owing to said plaintiffs from said defendants for lumber manufactured and shipped by defendants from said lands of plaintiffs for and during the period from November 1, 1882, to June 1, 1883."

The points of appellants are—*First*, that the evidence in relation to the former suit of plaintiffs against defendants was irrelevant and immaterial; and, *second*, that it was insufficient to justify the sixth finding. The former suit was between the same parties, upon the same contract, and for the value of lumber manufactured by defendants, pursuant to its terms, from November 1, 1882, to June 1, 1883. The payment in question was made under the contract, in advance and on December 31, 1881. If it was deducted from the amount due from defendants to plaintiffs for the lumber manufactured by the former during the period involved in the former suit, surely it ought not to be deducted from the amount due plaintiffs for the lumber manufactured by defendants during the period involved in the present action; for that would be to allow defendants double credit for one payment. Respondents claim that the said payment having been pleaded in bar *pro tanto* in the former action, and being there in issue, defendants, as well as plaintiffs, are bound by

the final result thereof, whatever it was, and therefore the circumstance that there was no evidence in the present case that the payment in question was allowed defendants in the former one is not important, although it is stated in the findings of the court below that it was so allowed. We think, however, that, before the defendants can be estopped in this case from claiming the benefit of their plea of payment, it must appear that they have had the benefit of the payment pleaded in the former suit. This can be shown only by the record itself, and cannot be presumed from the fact that an issue has been made and tried in the former action. It must be shown that such issue has been determined on its merits; that the suit has culminated in a final judgment. The trial of the former suit occurred September 24 to 26, 1883. This action was tried September 26, 1883. The record in the former suit, therefore, could not operate as a bar to a recovery in this case. There was no final adjudication at the time this cause was tried.

Upon the testimony given in this case, in connection with the record of the former action, showing that the payments alleged in both were identical, and that the defendants were seeking a double benefit therefor on different installments due under the same contract, the court below would have been authorized to withhold its decision in this case until the merits of the plea of payment in the former action had been finally adjudicated. This was not done, however, but the case went to judgment, and an appeal therefrom has been taken to this court. We see no way of securing the rights of all parties except by a retrial in the court below.

The judgment and order are reversed, and the cause is remanded for a new trial, with instructions to proceed in accordance with the views herein expressed.

We concur: TEMPLE, J.; SHARPSTEIN, J.; MCFARLAND, J.; MCKINSTRY, J.

THORNTON, J., (*dissenting.*) I dissent. I am of opinion that the fact was substantially found on the issue of the payment pleaded. The finding is that there was no payment. When a cause between the same parties has been tried in which the same payment was pleaded, and the issue tried, the trial commencing on the twenty-fourth of September, 1883, and continuing until the twenty-sixth, and the trial of a cause between the same parties, commencing on the twenty-sixth of September, 1883, in which the same payment is also pleaded and the issues tried, and the court finds that the payment was allowed in the action first tried, it is equivalent to a finding that no payment has been made in the action on trial. See findings set forth in the opinion of the court. It is said that there is no evidence which sustained the finding that there is no payment or that it was allowed in the cause first tried, because it does not appear by findings filed that the payment was allowed in such action. But there was sufficient evidence before the court to show that the payment should not be allowed in this cause, and in my opinion the court so finds. The record shows that the two actions were on the same contract, and that the same payment was pleaded in both, and that there was evidence of the payment in the other case. It is conceded that, if allowed in both cases, it would be allowed twice. This was evidence enough to justify a finding of the payment in the action first tried, and to authorize a finding against it in this action; which finding in my opinion was made. We have a right to presume that the findings have been long since filed in the cause first tried; and this court has the power under the constitution to send an order to the clerk of the trial court to have the judgment roll certified to this court, and to inspect it; and, if it appears that the payment was allowed in that cause, to affirm the judgment in this. This obviates the necessity of sending this cause back for a new trial, which trial must be a mere form, causing unnecessary expense to the parties.

72 Cal. 32

Robinson *v.* Spaulding Gold & Silver Min. Co. (No. 9,351.)

(*Supreme Court of California.* February 17, 1887.)

Corporation—Stock Taken for Unpaid Assessments—Execution.

Under Civil Code Cal. § 344, providing that, if stock of a corporation is bought in by the corporation, upon a sale for delinquent assessments, the legal title shall vest in the corporation, but the stock shall be held subject to the control of the stockholders, such stock is not subject to an execution against the corporation.

In bank. Appeal from superior court, city and county of San Francisco.

Geo. D. Shadburne, for appellant. *Henry H. Reid,* for respondent.

Morrison, C. J. The defendant, a mining corporation in the state of California, had a judgment entered against it in the superior court of the city and county of San Francisco for the sum of $619.25, on the second day of April, 1883. On the thirteenth day of same month an execution was issued on said judgment, and on the first day of the following month the sheriff of said city and county levied on 99,280 shares of the capital stock of the mining company to satisfy the same, and on said last day all the right, title, and interest of said company in and to said shares was sold under said execution to satisfy the same, and a certificate of sale was issued by the sheriff to the plaintiff therefor, whereupon the plaintiff demanded of defendant a certificate for such stock, and defendant refused to issue stock to the purchaser thereof at such sale; wherefore plaintiff prayed for a decree of the court directing the defendant to issue to him said 99,280 shares of its capital stock, in satisfaction of such execution. On the trial in the court below it was found, as a conclusion of law, that the plaintiff was entitled to a decree as prayed for, and costs of suit.

The question is, did the Spaulding Mining Company become the owner of said stock on the purchase thereof for non-payment of an assessment, and did it become the owner in such a sense as to make it its duty, on the sale thereof on execution, to deliver to the purchaser thereof new stock in place of that sold? We think it did not, and that it was not the owner of said stock so as to subject it to sale on an execution against the company. Section 344 of the Civil Code provides that "all purchases of its own stock made by any corporation (for delinquent assessments) vest the legal title to the same in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the by-laws of the corporation or vote of a majority of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock for all purposes of election or voting on any question at a stockholders' meeting." When the stock of the corporation was sold for assessments, and purchased by the company, it thenceforth held it subject to the control of the stockholders, and it was not subject to resale on an execution issued against the corporation in satisfaction of its debts. The corporation had no interest which it could sell and dispose of, and it had no interest which a creditor could dispose of by forced sale. Judgment reversed.

We concur: Temple, J.; Sharpstein, J.; McFarland, J; Thornton, J.; McKinstry, J.

72 Cal. 14

BROWN *v.* SUPERIOR COURT OF SAN BENITO CO. (No. 11,975.

(*Supreme Court of California.* February 10, 1887.)

CRIMINAL LAW—APPEAL FROM JUSTICE'S COURT—NEW TRIAL—JURISDICTION OF CALIFORNIA SUPERIOR COURTS.

Pen. Code Cal. § 1469, provides that when, on appeal from a justice's court in a criminal case, "a new trial is granted, it must be had in the superior court." There cannot, therefore, be a trial in the superior court on issues of fact raised by the plea of "not guilty" before there has been such a trial in the justice's court. As, for instance, where, after the overruling of defendant's demurrer, he has pleaded "not guilty," and the court afterwards has set aside its order and sustained the demurrer, and the people having appealed, and defendant, in the superior court, having confessed error in sustaining the demurrer, the superior court is without jurisdiction to order defendant to plead, and, on his refusal, to proceed to try the cause as on a plea of "not guilty." The cause should be remanded, and ample machinery for such procedure is provided by Pen. Code Cal. tit. 9.

Department 2.

McCroskey & Hudner and *M. T. Dooling*, for petitioner. *James F. Breen*, for respondent.

MCFARLAND, J. Application for writ of prohibition. The petitioner was brought before the court of a justice of the peace upon a complaint charging a misdemeanor, of which the court had full jurisdiction. He demurred to the complaint, and the court overruled his demurrer, whereupon he made and had entered a plea of not guilty. Afterwards the court, of its own motion, set aside its order overruling the demurrer, and entered an order sustaining it. The people then appealed to the superior court, and the petitioner there confessed that the justice erred in sustaining the demurrer, and asked that the cause be remanded to the justice's court to be there tried upon the said plea of "not guilty" already therein made and entered. The superior court refused to remand the cause, and made an order reversing the action of the justice's court in sustaining the demurrer, and ordering petitioner to plead in the superior court. Petitioner refused to plead, upon the ground that the superior court had no jurisdiction to receive the plea or to try the cause. The court thereupon ordered a plea of "not guilty" to be entered for petitioner, and set the cause for trial; and this proceeding is brought to prohibit said superior court from proceeding to try the petitioner.

In cases like the one under review the justice's court is the court of original jurisdiction. The superior court is the appellate court. The relation between them is very similar to that existing in other cases between the superior courts and the supreme court. There is one marked difference, which is that, when on appeal from a justice's court a *new trial* is granted, the new trial must be had in the superior court. Pen. Code, § 1469. But a new trial in a criminal case is a re-examination of the issue, "before another jury after a verdict has been given." Pen. Code, § 1179. Clearly, therefore, there cannot be a trial in the superior court before a jury upon issues of fact raised by the plea of "not guilty" before there has been such a trial in the lower court. To hold otherwise would be to convert the superior court into a court of original jurisdiction in such cases, and to deprive the defendant of his right to be first tried in the court to which the law assigns his case, and of his right afterwards to appeal to the proper appellate court.

The objection made by respondent that there is no machinery provided by the Code by which the superior court can transmit its rulings and directions to the lower court, is not well taken. Section 1467, Pen. Code, provides that "the appeal is taken, heard, and determined as provided in title 9, pt. 2, of this Code." Said title 9 contains the full method of procedure on appeals in criminal cases from the superior courts to the supreme court, and among its provisions will be found ample means for the disposition of an appeal of any character taken to the superior court from the court of a justice of the peace. In the case at bar the respondent should have remanded the action to the court below, with instructions to overrule the demurrer, but it has no jurisdiction to itself try the case as it proposes to do.

The parties have assumed that a demurrer to a complaint in a criminal case in a justice's court is a proper pleading. As the Code does not provide for a demurrer in such a case, it may be a question whether or not a court should entertain it at all. That question, however, would not affect the result in this present proceeding.

Let a writ of prohibition issue as prayed for.

We concur: TEMPLE, J.; THORNTON, J.

72 Cal. 34

DOLAND *v.* MOONEY and others. (No. 11,191.)

(*Supreme Court of California.* February 17, 1887.)

TAXES—SALE—MORTGAGE—DEED AND CERTIFICATE.

Under Const. Cal. art. 13, § 4, a mortgage upon land is assessable and taxable as an interest in the premises on which it is secured, and the taxes are a lien upon the land and the security; and a deed and certificate reciting that a mortgage on the premises (describing them) had been assessed to the owner, "and that said property" was sold for the taxes, is a sufficient recital of the sale of the land, and not merely a recital of the sale of the mortgage.

Commissioners' decision. In bank.

Appeal from superior court, Sacramento county.

Action in ejectment by F. F. Doland, appellant, against John E. Mooney and L. W. Newmann, respondents.

D. E. Alexander and *Jay R. Brown,* for appellant. *C. L. White* and *Lincoln White,* for respondents.

BELCHER, C. C. This action was brought to determine the ownership and right to the possession of a parcel of land in the city of Sacramento. The plaintiff claimed title to the demanded premises under a sale for delinquent state and county taxes, and at the trial introduced in evidence his tax deed and certificate of sale, and then rested his case. The defendant moved for a nonsuit, upon the ground that it appeared from the plaintiff's evidence that the tax collector sold only a mortgage upon the real property, and not the property itself. The court granted the motion, and the plaintiff appealed from the judgment.

The recitals of the deed are that "Robert Anderson was assessed for taxation for state and county taxes for the year 1883 upon his interest in the real property hereinafter described; that there was so assessed to said Robert Anderson a mortgage upon the following described property, to-wit, [describing the premises in question;] that the tax collector of said county gave due and legal notice, * * * and did expose for public sale, at the time mentioned in said notice, the property so as aforesaid assessed and described; that at said sale Eli Mayo was the bidder who offered to take the least quantity of said property, and the smallest portion of interest therein, * * * to-wit, all of the above-described property; that the same was thereupon, by the said tax collector, struck off and sold to said Eli Mayo."

The certificate of sale recites "that Robert Anderson was assessed for taxation for state and county taxes, for the year 1883, with the following described property, to-wit: Mortgage on north forty-two feet," etc., (describing property.) It then recites all the other matters required by section 3776 of the Political Code, and, among others, "that said property was sold subject to redemption, and that unless the same is redeemed, according to law, within one year from the date hereof, the said purchaser or his assigns will, at the expiration of one year from date hereof, be entitled to receive a deed for the same."

It is claimed for respondents that these recitals show that the mortgage was assessed and sold, and not the land on which the mortgage was placed, and that plaintiff's only remedy, if he has any, is to foreclose his mortgage. We do not think so. The constitution provides that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby, * * * and the value of such security shall be assessed and taxed to the owner thereof. * * * The taxes so levied shall be a lien on the property and security." Section 4, art. 13; section 3627, Pol. Code.

Under this provision, the Anderson mortgage was assessable and taxable as an interest in the premises in question, and not otherwise. It was evidently so assessed, and the description, in our opinion, was altogether sufficient. "In listing the land it must be described with particularity sufficient to afford the owner the means of identification, and not to mislead him." Cooley, Tax'n, 282.

The description here, as shown in the certificate and deed, was sufficient, if the owner knew the law,—and he is presumed to have known it,—to fully meet these requirements. It follows that the nonsuit was improperly granted, and the judgment should therefore be reversed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed.

72 Cal. 37

TOTTEN *v.* SUPERIOR COURT OF SONOMA CO. (No. 11,186.)

(*Supreme Court of California.* February 17, 1887.)

APPEAL—FROM JUSTICE'S COURT—NOTICE—WHO MAY SIGN.

A notice of appeal from the judgment of a justice's court may be signed by other attorneys than those who appeared for appellant in the justice's court.

In bank.

The answer in the justice's court was signed: "SAMUEL TOTTEN. By M. W. PLUMLY, Atty. for Deft." The notice of appeal to superior court was signed by "LAUGHLIN & THOMPSON, Attys. for Appt." The point made was that the notice of appeal to superior court was insufficient, being signed by parties who had not appeared for Totten in justice's court on the trial thereof.

Laughlin & Thompson, for petitioner. *J. A. Barham*, for respondent.

BY THE COURT. Application for writ of review. In this case the notice of appeal to the superior court was properly given. If there is an attorney of record in justices' courts, the statute does not require that an attorney should sign the notice of appeal. It may be signed by *the party*, or any person he may select for that purpose. Code Civil Proc. §§ 842, 974.

The petition is sufficient, and the demurrer thereto is overruled. The order dismissing the appeal is annulled and quashed. Ordered accordingly.

(72 Cal. 65)

ANDERSON v. GOFF. (No. 9,688.)

(*Supreme Court of California.* February 19, 1887.)

1. APPEAL—NOTICE—DATE OF RENDITION AND ENTRY OF JUDGMENT.
A judgment was rendered March 29th and entered April 30th. *Held*, that a notice of appeal therefrom as from a judgment rendered and entered March 29th was sufficient.

2. JUDGMENT—AGAINST NON-RESIDENT—VALIDITY—FORM.
If, in an action against a non-resident having property in the state, an attachment is made at the beginning of the action, a judgment, general in its terms, although void as a personal judgment, is so far valid as to uphold a sale of the attached property.

3. WRIT AND PROCESS—SERVICE BY PUBLICATION—REQUISITES OF AFFIDAVIT.
Under Code Civil Proc. Cal. §§ 412, 413, providing that service of summons may be made by publication when the defendant resides out of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself, and that fact appears by affidavit, etc., it is not necessary to show an attempt to find a defendant in the state or the return of an officer, that he cannot be found, if the affidavit states that he resides out of the state, and gives his residence.

4. SAME—PROPERTY IN STATE.
The affidavit need not state that defendant has property in the state, or that a writ of attachment has issued, although those facts must exist in order to render the judgment valid, as the statute does not require them.

5. SAME—FORM OF ORDER—DEPOSIT IN POST-OFFICE—"FORTHWITH."
An order of service of summons by publication directed a copy of the summons to be deposited in the post-office, addressed to defendant, as required by the statute, (Code Civil Proc. Cal. § 413,) but omitted the word "forthwith" contained in the statute. The copy, however was mailed on the same day that the order was made. *Held*, that the omission was an irregularity at most, and did not render the proceedings void.

6. SAME—WHO MAY MAKE THE DEPOSIT.
The plaintiff's attorney is a proper person to deposit the copy of summons and complaint in the post-office, and to make affidavit of that fact.

7. SAME—CODE CIVIL PROC. CAL. §§ 410, 415.
The provisions of Code Civil Proc. Cal. § 410, in relation to service of summons upon a defendant personally, has no application to the deposit of a copy in the post-office, the affidavit of performance of which act is provided for by the third subdivision of section 415.

8. SAME—TIME TO ANSWER—PUBLICATION BEYOND TIME.
The time to answer given to a defendant, on whom service is made by publication, by the order of publication and the statute, will not be extended by the fact that the newspaper publishing the summons continues to publish it beyond the time required.

9. WORDS—"FORTHWITH."
The term "forthwith," when applied to the performance of an act, imports that it shall be performed as soon as by reasonable exertion it can be.

Commissioners' decision. In bank.

Appeal from superior court, San Benito county.

The motion to dismiss was on the ground that the notice of appeal from the judgment purported to appeal from a judgment rendered and entered March 29, 1884; the record showing *entry* of judgment April 30, 1884. The notice of appeal was served and filed July 7, 1884.

G. B. Montgomery and *Burchard & Scott*, for appellant. *Briggs & Hawkins*, for respondent.

SEARLS, C. The motion to dismiss the appeal herein is met by a certificate of the clerk of the superior court in and for the county of San Benito, in which county the action was brought and passed to judgment, showing that the statement on motion for new trial was properly settled and certified by the judge of the superior court; that the order overruling the motion for a new trial was entered and signed by the judge on May 31, 1884, and that the judgment

in said cause was rendered on the twenty-ninth day of March, 1884, and entered on the thirtieth day of April, 1884, before the notice of appeal was filed.

The motion to dismiss the appeal should be denied. The appeal is taken by plaintiff from a judgment in favor of defendant, and from an order denying a new trial. The action is ejectment to recover a lot of land, containing one and one-half acres, situate in what is known as "College Addition" to the town of Hollister, San Benito county, and to recover damages for the withholding such land, and rents and profits. Plaintiff, at the several dates hereinafter mentioned, was and still is a married woman, the wife of J. G. Anderson. On the tenth day of November, 1876, one W. C. Land, being the owner of and in possession of the premises described in the complaint, conveyed the same to plaintiff's husband, and took from the latter his promissory note for $600, the purchase price thereof. On the tenth day of November, 1878, Anderson gave Land a new note for $300, the residue of the purchase price of the land having been previously paid. On the twenty-sixth of April, 1880, according to the findings, Anderson, being insolvent and unable to pay his debts, being indebted to various persons in sums aggregating over $4,000, and, among others, to Land, on account of said note, in the sum of over $300, in contemplation of insolvency, and for the purpose of hindering, delaying, and defrauding his said creditors, among whom was said Land, conveyed, without consideration and as a gift, the land in question to his wife, the plaintiff herein. Plaintiff never went into possession of the land, and knew of the insolvency of her husband. The deed was recorded April 28, 1880.

On May 6, 1880, Anderson filed his petition and schedule in insolvency in Alameda county, to which he had removed, and such proceedings were had therein that he was adjudged an insolvent debtor, and afterwards, on the fourth day of August, 1880, was discharged from his debts. He removed soon thereafter to Colorado, where, with plaintiff, he still resides. On February 16, 1881, Land brought suit against Anderson on his note, sued out a writ of attachment, and caused the same to be levied upon the interest of the defendant therein in and to the demanded premises. Service of summons was had upon Anderson by publication, etc.; and, upon his default for want of an answer, judgment was taken in favor of plaintiff, upon which an execution issued, was levied upon the property attached, and, after notice, a sale was had, at which Land became the purchaser, and in due time, there having been no redemption, received a sheriff's deed of the premises. Defendant holds the property by sundry mesne conveyances from Land, and has been in possession under his deed since August, 1882.

We may dismiss from consideration the proceedings of Anderson in insolvency, for the reason that, if the judgment of Land was regularly obtained, the former is concluded thereby for want of a plea of his discharge in that action.

Several objections are made by appellant to the affidavit for publication of summons, among which are: (1) That it fails to state that any writ of attachment was issued or levied, or that the defendant therein had any property in this state; (2) that it failed to show any attempt at service in this state, or any return of an officer that defendant could not be found, etc.

Our Code of Civil Procedure (sections 412, 413) provides that when the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, etc., and the fact appears by affidavit to the satisfaction of the court or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a necessary or proper party to the action, an order of service by publication of summons may be made, etc. The affidavit in this case showed that the plaintiff had a cause of action against the defendant therein, and also

referred to his complaint containing a like showing and duly verified. He also showed by the affidavit that defendant was a resident of Denver, in the state of Colorado, and was there engaged in business, etc. The affidavit was sufficient to warrant an order of service of the summons by publication.

Where a defendant is shown to be a resident of another state, and his place of residence is known, it is not necessary to show diligence in finding him in the county or state where the action is pending, or to have the return of an officer showing that he cannot be found. Nor was it necessary to show by the affidavit that a writ of attachment had issued, or that the defendant had property in this state. Our statute gives the right to service of summons upon defendants in all cases where they are non-residents of the state, without reference to the fact of their having or not having property here. The effect of a judgment thus obtained is quite another thing.

In *Pennoyer* v. *Neff*, 95 U. S. 714, it was held by the supreme court of the United States that, although a state having property of a non-resident within her territory may hold and appropriate it to satisfy the claim of her citizen against him, and her tribunals may inquire into his obligation to the extent necessary to control the disposition of that property, yet, in the absence of such seizure, a personal judgment is without validity if it be rendered by a state court in an action upon a money demand against a non-resident, who was served by publication of summons, but upon whom no personal service of process within the state was made, and who did not appear.

The same doctrine was laid down substantially in *Belcher* v. *Chambers*, 53 Cal. 636, in which it was held that, although a state having property of a non-resident within her territory may hold and appropriate it to satisfy the claim of her citizen against him, and her tribunals may inquire into his obligation to the extent necessary to control the disposition of that property, yet, in the absence of a seizure of such property, a personal judgment is without validity if it be rendered by a state court in an action upon a money demand against a non-resident who was served with summons by publication only, and who did not appear in the action, and the personal judgment was held void.

The right to institute and prosecute an action against a non-resident, and to serve summons upon him by publication, is by these cases upheld so far as may be necessary to determine his liability, with a view of subjecting his property to the payment of a debt due to a resident, provided, always, that such action must be in aid of an attachment, or some other process designed to reach and establish a lien upon the debtor's property within the local jurisdiction.

Now, in this state, we have one specific mode by which to acquire a lien upon the property of a debtor against whom a cause of action exists arising out of contract. It consists in commencing an action, and praying for judgment as in other cases, and, upon filing a proper affidavit and undertaking, a writ of attachment issues under which the property of the alleged debtor may be seized and held subject to sale for the purpose of satisfying such judgment as may be recovered. The judgment, when rendered, does not differ from that entered in other cases upon a money demand.

"If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant." etc. Code Civil Proc. § 550. By force of section 688 of the same Code "all property and rights of property seized and held under attachment in the action are liable to execution."

Under these provisions it has been held by this court that no order of sale by the court is necessary to authorize the sheriff to sell the attached property, and that the lien of the attachment is not lost by taking a simple money judgment without embodying therein directions for the sale of the attached property. *Low* v. *Henry*, 9 Cal. 538.

In *Bagley* v. *Ward*, 37 Cal. 121, it was held that "when a judgment is rendered in an attachment suit, and becomes a lien on real property attached, the lien of the attachment is merged in the judgment." And in *Porter* v. *Pico*, 55 Cal. 165, it is said: "But the judgment does not operate so as to release or obliterate the attachment lien. The property attached is still, in contemplation of law, in the hands of the officer, subject to the judgment. The attachment lien still exists so as to confer a priority in the lien of the judgment. * * * The property is sold under the final process issued on the judgment."

Had our courts adopted the practice, in cases where attachments are issued, of declaring the lien of the attachment in the judgment, and directing the attached property to be sold in satisfaction of such lien, the orderly connection between the lien and the rights accruing to a purchaser under a sale thereunder would be more readily apparent; but in the light of the interpretation given to the statutes, and to the judgments in such cases, the same result is reached.

In view of this result, we think it must follow that, while a personal judgment against a non-resident debtor who is only served with process by publication is void and of no effect, yet in a case where the debtor has property within the state which is seized under a writ of attachment issued in the cause at the time the suit is brought, a judgment therein which, though general in its terms, has the effect of perpetuating the attachment lien, and of subjecting the attached property to the payment of a debt due from the non-resident, is so far in the nature of a proceeding *in rem* as to uphold a sale of the attached property, and, considered for that purpose and to that extent, is not void. It is the method, and only method, pursued in our courts for subjecting the property of a non-resident debtor to the payment of demands due from him to our citizens, and the object sought is the essential thing to be considered, and is of more importance than the means by which the end is attained.

The facts that defendant had property in this state, that a writ of attachment issued in the cause was levied thereon, and the property sold in satisfaction of the claim, are all in proof. The existence of these facts are essential to the validity of the proceedings. The requirements of the affidavit for publication of summons are to be measured by our Code, and the facts that defendant has property in this state, and that a writ of attachment has issued, are not among them.

The decisions quoted from the New York courts have no application here, for the reason that the statute of that state is essentially different from our own. *There* service of summons can only be had against a non-resident of the state who "has property therein," etc. N. Y. Code Proc. § 135. Under such a statute the ownership of property in the state becomes a jurisdictional fact necessary to be stated in the affidavit.

The order of service of summons by publication, after stating the jurisdictional facts, and ordering publication in a designated paper for two months, directed a copy, etc., to be deposited in the post-office, etc., directed to defendant, etc., but failed to include in such direction the word "forthwith," as contained in section 413, Code Civil Proc.: "The court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his place of residence."

The term "forthwith," when applied to the performance of an act, imports that it shall be performed as soon as by reasonable exertion, confined to that object, it might be, and which must consequently vary according to the circumstances of each particular case. 3 Chit. Pr. 112.

In *Roberts* v. *Brett*, 36 Eng. Law & Eq. 358, it was held to mean "within a reasonable time." When a defendant is ordered to plead forthwith, he must plead within 24 hours. Whart. Law Dict. In other matters of practice the word has come to have the same meaning. 2 Edw. 328; *Moffat* v. *Dickson*, 3 Colo. 313; Bouv. Law Dict. Like the term "immediately," it is not in law to be necessarily construed as a time immediately succeeding, without an interval,

but an effectual and lawful time, allowing all the "adjuncts and accompaniments" necessary to give an act full legal effect to be performed. In *Van Wyck* v. *Hardy*, 20 How. Pr. 222, the word "forthwith" was construed as synonymous with "all reasonable dispatch."

The deposit of a copy in the post-office was made on the day the order was signed, and we are of opinion that the omission of the word "forthwith" from the order requiring such deposit was at most an irregularity which did not render the proceedings void, but which might perhaps have been good cause to set aside the proceedings for irregularity on a direct motion for that purpose.

The default was not prematurely taken. The summons was published from February 19, 1881, for two months, which expired April 20th. The defendant then had 30 days in which to answer, which expired May 21, 1881, and the default was not entered until May 27th following. The fact that the newspaper continued to publish the summons until May 7th did not have the effect to extend the time to answer beyond the periods fixed by the order of publication and the statute.

The deposit of a copy of summons and complaint, prepaid, in the post-office by N. C. Briggs, the attorney of plaintiff, and his affidavit of that fact, was sufficient. The provision of section 410, in relation to service of summons upon a defendant personally, has no application to the deposit of a copy in the post-office, the affidavit of performance of which act is provided for by the third subdivision of section 415

We think the judgment roll in *Land* v. *Anderson* was good as against a collateral attack, and was properly admitted in evidence. *McCauley* v. *Fulton*, 44 Cal. 355.

The objection made to the manner of levying the attachment is not tenable. The court finds that it was duly levied upon the land in question, and the finding is supported by the return of the officer in which he certifies that he "duly levied upon all the right, title, and interest of the said J. G. Anderson in and to the following real property, to-wit," (describing the land in dispute.) Under the ruling of the court in *Porter* v. *Pico*, *supra*, this was sufficient as against a collateral attack. Like considerations apply to the objection urged to the return on execution.

These views render the other questions raised in the record unimportant. We are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 59

PEOPLE v. CLARY. (No. 20,254.)

(*Supreme Court of California.* February 18, 1887.)

1. CRIMINAL LAW—TRIAL—LEADING QUESTIONS.
 Permitting leading questions to be asked a witness in a criminal case, who evidently did not speak English fluently, upon matters to which she had already testified in substance, *held* not ground for reversal.
2. LARCENY—CHARGE—WRONG USE OF WORDS.
 A charge to a jury correctly defined the difference between larceny and robbery, but in one part of it the words "forcible" and "violently" were used as applied to larceny. *Held*, that the defendant had no ground of exception.

Commissioners' decision. In bank.

Appeal from superior court, San Francisco.

John D. Whaley, for appellant. *The Attorney General*, for respondent

SEARLS, C. The defendant was convicted of the crime of robbery averred to have been perpetrated at the city and county of San Francisco by forcibly,

violently, etc., taking from one Maria Schaefer the sum of $500. At the trial the prosecuting witness, Maria Schaefer, had detailed the particulars of having drawn money from the Hibernia Bank in the presence of defendant, of her placing it in a satchel, and she related how she went to Silver street by the street cars, how defendant followed and knocked her down, how she held to the satchel and he struck her again, and got the satchel containing the money from her. Thereupon the court, against the objection of defendant, permitted the prosecution to put the following question: "*Question*. It was taken from you against your will, was it? *Answer*. Yes, sir." And the further question, as follows: "*Question*. And by means of this force? *Answer*. He took it with force."

The examination of a witness in the trial of a cause is a matter committed to the sound discretion of the court, and in the exercise of that discretion leading questions may be permitted or denied. It is apparent from the testimony of the witness that she was a foreigner who did not speak the English language with fluency. Under such circumstances, and in view of the fact that the witness had in substance stated the facts embodied in the questions put by the prosecution, there was no abuse of discretion by the court in permitting the questions. Code Civil Proc. §§ 2044–2046; *Moran* v. *Abbey*, 63 Cal. 56; *Green* v. *Gould*, 3 Allen, 466; *Hopkinson* v. *Steel*, 12 Vt. 582; *Parsons* v. *Huff*, 38 Me. 137.

It is next contended that the court erred in its charge to the jury in defining the crime of larceny, and in noting the features which distinguish that crime from robbery. The jury was first instructed as to what constitutes robbery, in which the essentials requisite to that offense, including the force or fear necessary, were set out at length. The court then defined grand larceny and petit larceny substantially in the language of the Penal Code. Subsequently, in defining the felonious taking of property from the person as constituting grand larceny, the court said: "Any stealing or taking from the person feloniously and violently, and with the intent to deprive the owner of it, is grand larceny, providing the property has some fixed value. As I said a moment ago, the forcible and felonious taking from the person of another of one dollar is just as much grand larceny as if it were one thousand dollars."

It will be observed that the court was here impressing upon the minds of the jurors a specific fact, viz., that larceny, committed by the felonious taking of property from the person of another, was grand larceny, without reference to the value of the property taken. In doing so he inadvertently, as we suppose, used the terms "forcible" and "violently,"—terms properly applicable in defining robbery, but not necessary to constitute larceny. The court later on in its instructions again defined the difference between robbery and larceny quite distinctly; and, while the definitions hereinbefore quoted were not technically correct, yet we cannot see that the defendant was injured thereby.

He was convicted of robbery. Robbery is larceny, with the element of force or intimidation added. The tendency of the instruction objected to, if indeed it tended to mislead the jury, which we think improbable, could only be to induce them to find the defendant guilty of the lesser crime of larceny rather than of robbery, with which he was charged in the information.

The crime with which defendant was charged was a grave offense. The manner of its execution was peculiarly outrageous; and, while the judgment of imprisonment for 50 years was exemplary, we do not find therein any cause for which we can reverse the judgment.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 476

HAYWARD *v.* MANZER and others. (No. 9,110.)

(*Supreme Court of California.* August 27, 1886.)

1. HIGHWAYS—CREATION OF—RECORDING PLAT OF TOWN—SUBSEQUENT ACTS OF OWNER.
 The owner of certain land platted a town thereon, and recorded the plat. Shortly afterwards he made a conveyance of a tract of the land embracing a part of one of the streets. The public had not then accepted or used that part of the street, the town had not been incorporated, and the grantee remained in undisturbed possession for 20 years. *Held*, that a claim then made on behalf of the town to open a street through the premises could not be maintained.
2. SAME—DEDICATION—OFFER—ACCEPTANCE.
 The recording of a map of a town is merely an offer to dedicate to the public the streets appearing on it, which offer does not become effectual as an irrevocable dedication until its acceptance by the public.

Commissioners' decision. Department 1.

Appeal from superior court, Alameda county.

Action to recover damages for trespass to land, and for an injunction.

Tilden & Tilden and *Colin Campbell*, for respondent. *Mastick, Belcher & Mastick*, for appellant.

FOOTE, C. The plaintiff, Hayward, brought an action to recover damages for trespass committed, as he alleged, by defendants the marshal and board of trustees of the town of Hayward. He complained that they had unlawfully intruded upon his land, and torn down his fences, cut down and dug up his trees, and thrown open his land for use as a public highway of that town. He prayed for damages against them for the acts of trespass committed, and for a perpetual injunction to prevent them and their successors, etc., from the commission of further acts of that nature. The cause was tried by the court without a jury. The plaintiff obtained a judgment for $50 and costs of action, and that the defendants be enjoined as prayed for. From that, and an order denying a new trial, the defendants appealed.

The principal grounds for the reversal of the judgment and order relied on are that the evidence was insufficient to justify the findings; but, conceding it to have been sufficient, that upon such findings the judgment should have been for the defendants.

Upon a careful examination of the whole record, we are convinced that the findings are sustained by sufficient evidence. They are as follows:

"*First.* That plaintiff and his grantors have been in possession of the land and premises in complaint described, claiming as owners, and exercising acts of ownership over same, for about the period of twenty years; that for about four years prior to the commencement of this suit plaintiff inclosed the premises in dispute (as a portion of the larger tract owned by him for several years prior thereto) with a substantial picket fence; that two rows of trees were planted on said premises,—one by plaintiff's grantor, and one by plaintiff,—one of said rows of trees running near the line of plaintiff's fence; that said land was graded or filled in by plaintiff.

"*Second.* That in February, 1877, defendants tore down the fence upon said land, and entered thereon for the purpose of opening a street over it; that they did this under an order or resolution of the board of trustees of said town of Hayward, who claim that the paramount owner of the land had dedicated it to public use as a street of said town; that defendants John Manzer, Thomas A. Cunningham, Joseph Pimental, L. Livikin, and J. D. Austin constitute said board of trustees, and that defendant Horn is the marshal of said town, and that they were such officers at the time of the commencement of these proceedings; that, in 1854, Guillermo Castro, claiming to be the owner of and being in possession of the Rancho San Lorenzo, claiming same under a Mexican grant, caused to be made a map of that part of the *rancho* on which he laid out a town called San Lorenzo, (now the town of Hayward;) that said map was filed in the recorder's office of the county of Alameda; that upon this map a street called Castro street was laid out and differently located from the location of a street called by the same name upon a second and subsequent map of said town; that some few sales were made under said map.

"*Fourth.* That in 1856 said Castro caused a second and different map to be made, and filed, in the office of the recorder of said Alameda county, of said town of San Lorenzo, (now Hayward,) altering the first plan of said town, and increasing the size of the blocks, and materially changing said town from what it was as delineated on said map of 1854, and upon which said last-named map of 1856, said Castro street is located further to the south-west than upon said map of 1854; that said Castro street, as laid down on said map of 1856 extended north 36 deg. 24 min. west, through said town, and intersected a county road leading from San Leandro to the mission of San

Jose, south of a line on the said last-named map marked Pierce street, and south of the land of plaintiff, (in dispute;) that south of the intersection of said Castro street with the county road Castro street was opened and used as a public road, but not to the north of said point; that said Castro street, as delineated on said map, extended several blocks to the north of Pierce street, but was not opened or used as aforesaid; that both said maps were filed in said recorder's office of Alameda county before the United States patent was acquired to said Rancho San Lorenzo; that some sales were made under said map of 1856.

"*Fifth.* That, in 1856, Castro conveyed to plaintiff a portion of said *rancho* lying north of Pierce street, and east of the county road, and including said Castro street, as delineated in said map of 1856, and included in such conveyance; that the county road was recognized as a boundary in said conveyance.

"*Sixth.* That, in 1858 and 1859, Castro mortgaged the remainder of his *rancho*, including that portion of it on which the town had been laid out; that said mortgages were foreclosed, and the mortgaged premises passed by judicial sales, under decree of foreclosure to F. D. Atherton, who as owner thereof, in 1862, made and filed a new map of the town of Hayward, on which said Castro street, as delineated, is cut off at its intersection with the county road at the point hereinbefore mentioned, and that Castro street as therein delineated does not embrace any part of the land in dispute; that a great many sales of land have been made by reference to said map; that said town of Hayward was incorporated in 1876, and that the board of trustees constituted under said incorporation accepted the alleged dedication under the map made and filed by Guillermo Castro in 1856; that there are various shade and ornamental trees on said land which defendants have threatened and intend to cut down and destroy."

Before a person's land can be declared a public highway, it must be clearly proven that the same has been dedicated as such, and, when it is undertaken by city authorities to remove fences or improvements therefrom as a nuisance, they must affirmatively show such a dedication. *Tate* v. *City of Sacramento*, 50 Cal. 242.

When Guillermo Castro, on the thirtieth day of September, 1856, within a year of the time of filing the map of 1856 of the town of San Lorenzo, (now Hayward,) deeded to the plaintiff a portion of Castro street as laid down on said map, and bounded the tract of land which he thus conveyed by the county road on the west, the public had never accepted or used the part of the street, including the land in dispute here, as intended to be dedicated, and the town of Hayward had not then been incorporated. It is therefore evident that the deed above referred to was a complete revocation by Castro of his alleged dedication, so far as it affected the public, howsoever it may have been as to the few persons who had purchased lots according to said map, whose rights in the premises we do not now determine.

By the filing of that map, and having it recorded, Castro merely made an offer of dedication to the public of the streets which were shown by said map, which offer could not become effectual as an irrevocable dedication to the public use until its acceptance by the public. *People* v. *Williams*, 64 Cal. 498–502, 2 Pac. Rep. 393; *San Francisco* v. *Canavan*, 42 Cal. 542–548; *San Francisco* v. *Calderwood*, 31 Cal. 589; Washb. Easem. & Serv. 132; *Harding* v. *Jasper*, 14 Cal. 647; *Child* v. *Chappell*, 9 N. Y. 257.

Such acceptance is ordinarily made manifest by a use on the part of the public for such a length of time as will be sufficient to evince its acceptance of the dedication as intended to be made. Washb. Easem. & Serv. 139, 140. It does not appear by the record that the public or the defendants, either before or after the deed of revocation made by Castro, ever used Castro street at the place where it was originally designed to impinge upon the plaintiff's land;

but it appears that, by preference, the public had always, from its establishment, used the county road instead,—that road having been about the year 1855 laid out as a public thoroughfare (somewhat identical with Castro street) by the proper authorities of Alameda county. Any right the public or the defendants may have had to use the land in dispute as part of Castro street was never availed of; and as the plaintiff, during the period of about 20 years, had, by himself or his grantors, been in the exclusive possession of such part of said street, his right thereto had become paramount to that of the public or the town of Hayward. In other words, the plaintiff, by himself or his grantors, claimed and held possession of the land in controversy for 20 years adverse to the whole world, and neither the public nor the defendants had at any time accepted or used that land as intended to be dedicated by Castro. Hayward's effort, as disclosed by the record, is not to hold possession by means of the statute of limitations of a portion of what in fact had once been a public highway. It is to retain possession of land which, in fact, had never been accepted nor used as the public highway, and had been in his adverse possession for 20 years. Such being the case, the proceedings on the part of the authorities of the town of Hayward to remove a nuisance from a public street was not authorized, since what they claimed to belong to a street had never been dedicated, used, or accepted as such. The effort made to devote Hayward's land to the public use as a street, and the other trespasses committed thereon, in the manner attempted and partially accomplished, were contrary to law, and the judgment and order of trial court should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 38

FISK, Jr., *v.* CENTRAL PAC. R. Co. (No. 11,572.)

(*Supreme Court of California.* February 17, 1887.)

1. MASTER AND SERVANT—FELLOW-SERVANT—CHILD.
 The rule which excuses a master from liability to a servant for an injury caused by the negligence of a fellow-servant, applies to the case of a child who is injured by dangerous machinery, upon which he is negligently set to work by a fellow-servant.

2. SAME—INJURY TO CHILD BY DANGEROUS MACHINERY—AUTHORITY OF BOSS.
 Plaintiff, a boy 12 years of age, was employed by the foreman of the defendant's boiler-shops to work in the tool-room, and was instructed to obey the boss of that room. At a time when there was nothing for him to do in the tool-room, the boss sent him to the shop to see if there was anything for him to do there. There he was set to work by the employes on dangerous machinery, and was injured. *Held*, that the instruction to plaintiff to obey the boss should be construed to refer to employment in the tool-room alone; that the boss was not authorized to send plaintiff to the shop to find work; and that for the consequences of his doing so, or for the careless acts of the other employes in giving plaintiff dangerous work to do, defendant itself was not responsible.

 THORNTON, J., dissenting.

Commissioners' decision. In bank.

Appeal from superior court, Sacramento county.

Freeman, Johnson & Bates, for appellant. *S. C. Denson*, for respondent.

SEARLS, C. This is an action to recover damages for a personal injury received by plaintiff while in the employ of defendant. A judgment of nonsuit was entered in the court below, from which judgment, and from an order denying a new trial, the plaintiff appeals.

The defendant is a corporation organized under the laws of the state of California.

At the trial there was testimony tending to show that in September, 1883, the plaintiff, who was of the age of about 12 years, applied to Price Davis, assistant foreman in defendant's boiler-shops in Sacramento, for work, and was informed he would have to see Charles Hooper, the foreman. He saw Mr. Hooper accordingly, who gave him work in the tool-room, under David Snape, who was the boss of such room, and whom he was instructed to obey. His principal work was in cleaning the tools, putting them in place, giving them to the men, doing errands, etc. He also seems to have been engaged for nearly a month in heating rivets.

On the first of May, 1884, plaintiff went to the shop, and, there being no work for him in the tool-room, he was told by the boss to go into the shop, and see if there was anything for him to do there. In the shop he was requested by Price Davis, Jr., a young man aged 19, and a son of the assistant foreman, to go into the fire-box of a boiler and wipe a tap, in place of another boy named Downs, who was engaged in the work, and whom young Davis said he wanted to help him at something else. The precise testimony on this point is as follows: "I went into the shop, and met Price Davis, Jr., and he asked me if I was doing anything. I told him, 'No, I was not doing anything,' and he told me that he wanted me to go in and wipe the tap for him. He said he wanted another boy to help him. Before that there was a boy named Downs that was inside of the fire-box, and Downs was going to help him do some work. I asked him if I could not help do the work, and he said, 'No.' He went off, and stayed about five minutes, and came back, and said his father told me to go into the fire-box. * * * He was the son of Price Davis, the assistant foreman," etc.

The tap was being used by one John Soule to drill holes through the fire-box, and to cut threads in them to receive screws, and was propelled by machinery on the outside which gave to it a revolving motion at the rate of 100 revolutions a minute. The office of plaintiff was to receive the tap when it came through, clean it from the particles of iron which adhered to its oiled surface, and pass it outside the boiler to Soule for readjustment. There were two methods for cleaning the tap,—one was to wait until it came entirely through, and was detached from the machine, which was entirely safe, but slow; the other was to wipe it as it came through, and while in motion, which was dangerous. Plaintiff testifies that Soule "told me to wipe off the tap in a hurry, and told me to wipe it off while it was running." While engaged in wiping the tap with a piece of coarse cloth, the instrument caught the cloth, which was around plaintiff's hand, twisted and broke his arm, and injured him severely and permanently. Plaintiff had previously been employed in a boiler-shop at Oakland, and so informed Hooper, the foreman of the shop, when he applied for work. Soule was a workman in the shop, and usually had charge of the tap. Plaintiff says: "When I went up to the tap Soule asked me what I was going to do. I told him I had come to wipe off the tap. He said, 'What are you going to wipe it off with?' I told him with a sack, and he told me to go inside; and he said, 'Wipe it off while it is running.'"

From the nature of the employment, and the instrument described in the testimony, we have no doubt of two propositions: (1) It was dangerous business to wipe the tap while in rapid motion, in the manner pursued by plaintiff. (2) A man of mature years, in full possession of his faculties, and gifted with ordinary ingenuity, could have performed the task while the instrument was in motion without material risk.

The rule is well settled in England and the United States that the maxim *respondeat superior* does not apply so as to make a master responsible for injuries inflicted on one servant by the negligence of another servant, in the same common employment, unless such injuries are traceable to the personal negligence of the master. The law implies a contract on the part of the

servant, when he enters into the service, that he will assume the ordinary risks which are incident to the employment, among which is the risk of suffering hurt and injury from the negligence of his fellow-servants. The boy (plaintiff) was directed to go into the fire-box to work by Price Davis, Jr., who seems to have been a hand in the shop, who was a son of the assistant foreman, and who told the plaintiff that his father (the assistant foreman) so directed, but there is no evidence to show that the assistant foreman gave any such order. The order of Soule directing the plaintiff to clean the tool while in motion was improper, but it was the negligence of a fellow-servant engaged in the same general employment. The rule which excuses a master from liability where an injury is caused by the negligence of a fellow-servant is not altered by the fact that the party injured is a child. *King* v. *Boston, etc., R. Corp.*, 9 Cush. 112; *Chicago R. Co.* v. *Harney*, 28 Ind. 28; *Ohio R. Co.* v. *Hammersley*, Id. 371; *Gartland* v. *Toledo R. Co.*, 67 Ill. 498; *Brown* v. *Maxwell*, 6 Hill, 592.

We conclude, therefore, that the plaintiff cannot recover for the injuries which he received, either by being placed by a fellow-servant in a dangerous place, or by the negligence of his fellow-servant in directing him in the manner in which he was to perform his work, unless the negligence of his fellow-servants was in some way combined with the negligence of the defendant so as to produce the result. If the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury, the servant injured may recover damages of the master. *Crutchfield* v. *Richmond R. Co.*, 76 N. C. 320; *Booth* v. *Boston, etc., R. Co.*, 73 N. Y. 38; *Paulmier* v. *Erie R. Co.*, 34 N. J. Law, 151; *Cayzer* v. *Taylor*, 10 Gray, 274.

Was the defendant guilty of any such negligence as rendered it liable? There is nothing in the testimony to show any negligence in the selection of Soule as an employe, or tending to bring home to the defendant knowledge of his carelessness. We must therefore look to the circumstances under which the plaintiff sought work in the boiler-shop for a basis upon which to determine whether or not defendant, or its servants in authority, were guilty of wrong. The *first* question manifestly is as to the extent of the authority conferred upon Snape, the boss of the tool-room, and, if it shall be found that he possessed the requisite power to bind the defendant by his direction to plaintiff, then, *second*, we may inquire into the manner in which his authority was exercised.

Recurring to the testimony, we find (1) that Snape was boss of the tool-room, presumably connected with the boiler-shop, and, as such, had charge of the tool-room; (2) that Hooper was foreman of the boiler-shop, and had authority to employ men therein; (3) that, when plaintiff applied for work, Hooper employed him to labor in the tool-room, took him to Snape, the boss, and told him to obey the latter, which he did; (4) at the end of eight months, and on the first day of May, 1884, there being nothing for plaintiff to do in the tool-room, he was directed by Snape to go into the boiler-shop, and see if he could get any work there, and he went to the shop, where he obtained the employment in the manner and with the result hereinbefore mentioned.

"Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself, if he goes on with it." Wood, Mast. & Serv. § 349. This doctrine presupposes that the servant has sufficient discretion to appreciate the dangers incident to the work, and has no application to the case of young and inexperienced children. In such a case it is the duty of the master not only to warn the child, but to instruct him as to the dangers of the employment, and the means of avoiding them. To a mere child, like the plaintiff in this case, dangers which would be patent to the adult of experience are or may be latent. *Coombs* v. *New Bedford C. Co.*, 102 Mass. 572; *Grizzle* v. *Frost*, 3 Fost. & F. 622; *Dowling* v. *Allen*, 74 Mo. 16; *Railroad Co.* v. *Fort*, 17 Wall. 554; *Kline* v. *Central Pac. R.*

Co., 37 Cal. 400; *Sullivan* v. *India Manuf'g Co.*, 113 Mass. 398; *Hill* v. *Gust*, 55 Ind. 49.

These cases proceed upon the theory of the enhanced duty of the employer in cases of the employment of minors, without knowledge of the risks they are to assume. This duty performed, and the minor properly instructed, he stands upon the same plane with other servants in reference to the risks incident to the employment, and those arising from the want of care in his fellow-servants. In the cases cited *supra*, no question was made as to the authority of the superintendent to bind his principal by ordering the thing done which produced the injury. In all of them the service to be performed was within the scope of the authority conferred. Here the question is, could Snape bind the defendant by the order he gave the plaintiff to seek work outside of his own peculiar department? He was a *boss* in the tool-room, and, as such, we may fairly assume he was authorized to control and direct the manner in which the work of that room was to be performed, and all other things relating to the orderly and proper conduct of his branch of the business. But it does not appear that he was authorized to employ hands for any purpose.

Charles Hooper was the vice-principal of the defendant in the boiler-shop, with full control and authority, and authorized to employ and discharge help. He employed plaintiff, and directed him to obey David Snape; but he employed him to work in the tool-room, and the instructions given to plaintiff to obey the boss of that room must be construed in view of the employment. We cannot, by any reasonable intendment, hold that the authority of David Snape was enlarged or extended by this direction of Hooper. It simply relegated the plaintiff to the control of Snape, within the purview and subject to the employment which Hooper had given him. The employment to work in the tool-shop was the subject-matter; and the control given to Snape, and the directions to plaintiff to obey him, must be construed with reference to and confined to such subject-matter. Plaintiff was directed to obey Snape, but it was as a laborer in the tool-room that he was so ordered. We know of no rule of construction by which the order given under such circumstances, and for such a purpose, can be held to authorize Snape to employ the plaintiff for an entirely different purpose from that contemplated by Hooper, and thereby to bind the defendant. The roving commission given to the plaintiff by Snape to seek employment in the boiler-shop, unless intended to direct him to the persons in charge of such shop, involved an element of carelessness; but it was not the negligence of the defendant, or of its agent or vice-principal, its *alter ego*, authorized, or held out as being authorized, to speak for it. We conclude, therefore, that as Snape was not authorized to send plaintiff to the boiler-shop in quest of employment, and that as he was not directed or employed by any one so authorized, the defendant is not responsible for the injuries which he received through the carelessness (if any) of defendant's employes.

It follows that the nonsuit was properly granted, and the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J., dissenting.

PACIFIC TRUST CO. *v.* DORSEY. (No. 11,153.)

(*Supreme Court of California.* February 17, 1887.)

CORPORATIONS—SUBSCRIPTION TO STOCK—PAYMENT BY NOTE.

Appellant subscribed for stock in a corporation on which he paid nothing in money, but, being assessed on the subscription, gave his note for the amount, and thereupon a certificate of stock was issued to him, to be held by the company until he paid the note. *Held*, the note was not void, as against public policy, under Const. Cal. art. 12, § 11, providing that no corporation shall issue stock except for money paid or property actually received, and all fictitious increase of stock shall be void; for, if it be conceded that the certificate was improperly issued before actual payment of any money, still that fact does not render the note void. Nor was the note void under California Act April 1, 1876, (St. 1875–76, p. 729,) requiring corporations to publish semi-annual statements of their paid-up capital, and providing that nothing should be counted as capital except money, and especially not notes. Under this act the note could not be included as capital, but was not on that account void. Nor was it void under Pen. Code Cal. § 560, providing that any director of a corporation voting to receive a note in payment of an assessment on a stock subscription should be guilty of a misdemeanor. MCKINSTRY and TEMPLE, JJ., dissenting.

In Bank. Appeal from Department 2, affirming commissioners' decision, reported in 12 Pac. Rep. 49.

James A. Louttit, W. S. Montgomery, S. D. Woods, and *A. L. Levinsky,* for appellant. *L. W. Elliott* and *P. S. Wilkes,* for responden

BY THE COURT. For the reasons given in the opinion of department 2, reported in 12 Pac. Rep. 49, the judgment and order are affirmed.

MCKINSTRY and TEMPLE, JJ., dissenting.

72 Cal. 53

Ex parte LEMKUHL. (No. 20,261.)

(*Supreme Court of California.* February 17, 1887.)

HABEAS CORPUS—REVIEW IN CRIMINAL CASE.

One who has been tried for a misdemeanor, and sentenced to imprisonment by a court having jurisdiction of both his person and of the offense, cannot, in a *habeas corpus* proceeding, have the judgment and sentence reviewed for error. The writ of *habeas corpus* was not framed to retry issues of fact, or to review the proceedings of a legal trial; that can only be properly done by writ of error on appeal.

Commissioners' decision. In bank.

On *habeas corpus.*

The "ordinance" referred to was one establishing a street market by the city council of Oakland.

Moore & Reed, for petitioner. *S. P. Hall,* Dist. Atty., and *J. M. Poston,* for respondent.

FOOTE, C. The petitioner was tried before the police court of the city of Oakland for a misdemeanor, viz., the commission of a nuisance in obstructing Broadway, a street of said city. The judgment was that he pay a fine of two dollars, or be imprisoned until said fine be duly satisfied, at the rate of one day's imprisonment for each dollar of fine. The captain of the police of the city of Oakland has him in custody, by virtue of a writ of commitment issued from the police court of said city under its judgment of conviction as aforesaid. The only defense which the defendant set up (as he says in his petition for the writ) why he should not have been convicted and punished for his alleged offense, was that he was authorized by an ordinance of the city of Oakland to obstruct the street as he did. The complaint upon which the defendant was tried properly charged an offense against the laws of this state, as defined in section 370, Pen. Code, and made punishable as a misdemeanor

under section 372, same Code. We do not perceive anything in the complaint or the record of the police court which shows that the defendant had any justification or defense which would bar his prosecution for the offense alleged against him. And the court which tried him had jurisdiction of the offense. St. 1873–74, p. 906. But the defendant contends that, as a fact in the case, he was justified, by reason of a certain ordinance of the city of Oakland, in doing what would otherwise have been a violation of the state law. This ordinance he quotes at length in his petition for the writ of *habeas corpus*.

Thus it appears that the court who tried the defendant had jurisdiction of his person, and the offense for which he was tried, and that it tried, convicted, and sentenced him, perhaps, under an erroneous view of conflicting laws. What this court is now asked to do is to restore him to liberty on a writ of *habeas corpus*, because of the error of law committed by the trial court. We do not perceive how, in such a proceeding, this court can review the alleged erroneous action of the court below. "The writ of *habeas corpus* was not framed to retry issues of fact, or to review the proceedings of a legal trial." *Ex parte Bird*, 19 Cal. 130. The petitioner's contention involves only a question of mere error, and that cannot be inquired into upon the writ here invoked, but only upon proceedings in error. *Ex parte Maux*, 44 Cal. 579–581; *Ex parte Cohn*, 55 Cal. 193, and cases cited.

The petition should be dismissed, and the petitioner remanded to the custody of the captain of police of the city of Oakland.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion, petition dismissed and petitioner remanded.

72 Cal. 46

PEOPLE v. MARKS. (No. 20,262.)

(*Supreme Court of California.* February 17, 1887.)

1. CRIMINAL PRACTICE—INSTRUCTIONS—FAILURE TO REQUEST.
 A party who fails to ask an instruction on a particular subject cannot complain of the omission of the court to give such an instruction of *its own motion*.
2. SAME—RECORD SHOWING INSTRUCTION GIVEN BY COURT OF ITS OWN MOTION—PRESUMPTION.
 The transcript of the record on appeal showing that a certain instruction was given by the lower court of its *own motion*, and stating that "was all the law *so* given in the action," *held*, it cannot be presumed from this that the court did not give any instructions at the instance of the parties.
3. SAME—BILL OF EXCEPTIONS—PRESUMPTION AS TO EVIDENCE.
 The bill of exceptions stating simply what the evidence of the principal witness for the state and for the defendant tended to show as to the commission of the crime charged, and does not show that there was not any evidence relating to the venue, nor that the evidence stated was all that given, *held*, there is nothing in the bill to make it appear affirmatively that the venue was not proved.

Appeal from superior court, San Francisco.

Chas. B. Darwin, for appellant. *The Attorney General*, for respondent.

FOOTE, C. The defendant was tried and convicted of the crime of embezzlement. He appeals from the judgment rendered therein, and from an order denying him a new trial. He contends that the charge of the court, given on its *own motion* to the jury, does not declare to them that, in order to convict him as charged in the indictment, they must believe from the evidence that the crime so alleged against him was committed in the city and county of San Francisco, and that such omission on the part of the court constituted a reversible error. The bill of exceptions presented by the defendant does not show that he, or his counsel for him, requested the court to instruct

the jury that, if the venue was not proven, they should acquit. Therefore the omission of that tribunal so to charge of its *own motion* cannot be taken advantage of by one who failed to exercise the privilege which he had of requesting an instruction or instructions on his behalf to be given to the jury upon the point in question. The charge of the court, which is before us, was given to the jury "of its own motion, and was all the law *so* given in the action." Transcript, 16. We cannot say, therefore, that the court did not give other instructions for the people or the defendant, in relation to the necessity for the proof of venue as laid in the indictment. The bill of exceptions states simply what the evidence of the principal witness for the people and that of the defendant tended to show as to the commission of an embezzlement of money. It does not show, or pretend to do so, that there was or not any evidence relative to the venue, nor is it anywhere made apparent that the above-stated was *all* the evidence given on that or any other point in the case. There is nothing whatever to make it appear affirmatively that the venue was *not proved*. To obtain a reversal of a judgment of conviction, the defendant must show error affirmatively, and all omissions and uncertainties in a bill of exceptions presented by him are to be construed against him. *People* v. *Williams*, 45 Cal. 27.

No prejudicial error is apparent from the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 62

PEOPLE *v.* MORTON. (No. 20,257.)

(*Supreme Court of California.* February 19, 1887.)

1. CRIMINAL PRACTICE—INSTRUCTION—INTENT—DEFENDANT AS WITNESS.
 On an indictment for burglary, a charge by the court to the effect that "it was not possible to give any direct proof of the intent of any person in the commission of any act, and that the prosecution could never, unless the defendant himself saw fit to speak, give any direct or positive proof of the intent," etc., *held* not error, as suggesting that any presumption should be indulged against the defendant because he did not give evidence as a witness in the cause.
2. SAME—APPLICATION TO FACTS.
 On the trial of an indictment, a charge as follows: "Now, gentlemen, there is a proposition of law which may or may not be involved in this case, as you determine the facts, but it is eminently proper that I should give it to you, and that is," etc.,—cannot be held misleading, as leaving to the jury as their province to say whether or not the rule of law as given was applicable to the facts of the case in hand.

Commissioners' decision. In bank.

Appeal from superior court, San Francisco.

John D. Whaley, for appellant. *The Attorney General*, for respondent.

FOOTE, C. The defendant was convicted of burglary in the second degree. He contends that the judgment therein rendered against him, and the order denying his motion for a new trial, should be reversed.

His first ground therefor is that the evidence was insufficient for his conviction. Upon a careful examination of the record, we are satisfied that the jury were fully warranted in believing and declaring by their verdict the defendant guilty as charged.

It is assigned for error that the court, in a portion of its charge, indulged in a presumption against the defendant for not testifying in his own behalf. The language objected to is as follows: "You all know that the intent is a simple mental operation, and we cannot, unless the defendant himself

speaks,—it is not possible to give any direct positive proof of the intent of any person in the commission of any act. You cannot look into the human mind and see what its workings are. The prosecution can never, in any case, unless the defendant himself sees fit to speak, give any direct or positive evidence of the intent. * * *" The defendant did not go upon the stand and testify. We fail to see anything in the words above quoted, taken together with the rest of the charge, which announces to the jury in the remotest degree that any presumption should be indulged against the defendant because he did not give evidence as a witness in the cause. The jury were simply told that intent might be inferred from the facts and circumstances surrounding the transaction, in the absence of any declaration upon that subject which had emanated from the defendant.

As a part of the charge, this language was employed:

"Now, gentlemen, there is a proposition of law which may or may not be involved in this case, as you determine the facts, but it is eminently proper that I should give it to you, and that is that all persons concerned in the commission of a crime," etc. It is not contended that the portion of the charge which immediately follows this is erroneous, but that the court, in uttering the words quoted, left to the jury, as their province, to say whether or not the rule of law as given was applicable to the facts of the case in hand. To us it seems that the court told the jury that if, in their opinion, the facts referred to in the charge were proven, then they should apply the rule of law as given; and this was not erroneous.

We do not think that the charge is objectionable for the reason assigned by the defendant, viz., that the jury, as he contends, are directed to convict the defendant if they believed from the evidence that he and his confederate, Connors, who had previously pleaded guilty, had confederated to commit larceny in the building 501 Post street, and entered the said building with the intent to commit larceny in *any room* therein; for the court in that connection further charged that, in addition to entering the building with such felonious intent, one of the conspirators must have entered *a room* of the building with the intention of committing a larceny therein, and as such room so entered the court in close connection therewith refers to Fortson's room, the one in which the information charges the burglary was committed, and the only one which, as the proof abundantly shows, was entered with the intent to commit larceny therein.

The information charged that burglary had been committed in entering V. E. Fortson's room. The court, giving an unstrained interpretation to the whole charge, announced to the jury that they must believe from the evidence that such room was so burglariously entered in order to convict the defendant; and the proof showed that it and no other room was entered with intent to commit larceny by the *confederate* of the defendant.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 85

LYONS and others *v.* ROACH, Adm'r, etc. (No. 11,918.)

(Supreme Court of California. February 21, 1887.)

APPEAL—DISMISSAL—DEATH OF PARTY—SUBSTITUTION.

Where, from the affidavits on a motion to dismiss an appeal for failure to file a transcript, it appears that the plaintiff below, in whose behalf the motion is made, was dead when the judgment appealed from was entered, and the notice of appeal was claimed to have been served and filed, the appellate court will take notice of the death, and will not proceed further with the cause until the personal represent-

atives of such plaintiff have been substituted as parties in the appellate court; and such a substitution in the court below, made long after the judgment and the taking of the appeal to the appellate court, will not be noticed in the latter court.

Department 2. Appeal from superior court, San Francisco.

This was a proceeding brought by Denis Lyons and others, respondents, against Roach, administrator, etc., appellants, in which judgment of foreclosure was rendered. Motion is now made to dismiss the appeal for failure to file a transcript.

Matt. I. Sullivan, for appellant. *J. C. Bates*, for respondents.

By the Court. Motion to dismiss appeal on clerk's certificate. When the notice of this motion was served, and the motion brought to a hearing, the plaintiff in the action, (Denis Lyons,) when the judgment appealed from was entered, and the notice of appeal is claimed to have been served and filed, was dead, having departed this life long prior to the times first above mentioned. This appears by affidavits used on the motion, and is a sufficient suggestion of his death in this court. On such suggestion being made, this court has no authority to proceed further in the cause until his personal representatives have been substituted as parties in this court, and, until such substitution has been made, no motion can be made to dismiss the appeal. A substitution of the representatives of the deceased plaintiff in the court below, made long after the judgment, and the taking of the appeal to this court, cannot be noticed here. The parties, under the condition of matters above stated, must be substituted here, before any motion can be made or heard, or any available notice thereof given. The motion must be denied. As we hold that there is no motion before us, it is unnecessary to say that such denial is without prejudice to a motion, when the proper persons have been made parties in this court. Motion denied.

72 Cal. 78

Tredinnick and others *v.* Red Cloud Consolidated Min. Co. and another. (Nos. 9,816 and 9,817.)

(*Supreme Court of California.* February 21, 1887.)

1. Miner's Lien—Claim—Sufficiency of—Code Civil Proc. Cal. § 1187.
 In an action to enforce a mechanic's lien for labor done on a mining claim, a claim setting forth the kind and number of days of labor performed, the dates between which it was performed, with the aggregate amount then due, and "that the terms of payment for said labor were cash, as soon as said labor was performed," and describing the mine, which is well known, by name and the district, sufficiently complies with Code Civil Proc. Cal. § 1187, prescribing that such claim must contain, among other things, "a statement of the terms, time given, and conditions of the labor contract, and also a description of the property to be charged with the lien sufficient for identification."
2. Same—Postponement of Lien—Code Civil Proc. Cal. § 1188.
 Code Civil Proc. Cal. § 1188, providing that, in cases in which a claim for a lien for work done is filed against two or more mining claims, the person filing the same must designate the amount due to him on each of said mining claims, and under penalty of having his lien postponed to other liens, does not apply to a case where several mining claims have been consolidated, and are owned and worked as one mine, under a common name

Commissioners' decision. Department 2.

Appeal from superior court, Mono county.

Wallace, Greathouse & Blanding, for appellant Wadsworth. *Craig & Meredith, T. C. Van Ness*, and *Louis T. Haggin*, for appellant Red Cloud Consolidated Min. Co. *P. W. Bennett* and *P. Reddy*, for respondents.

Belcher, C. C. This is a joint action brought by William Tredinnick and 29 other persons, as plaintiffs, to enforce liens for labor severally performed by them in and upon a mining claim known as the "Red Cloud Mine." The mine was situate in Mono county, and was owned and worked by the de-

fendant the Red Cloud Consolidated Mining Company. Henry Wadsworth was joined as a defendant in the action because he had a judgment lien against the mine which, as alleged by plaintiffs, was subsequent and subordinate to their liens. In the court below judgment was rendered in favor of the plaintiffs. The defendants separately moved for a new trial, and, their motion being denied, separately appealed from the judgment and order. The two appeals may be considered together.

The Code provides that, when one seeks to fasten a lien upon another's property, he must file with the county recorder his claim, containing, among other things, "a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification." Section 1187, Code Civil Proc. It is urged for the appellants that the claims filed by the plaintiffs do not contain the statement and description required by the statute, and are therefore fatally defective and insufficient. The provisions of the Code referred to "are to be liberally construed, with a view to effect its objects and to promote justice," and not strictly, as claimed. Section 4, Code Civil Proc. So construed, were the claims sufficient to create valid liens? We think they were. In each of them was set forth the kind and number of days of labor performed, with the dates between which it was performed, the price agreed to be paid for the labor per day, with the aggregate amount then due, and "that the terms of payment for said labor were cash, as soon as said labor was performed." This was a substantial compliance with the requirements of the statute as to the statement of the terms, time given, and conditions of the contract. *Blackman* v. *Marsicano*, 61 Cal. 638; *Hills* v. *Ohlig*, 63 Cal. 104.

The property on which the labor was performed was described as "that certain mine commonly called the 'Red Cloud Mine,' situate in the Bodie mining district, Bodie township, in said county, and hereinafter more particularly described." The particular description is by 16 courses and distances, commencing at a point easily ascertainable, and running around to the place of beginning, "containing 35.31 acres, and known as the 'Red Cloud Mine.'" The fourth course reads, "Thence, 4th, 67 deg. 45 min. E., 1.51 chains, to N. E. cor. Gibraltar;" when it should have been, "Thence, 4th, S., 67 deg. 45 min. E.," etc. The fifth course reads, "Thence, 5th, S. 22 deg. 15 min. N., 11.07 chains, to N. boundary Top-gallant Royal;" when it should have been, "Thence, 5th, S., 22 deg. 15 min. W.," etc. The twelfth course reads, "Thence, 12th, S., 49 deg. 30 min. E., 1.06 chains, to N. E. cor. Westchester;" when it should have been, "Thence, 12th, S., 49 deg. 30 min E., 1.86 chains," etc.

It is claimed for the appellants that, on account of these errors, it becomes impossible to trace all of the exterior lines of the mine, and for that reason the description is insufficient. On the other hand, it is contended for the respondents that "Gibraltar," "Top-gallant Royal," and "Westchester" are names of adjoining, well-known, and defined mining claims, which are monuments, and must control the courses and distances. As they are used, these names seem to have been intended to represent monuments of some kind, and we cannot know judicially that they do not efficiently serve the purpose claimed for them. But, however this may be, we think the description by name was sufficient for the identification of the property. It appears from the evidence that the mine was well known and commonly spoken of as the "Red Cloud Mine;" and by the word "mine" was not meant "a subterranean cavity or passage, especially a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging," as that word is defined by Webster, but the whole claim or body of mining ground.

In *Hotaling* v. *Cronise*, 2 Cal. 63, which was an action to enforce a mechanic's lien, the notice filed described the property as "the wharf situated on Battery street, between Pacific and Jackson streets, in San Francisco." The

court said: "We think the description of the property sufficiently certain. * * * It is sufficient if the claim be set forth with convenient certainty."

In *Tibbetts* v. *Moore*, 23 Cal. 212, which was a similar action, the property was described in the notice filed as a quartz-mill, being at or near the town of Scottsville, in Amador county, known as "Moore's New Quartz-mill." There was no evidence that there was any other quartz-mill at the place named, so designated as to render it uncertain which was intended, and it was held that the description was sufficient to identify the property, and uphold the lien.

In *Haley* v. *Amestoy*, 44 Cal. 132, the action was ejectment, and the principal question in the case related to the description of the premises found in the deed under which the defendants claimed. There were two descriptions, —one by name, and the other by courses, distances, and monuments. It appeared from the evidence that the property was well known by the name given to it, but the description by courses and distances was so erroneous that the lines could not thereby be traced. It was held that the description by name was sufficient, and that the other description might be disregarded. The same rule has been since embodied in the Code. Civil Code, § 1092.

If the foregoing cases are correct expositions of the law, we fail to see why the description by name was not sufficient to meet all the requirements of the statute in this case.

It is further claimed for the appellants that the proof as to the character and as to the amount of labor performed by plaintiffs is insufficient to support the decree, and also that "it does not appear from the evidence that any of the plaintiffs other than William Dunn, John Tredinnick, and Watkin Morgan had not, at the time of the commencement of the action, been paid in full for all services, if any, rendered." In the answer of the defendant corporation it is admitted that each of the plaintiffs performed labor upon its mine at the times, and in the capacity, and for the agreed rate of wages, alleged in the complaint, and that the sums of money respectively claimed to be due them for such labor were due and unpaid. In the answer of defendant Wadsworth it is alleged that he has no information sufficient to enable him to answer the averments of the complaint, and for that reason he denies that any of the plaintiffs performed labor upon the mine in the capacity alleged, or in any capacity, or that any money was due them and unpaid for such labor. At the commencement of the trial it was admitted by counsel, appearing for both defendants, "that plaintiffs John Tredinnick and William Dunn worked for the Red Cloud Consolidated Mining Company the number of days specified in the complaint;" and later in the trial it was further admitted "that each of the plaintiffs, except William Dunn and John Tredinnick, performed labor for the Red Cloud Consolidated Mining Company, on the property of the Red Cloud Consolidated Mining Company, for the number of days and at the rate of wages mentioned in the complaint, and to the amounts alleged by them respectively, and that they have not been paid for said labor." It was proved that William Dunn worked on the Red Cloud mine at the hoisting works as engineer; that he worked on the hoisting-engine, which lowered and hoisted the men and rock; that the water was raised from the mine by a pump, and that John Tredinnick was "pump-man;" that all the other plaintiffs worked in and upon the Red Cloud mine; that the mine was owned and worked by the Red Cloud Consolidated Mining Company; and, so far as the witness knew, the company had no other property in the mining district. These proofs, with the admissions made, were, in our opinion, quite sufficient to meet the objection above referred to, and justify the judgment which was entered.

The point is made for the appellant Wadsworth that the liens of the plaintiffs are made by the Code subordinate to his lien, and that the court erred in not so treating them.

The Code provides, (section 1188, Code Civil Proc.:) "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated."

It was proved that the entire property known as the "Red Cloud Mine" was made up of what were originally several mining locations, but that these locations or claims had been conveyed to the Red Cloud Consolidated Mining Company, and had been by it consolidated together, and held, worked, and treated as one mine or claim. Under the circumstances shown, we do not think the section invoked applies. It has been common in this state to consolidate two or more mining locations into one claim, and thereafter to treat and work them as one claim. After such a consolidation, the different locations cease to constitute different claims, and become in law, as they are in fact, only parts of one claim. The plaintiffs' labor was performed upon the property as a whole, and they were entitled, as we think, under the proofs, to claim liens upon it as a whole.

We find no error in the record prejudicial to the appellants, and the judgment and orders should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

72 Cal. 97

BUHLERT *v.* SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(No. 11,646.)

(*Supreme Court of California.* February 22, 1887.)

INSOLVENCY—ASSIGNEE IN CONTEMPT FOR DISOBEYING ORDER TO PAY MONEY NOT ASSETS.

Section 67 of "the California insolvent act of 1880," providing that the official undertaking of an assignee in insolvency stands in the place of an undertaking on appeal, does not apply to an appeal taken by such an assignee from a judgment against him, in which it is adjudged that the money ordered to be paid by him forms no part of the assets of his insolvent's estate and the court has jurisdiction in such case to commit the assignee for contempt in disobeying the order.

In bank.

A. D. Splivalo, for petitioner. *J. W. Harding*, for respondent.

THORNTON, J. Application for a writ of review as to order committing petitioner, Buhlert, for contempt of court. In an action of *Sere* v. *McGovern et al.*, pending in the court above named, Buhlert was properly made a party as assignee in insolvency of McGovern. The action was for the settlement of the accounts of a partnership between Sere and McGovern. The property of the firm, it seems, had passed into the hands of Buhlert, as assignee as aforesaid, who took possession of it under an order in the insolvency case, and had, by agreement of all parties, including Sere, been sold by the assignee, from which was realized the sum of $1,588. By the final judgment in the action of *Sere* v. *Buhlert, assignee, et al.*, it was adjudged that plaintiff recover of Buhlert, assignee as aforesaid, the sum of $794, and Buhlert was by the judgment required to pay into court, within 10 days after its rendition, the said sum of money for the use of plaintiff. This order to pay into court the sum mentioned was disobeyed by Buhlert. Thereupon proceedings

were taken against him for contempt of court, and he was adjudged guilty of contempt, and punishment was pronounced against him therefor. The application here is to review and annul this order.

The above facts appear by the return to this court. But it is urged that Buhlert has appealed from the judgment above entered in the case of *Sere* v. *Buhlert et al.*, and has filed an undertaking on appeal in the sum of $300, and that, by a portion of section 67 of the insolvent act, the bond of Buhlert, as assignee, stays all proceedings on the judgment, and no undertaking to stay execution is required, and, in consequence of the foregoing, the court had no jurisdiction to enforce its judgment by a proceeding for contempt. The contention is without anything to support it. Section 67 of the insolvent act has no application to the appeal taken by Buhlert. It applies only to the appeals specified in the section cited, of which the appeal of Buhlert is not one. The court had jurisdiction as to the contempt proceeding, and the application to annul the order of the court committing the applicant for contempt must be denied.

On the argument it was urged that Buhlert's accounts as assignee were still unsettled, and that on such settlement the sum of $1,588 in his hands would be materially reduced. But it should be remembered that Buhlert was the assignee of McGovern; that the money for which Sere obtained the judgment above mentioned was no part of the assets or estate of McGovern, and should not be used to pay the creditors of McGovern, or the costs and expenses attending McGovern's proceedings in insolvency. The money belonged to Sere, and should go to him. This was so adjudged, and we cannot look behind the judgment entered in favor of Sere. If there is any error in the procurement of this judgment, it can be, and will be, considered on appeal from it, should such error appear on the record brought here on such appeal.

The application is denied, and the prooceedings dismissed.

We concur: McFarland, J.; Temple, J.; McKinstry, J.; Sharpstein, J.

Paterson, J., (*concurring.*) The authority of the court to command a judgment debtor to pay into court money sufficient to satisfy the judgment, under any circumstances, and to summarily enforce such command by proceedings for contempt, is by no means clear, even where the debtor is an officer of the court, in another proceeding therein pending. The petitioner makes no complaint on this ground, however, and, considering it waived, I concur.

72 Cal. 91

Kruger and another *v.* Western Fire & Marine Ins. Co. of California. (No. 11,750.)

(*Supreme Court of California.* February 22, 1887.)

Fire Insurance — Receipt of Premium by Agent with Knowledge of Breach of Condition.

Where the agent of a fire insurance company, well knowing that petroleum oil is kept on the premises by the insured, makes out and delivers to him a policy containing a condition that the same shall be void if petroleum oil is kept on the premises, and receives the premium for the policy, his company is estopped from claiming that the policy is void for breach of the condition, and that a waiver by parol cannot affect the written agreement.

Commissioners' decision. Department 2.

Appeal from superior court, San Francisco.

T. C. Van Ness, for appellant. *Geo. Lezinsky*, for respondents.

Foote, C. This was an action to recover upon two policies of insurance. The cause was tried before a jury, who brought in a verdict in favor of the

plaintiffs, upon which a judgment was rendered against the defendant for $1,500, costs, etc. From that judgment an appeal is prosecuted.

From the record it appears that, in the year 1881, Grant Lapham, the agent of the defendant in the county of Alameda, where the plaintiffs kept their stock of goods, was at the place of business of the plaintiffs, and examined said stock; and that on the thirty-first day of August, 1881, after such examination, the defendant issued a policy of insurance upon the stock of goods thus examined by its agent. The testimony of one of the plaintiffs with reference to the transaction was as follows: "Yes, sir; I did have a conversation with him, [meaning Lapham.] First, you know, we insured with another man. The agent came round, and insured us. That was right before the fourth of July. He did not bring round the policy; he kept the policy. During the 4th we did not have any policy at all. Right after the 4th he brought it around. I said: 'You just bring it around now. There is no danger now.' That was before. 'The danger is over now,' I says. 'You can keep it now.' He left it in the store; left it there over a week. I told him I would not accept it. Then, during the week, I read over the policy what he left there. It mentioned something about the coal-oil. During that time Mr. Grant Lapham came around, and said he wanted to insure us. I told him about this. He was a friend of mine. I told him about this that was in the policy. 'What is the use of insuring? We cannot get nothing if we burn out. Because it says there—mentions about the coal-oil.' He says: 'Such a small amount as you keep, that won't be any matter. You don't keep any large amount.' I told him, 'All right; go on and insure us.' Then he brought around the policy, so it was all right. We kept it."

It was further proved that upon the expiration of the policy thus issued, in August, 1881, and at the expiration of each year thereafter, down to and including the issuance of the policies in suit, new policies in the same company, upon the same description of goods, were issued by defendant to plaintiffs. No further conversations with any agent of the defendant were proved, nor were any other policies than those in suit introduced on the trial.

It appeared in evidence that there was an indorsement on said policies as follows:

"Not valid until countersigned by the regularly authorized agent at Oakland, Alameda county, Cal. Countersigned, Oakland.

"GRANT LAPHAM."

The record further shows that during all the times that the policies sued on were in force, and at the time of the fire and loss in the complaint alleged, the plaintiffs kept, stored, used, and sold, upon the premises in which the property described in the policies was during such time kept, the products of petroleum, consisting of illuminating oils; that the said oils were kept in a 10-gallon tank, into which they were poured at the top, and from which, when required by customers, they were drawn through a faucet; that the premises were lighted with said oils in lamps, and that the fire alleged in the complaint was directly caused by the fall of one of the said lamps; that the tank in which said oils were kept was the same tank that had been used by the plaintiffs on said premises during all the times they had carried on business on said premises, and that it had, during all of said times, stood directly opposite, within a few feet of the entrance to said premises, and in full view of every one who entered the same; that no other oils were kept by the plaintiffs on said premises, except those kept in said tank, and plaintiffs also used said tank for the purpose of filling the lamps used for lighting said premises.

The policies of insurance contained, among others, this clause: "C. This company shall not be liable for loss occurring while any of the following-named articles are kept, stored, or used in or on the premises herein described, any

custom or usage of trade or manufacture to the contrary notwithstanding, namely, petroleum and its products."

It will be seen that the plaintiffs, having kept petroleum and its products on the premises in question, although in small quantity, could not recover on the policies, unless it should appear that the condition of the policy upon that subject had been waived by the company. The acts and language of Lapham, as above stated, are not contradicted, nor is it disputed that he was the regularly constituted agent of the company, resident at Oakland, when the first policy of insurance was issued. The policies sued on were unquestionably but renewals of that policy, and we think that an agent so appointed and authorized as he was, was empowered to waive the condition of the policy, and we are of opinion that the plaintiffs were warranted, from what he said and did, in believing, and did believe, that such condition was waived. Lapham was the general agent of the company at Oakland, and authorized to represent it, make contracts of insurance, and transact its business at that place, according to the practice and course of dealing of such corporations. He was authorized to make and did make the original contract of insurance, and the policies in suit, being but renewals of that, are to be affected by his acts as if they were the original contract. *Miner* v. *Phœnix Ins. Co.*, 27 Wis. 693, and cases cited.

The agent of the defendant, authorized to act for them, and by whose acts they were bound, knew when he countersigned and delivered the policy that it was absolutely void, unless he had waived the condition of the policy by means of the alleged existence of which the company now seeks to avoid the payment of the loss. That is to say, the agent and the company took the premium, and yet believed the policy was void. And the company now says: "At the time we took your premium your policy was void, although our agent told you it was not, and induced you so to believe, yet you cannot recover of us the loss you claim, and you cannot be heard to state in evidence what our agent said, as that would be to vary the terms of a written contract by parol testimony." This we think the company is estopped from doing. *Woodruff* v. *Imperial Fire Ins. Co.*, 83 N. Y. 140, and cases cited.

The delivery of the contract, and a breach of its condition, were concurrent acts, if the defendant's theory of the case be correct; and at the moment the contract was entered into it was void, although the party effecting the policy on his goods paid then and there the premium, and was made by the agent to believe that the policy was valid, and the petroleum oil clause waived. The defendant's contention is without force. In the language of a distinguished judge, "we would scarce expect two parties to go through so senseless an act" as is claimed to have been done by the defendant, "if the facts were known to each at the time; but would rather conclude that they had by words or act agreed that the condition should not be considered as binding." *Van Schoich* v. *Niagara Fire Ins. Co.*, 68 N. Y. 436.

We are of opinion that the evidence objected to was properly allowed to go to the jury; that their verdict was in accordance with the facts in evidence, and the charge of the court, which last was not erroneous; that no prejudicial error is shown by the record; and that the judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

72 Cal. 86

SPRECKELS *v.* ORD. (No. 9,703.)

(*Supreme Court of California.* February 22, 1887.)

APPEAL—NO FINDING ON MATERIAL ISSUE—EJECTMENT—LIMITATIONS.

Where, in an action to recover the possession of real property in which defendant pleads the statute of limitations, judgment is rendered for plaintiff without any

passing by the court upon the plea of the statute, and no bill of exceptions is taken embodying evidence tending to show that a finding, if made, must have been against defendant, the judgment must be reversed on defendant's appeal; and an entry on the minutes of a stipulation at the trial by the parties to waive the plea of the statute will not avail to save the judgment, as such an entry constitutes no part of the judgment roll, nor can it be construed as an amendment of the answer striking out the plea.

Department 1. Appeal from superior court, Santa Cruz county.

The deed from Castro to the grantor of the defendant, referred to in the opinion, described the land as follows: "Beginning at the head of the Arroyo de los Borregas, at a blazed oak tree, and running down and along said arroyo to the sea-beach; thence, along the same easterly, to some small trees growing in a small pocket or break in the top of the cliff, one of which is blazed; thence north to a blazed tree and the gulch near by being the first gulch to the east of the Arroyo de los Borregas, running parallel to a blazed oak tree, growing at the head of said gulch; thence westerly, in a direct line, to the place of beginning."

S. W. Holladay, for appellant. *Charles B. Younger*, for respondent.

McKinstry, J. An action to recover the possession of real property. The defendant pleaded the appropriate statute of limitations, contained in certain sections of the Code of Civil Procedure. The appeal is from a judgment in favor of the plaintiff, as well as from an order denying a motion for a new trial, and the court below failed to find upon the issue made by the plea of the statute. Thus the court failed to find upon a material issue. In such cases we can affirm the judgment only when the evidence shows that the finding, if one has been made, must have been adverse to the appellant. No bill of exceptions has been brought up showing what evidence was offered in support of the plea of the statute of limitations, or that none was offered, or that at the trial it was agreed the court should find against the defendant upon the plea, or that the plea of the statute was withdrawn. We cannot say, therefore, that, if the court had found on the issue, the finding would have been against the defendant. If at the trial the counsel for the respective parties, by stipulation entered in the minutes, stipulated "both parties waive any claim by adverse possession, or under the statute of limitations," such entry in the minutes constitutes no part of the judgment roll. Code Civil Proc. § 670. Nor can the entry be construed as an amendment of the answer striking out the plea of the statute. Pleadings must be in writing, subscribed by the party or his attorney. Code Civil Proc. § 446. If a complaint is amended, a copy of the amendment must be filed, etc. Code Civil Proc. § 432. And such has always been the practice with respect to amendments of answers.

For failure to find upon a material issue, the judgment must be reversed.

There is no patent ambiguity in the deed from Castro to the grantor of the defendant, since the blazed tree and the head of the Arroyo de los Borregos are both stated to be at the same point; and so of the blazed tree and the head of the gulch mentioned, When the evidence showed, if it did show, that the head of the arroyo and the blazed tree (both mentioned in the deed as the commencement point) were a considerable distance apart, the ambiguity, hitherto latent, was discovered. It was for the jury, or court sitting as a jury, to find as facts where was the head of the arroyo, and where was the blazed tree; and inasmuch as the tree actually blazed by the parties to the deed, or adopted by them as the point of commencement, was a more certain object than the "head" of the arroyo,—a place somewhat indefinite, and perhaps shifting,—it was the duty of the court to determine, as matter of law, that such tree (if clearly identified) was the controlling monument. Evidence tending to identify the tree was admissible. But, as the cause must go back for a new trial, we decline to express any opinion as to the credibility of the

only witness whose testimony has been brought here, or as to whether his testimony tended to fix the location of the trees, or was sufficient to identify them.

Judgment and order reversed, and cause remanded for a new trial.

We concur: TEMPLE, J.; PATERSON, J.

72 Cal. 89

WITTRAM *v.* CROMMELIN. (No. 11,995.)

(*Supreme Court of California.* February 22, 1887.)

APPEAL—STIPULATIONS EXTENDING TIME FOR SURETIES TO JUSTIFY—WAIVER OF DELAY IN FILING TRANSCRIPT.

Stipulations by a respondent extending the time for the sureties upon appellant's undertaking to justify, after an exception to them has been taken, is not a waiver of any objection to any of the proceedings taken to effect the appeal, and an appeal will be dismissed for failure to file a transcript, irrespective of such stipulations.

Department 1. Appeal from superior court, San Francisco.

Motion to dismiss appeal for failure to file transcript in time.

C. Wittram, for appellant. *B. McKinne*, for respondent.

PATERSON, J. The failure of the sureties on an undertaking on appeal to justify after an exception to their pecuniary sufficiency has been taken, does not render the appeal ineffectual. *Hill* v. *Finnigan*, 54 Cal. 311. It merely operates to avoid the stay of execution of the judgment appealed from. *Schacht* v. *Odell*, 52 Cal. 449.

The stipulation of respondent, therefore, extending the time for appellant's sureties to justify, is not a waiver of any objection to any of the proceedings taken to effect the appeal. The notice of appeal was filed and served on October 6, 1886. On the eleventh day of October, 1886, an undertaking on appeal was filed, and on the fourteenth of the same month the respondent served and filed exceptions to the sufficiency of the sureties. Since that time the justification of said sureties has been postponed from time to time, by stipulation of counsel for the respective parties. No transcript has been filed herein, and the clerk of the superior court certifies "that the appellant has not requested the clerk to certify to a correct transcript of the record in said cause, and that no statement or bill of exceptions on appeal has been filed herein by plaintiff." For this failure to file the transcript within the 40 days prescribed by the rule the motion to dismiss must be granted. Appeal dismissed.

We concur: MCKINSTRY, J.; TEMPLE, J.

72 Cal. 96

HEILBRON and others *v.* SUPERIOR COURT OF TULARE CO., etc. (No. 11,998.)

(*Supreme Court of California.* February 22, 1887.)

CONTEMPT—VIOLATION OF INJUNCTION.

Where, in proceedings for a contempt of court alleged to have been committed by defendant in violating an injunction, the court has dismissed the proceeding, the appellate court will not, in such a proceeding, pass upon the question of whether the court below erred in the construction of the judgment which it held not to have been disobeyed.

Department 2.

A judgment was obtained enjoining defendant in an action, (*Heinlen* v. *Heilbron*, 12 Pac. Rep. 673,) the Last-chance Water-ditch Company, from interfering with the flow of water in a certain slough. Petitioners claimed defendant violated the injunction.

Brown & Daggett, for petitioners. *Atwell & Bradley*, for respondent.

BY THE COURT. Application for writ of mandate to review order of above-named court dismissing a proceeding for contempt, and to command the court to punish the party for the alleged contempt. The court, after hearing the proceeding for contempt, dismissed it, in effect holding that the party proceeded against was not guilty. It is clear to us that the court acted within its jurisdiction. It construed the judgment out of an alleged disobedience to which the proceeding for contempt had its origin, and must have held that the judgment was not disobeyed. The court may have erred in its construction of the judgment, but that would be error which this court cannot pass on in this proceeding.

The application for the writ is denied, and the proceeding dismissed. So ordered.

72 Cal. 99

BEACH v. COOPER and others. (No. 9,287.)

(*Supreme Court of California.* February 22, 1887.)

1. CORPORATION—ACTION BY STOCKHOLDER AGAINST DIRECTORS AND OTHERS FOR FRAUD AND BREACH OF TRUST.

Suit may be brought by a stockholder, on behalf of his corporation, against the directors and others, for frauds, wrongs, and breaches of trust, and for the recovery from them of money of which the corporation has been defrauded, and the corporation be joined as a defendant.

In bank. Appeal from superior court, San Francisco.

This action was brought by Carnie W. Beach, respondent, a stockholder of the Alexander Mining Company, on behalf of said corporation, against J. B. Cooper, A. B. Cooper, George A. Ball, John McNeil, Manuel San Pedro, and the Alexander Mining Company, appellants, for an account and recovery of money of which it was alleged to have been defrauded by the defendants. Judgment for plaintiff. Defendants appeal.

Fox & Kellogg, for appellants. *H. G. Sieberst*, for respondent.

TEMPLE, J. The plaintiff, a stockholder in the Alexander Mining Company, commenced this action against the individual defendants, who are the directors of the company, making the corporation also a defendant. The suit was brought on behalf of the corporation, alleging numerous frauds committed by the directors, and praying an account and a recovery by the corporation of moneys of which it had been so defrauded. Judgment was rendered for the plaintiff, and this appeal is from the judgment, and from an order denying a new trial.

The corporation was formed in 1877, for the purpose of mining, and owned a lode of gold and silver bearing ore in the state of Nevada. It had constructed expensive works upon the mine, mostly upon credit, and was largely indebted, and in the year 1880 found itself financially embarrassed, and the demands against it pressing. Defendants J. B. Cooper, McNeil, and San Pedro owned a large majority of the stock of the corporation. Cooper and San Pedro owned individually several mining claims, located contiguous to or near the mine owned by the corporation. They concluded to sell the mines owned by themselves and the corporation. Accordingly, in June, 1880, Cooper and San Pedro executed a bond for the sale of their individual mining property and two-thirds of the capital stock of the corporation to Baldwin and McLaughlin. The latter sent to New York one Welsh to effect, if possible, a sale of the mines owned by the individuals, and also the property of the corporation. McLaughlin loaned money for the use of the corporation to the amount of $60,000. Defendants Cooper and San Pedro became personally liable for this money. The individual defendants then endeavored to sell the property in New York, and at the same time to borrow, if possible, a large sum of money to meet the urgent demands.

Substantially, it is found that in December, 1880, the defendants caused the

corporation to make a promissory note, payable to one L. E. Chittenden, of the city of New York, for the sum of $250,000, with interest at the rate of 9 per cent. per annum, secured by mortgage upon all the property of the corporation; that the defendant Ball, who was vice-president of the corporation, proceeded to New York, and while there, as the agent of J. B. Cooper and San Pedro, entered into a conspiracy with Brown, Chittenden, and Welsh to cause the note and mortgage to be assigned to Brown for the sum of $140,000; that this purpose was accomplished, and the money was paid to J. B. Cooper individually, and was used by him in violation of his trust, and not paid to the corporation until long afterwards; that, as part of the fraudulent scheme, they caused the corporation to execute another note for $65,000 to Brown, on the fifth day of April, 1881, which was antedated as of December 22, 1880, also secured by mortgage upon the property of the corporation; that there was no valuable consideration whatever for this note received by the corporation; that all these acts were in pursuance of, and part and parcel of, a fraudulent conspiracy of the individual defendants with Chittenden, which was intended to have the effect of increasing their own profits and income, to the loss and expense of the corporation. It is found that the corporation paid both notes in full. The findings also show other smaller sums fraudulently expended by the directors. The complaint does not contain any very distinct charge that the individual defendants did gain anything by the supposed frauds, or that the corporation lost anything. It is said, in general terms, after stating the conspiracies and frauds perpetrated by said defendants, as follows: "Having and being by them intended to have the operation and effect of increasing their own private individual gains, profits, and income, to the loss and expense of said corporation," etc.

The answer contains full and specific denials as to all acts of fraud alleged, and particularly denies that the notes and mortgages were not executed by the corporation or in its interests, or for the individual gain of the defendants, or that the corporation suffered loss thereby. Upon this issue there is no finding. True, it appears that the corporation gave its obligations for $315,000 for a loan for a few months of $140,000. This was a very suspicious transaction, and would of itself go a great way towards the proof of fraud. But there was an attempt at the trial to show that the transaction was not really a disadvantage to the corporation; that it was heavily indebted, and the debts were pressing, and that it was necessary to have $140,000 at once to save the property of the corporation; and that the effect of the loan was to save its property from being sacrificed to pay the debts, and that thereafter it was sold for a large sum, the debts all paid, and a surplus left for the stockholders. It is not necessary now to say that such facts were satisfactorily proven; but here is a material issue upon which there is no finding.

In the ninth finding it is found that the individual defendants did not, in 1879, 1880, or 1881, fraudulently or otherwise, abstract or appropriate to themselves any money from the funds of the corporation save and except the sum or sums thereinafter specifically set out. The findings after that contain the findings the substance of which we have stated, but no finding of any moneys abstracted by the defendants. There is no finding that the defendants or any of them did receive, might have received, or ought to have received, anything whatever through or in consequence of the frauds charged against them. There is no order for an account to be taken to ascertain such supposed gains. The suit is brought for an account for the frauds, wrongs, and breaches of trust, and for the sums received by the defendants, or such other sums as they received, or might or ought to have received, and all the proceeds and fruits thereof. Under the issues made, we think the findings do not sustain the judgment.

As to the claim that the corporation is not before the court, it is enough to say, for the purposes of the suit, the plaintiff represents the corporation.

This is naturally subject to many limitations and qualifications, but it is the theory of such action that the legal agents of a corporation, refusing or being disqualified to act, the stockholders may assert their rights through an action in behalf of the corporation. We are not called upon to say how far such a proceeding concludes the corporation, but it is plain that the plaintiff and the defendants continue to be the real adverse parties. The notice of appeal was properly served on the attorney for the plaintiff, and such an appeal necessarily brings up also the corporate defendant, and in such a proceeding it would seem that at no stage can that defendant be dismissed from the case without working a discontinuance.

The judgment is reversed, and a new trial ordered, with leave to either party to amend their pleadings, if so advised.

We concur: McFARLAND, J.; McKINSTRY, J.; THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.

72 Cal. 104

FOOT, Adm'r, etc., *v.* MURPHY. (No. 9,485.)

(*Supreme Court of California.* February 23, 1887.)

1. EJECTMENT—TITLE—EVIDENCE—POSSESSION.

Where, in an action of ejectment in which neither party shows any paper title, it is shown that plaintiff's decedent entered upon the land 10 years previously, and fenced it on all sides except where it abutted on his own land, which possession was continued by his administrator till ousted by defendant, a state of facts is shown sufficient to warrant a judgment for plaintiff.

2. SAME—POSSESSION OF THIRD PARTIES.

In an action of ejectment, where neither party claims under a paper title, evidence offered by defendant tending to show that, prior to plaintiff's taking possession, the land had been in the possession of other parties, is immaterial and inadmissible.

THORNTON, J., dissenting.

Commissioners' decision. In bank.

Appeal from superior court, San Benito county.

Burchard & Cothran and *Burchard & Scott*, for appellant. *Briggs & Hawkins*, for respondent.

FOOTE, C. This is an action of ejectment, brought by Joseph Foot, as the administrator of Jose Ignacio Roze, deceased, against A. S. Murphy, to recover possession of certain lands of the decedent's estate. The plaintiff obtained judgment for the recovery of the premises, one dollar damages, and the costs of the action. From that, and an order denying him a new trial, the defendant has appealed.

Neither party to the action claimed or showed any paper title to the premises, but the plaintiff relied upon his right of *prior* possession, from which he claimed to have been unlawfully ousted by the defendant, to sustain his contention. It is contended by the defendant that the findings do not sustain the judgment. They show, substantially, that the plaintiff's decedent entered upon the land and took possession of the same, 10 years prior to the first day of April, 1883; that this possession was continued by the plaintiff, as administrator, until his ouster by defendant; that the land was subjected to the will and dominion of the decedent and said administrator for the purpose to which it was adapted,—that is, the grazing of cattle; that the former inclosed it with a fence on all sides, save that on which he owned other land, which other land was used by them for grazing in conjunction with that in dispute; that they excluded all other persons from using it, and exclusively enjoyed its advantages for grazing purposes by means of the fence and herders, keeping their own cattle upon the land and other cattle away from it, which state of facts was sufficient to warrant the judgment. *Sheldon* v. *Mull*, 7 Pac. Rep. 710, and cases cited.

It is true that the defendant claimed a prior possession, and showed that, at one time, anterior to that of the plaintiff, he had such possession; but the court found that such possession had been abandoned before that of the plaintiff commenced, and we think the evidence justified the finding. The finding of abandonment appears under the heading of "Conclusions of Law," but it is evidently a mere finding of a fact. Perhaps it is unfortunate that it, as well as other findings strictly of facts, appear under that same heading; but that does not constitute them conclusions of law. We are of opinion, also, that the court found upon all the material issues raised by the pleadings.

The defendant also assigns for error the refusal of the court to allow Jamison, a witness, to answer this question: "Do you know why Anderson left?"—claiming that its answer would tend to show defendant's claim of prior possession. But we cannot agree with him. It was not in issue or claimed that Anderson had any title or transferred any to the defendant, and the former could not transfer any right to the latter by a mere abandonment of the premises. The testimony of Domingo Roze, the brother of the deceased, as to conversations between himself, the former, and the defendant, were strictly in rebuttal of the testimony which the defendant had introduced, tending to show that the deceased had admitted the former's prior right, and disclaimed any on his own part. The question put to that witness, "Did your brother ever say he claimed the lands north of the gulch?" was answered by him in the negative, hence no detriment accrued to the defendant. The answer that he gave, viz., "He pointed out his inclosure," was not objectionable. Upon the cross-examination of the same witness this question was asked: "Was not the land in dispute occupied by another person when you say your brother and Murphy had their conversation?" It was objected to, and the objection sustained, and of that, also, the defendant complains, but, as we think, without sufficient grounds. This was an action brought solely on the prior possession of the plaintiff, against the defendant as a mere trespasser, and the latter, therefore, could not justify his wrongful act by showing title in another. *Bird* v. *Lisbros*, 9 Cal. 1.

The testimony of Mr. Briggs, and the documentary evidence introduced through him, were admissible as tending to rebut the defendant's evidence, which went to show an acknowledgment of his prior right by the deceased. The defendant also contends that the court should have allowed him to have been heard to testify in denial of the evidence given by Domingo Roze, as to the conversation detailed by the latter, in rebuttal. If it appeared satisfactorily from the record that this evidence had been new matter, we should say that the point was well taken; but it was not new matter, being in rebuttal of the claim which the defendant had during the trial, by evidence before that time, advanced, that the deceased had admitted in a conversation that his right was subordinate to that of the defendant.

No prejudicial error appearing by the record, the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J., dissenting.

72 Cal. 107

Estate of BRISWALTER, Deceased. (No. 11,774.)

(*Supreme Court of California.* February 23, 1887.)

APPEAL—PROBATE CONTEST—HARMLESS ERROR IN INSTRUCTION.

In proceedings to contest a will, brought by a party claiming to have been married to the testator, an instruction by the court on the point of what constitutes

legal marriage at the time the relation was alleged to have existed, even if erroneous, is no ground for reversal, where it is shown that the relation between petitioner and deceased was *not* marriage under any construction of the law upon that subject.

In bank. Appeal from superior court, Los Angeles county.

Wells, Van Dyke & Lee and *Wicks & Bentley*, for appellant. *Glassell, Smith & Patton* and *Bicknell & White*, for respondents.

McFARLAND, J. Andre Briswalter died April 20, 1885, leaving a will in which the respondents Hellman, Hammel, and Denker were named as executors, who petitioned to have it admitted to probate, and for letters testamentary. The appellant, calling herself Celedonia Guirado de Briswalter, and claiming to be the surviving wife of said Andre Briswalter, deceased, filed written grounds of opposition to the probate of said will. Respondents then filed an answer and petition, in which they denied that appellant was the surviving wife of the deceased, or had any interest in his estate, and objected to her right to make a contest of the probate of said will, and prayed that said contest be dismissed. The other respondents, Louis and Christina Mesmer, two of the beneficiaries under the will, also filed similar objections to the hearing of the contest. The appellant filed an answer averring specifically that she was such wife. The issue thus made was submitted by the court to a jury, who found that the appellant was not the surviving wife of said deceased. Appellant moved to set aside the verdict, and for a new trial of said issue, and, her motion having been denied, she appeals from the order denying the new trial, and also from the judgment and order of the court dismissing said contest, and admitting said will to probate.

The only ground for reversal contended for by appellant which we deem it necessary to particularly notice is the alleged error of the court in instructing the jury what constituted legal marriage at the time when that relation is claimed to have existed between appellant and the deceased. It was admitted by appellant that there never was any ceremony between deceased and herself before any officer or person authorized to solemnize marriages; but she testified that, commencing in the year 1861 and ending in 1864, there were such facts of intimacy and cohabitation and mutual assumption of the marital relation by and between them as constituted in law a marriage. Now, the court instructed the jury (substantially) that prior to January, 1873, there could be no legal marriage in this state without the ceremony and solemnization required by the statutes then in existence; and that although, without direct evidence of such solemnization, it might, under some circumstances, be presumed from the existence of other facts, yet that such presumption would be overcome by the admission or clear proof that the conditions necessary to a legal marriage never were, in fact, complied with. But, whether or not this instruction was erroneous,—and we do not decide that it *was* erroneous,—the evidence, admissions, and proven facts in this case show clearly that the relation between the appellant and the deceased was *not* marriage under the most liberal construction of the law upon that subject. If the instruction objected to had not been given at all, the jury would have been bound to find as they did; and if they had found for appellant their verdict should have been set aside as against the evidence. The proof is overwhelmingly to the point that appellant and the deceased never publicly assumed the marriage relation towards each other; that they never lived as husband and wife "in the face of their neighbors;" that she did not take and was not known by his name; and that the relation between them was generally recognized as meretricious. Her own acts show that she did not consider the relation that of marriage; because after she quit living with the deceased, and 10 years before his death, upon a marriage license regularly issued by the county clerk of Los Angeles county, in which she was named "Celedonia Wilburn," she was solemnly married by a justice of the peace to one Andres Souer, with whom she has lived ever since

as his wife. Under these circumstances there is no need of a critical examination of abstract questions about the law of marriage. If we deemed the instruction to the jury erroneous, we would not reverse the judgment; because, under any instructions upon the subject which we could hold to be correct, the verdict should have been for respondents. *Green* v. *Ophir C., S. & G. M. Co.*, 45 Cal. 527.

With these views of the case, it is unnecessary to note minor points made by counsel, further than to say that we see no material errors in the ruling of the court below.

Judgment and orders affirmed.

We concur: MORRISON, C. J.; THORNTON, J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

72 Cal. 110

DEMICK *v.* CUDDIHY. (No. 9,708.)

(*Supreme Court of California.* February 23, 1887.)

MORTGAGE—PLEADING AND PRACTICE—CROSS-COMPLAINT.

12 Pac. Rep. 287, affirmed.

In bank. Appeal from superior court, Del Norte county.

L. F. Cooper, for appellant. *R. G. Knox*, *W. H. H. Hart*, and *Aylett R. Cotton*, for respondent.

BY THE COURT. For the reasons given in the opinion of Department 1, filed December 7, 1886, (12 Pac. Rep. 287,) the judgment and order are reversed, and cause remanded for a new trial, and with leave to the parties to apply to the court below for leave to amend their pleadings, if they shall be so advised.

2 Cal. Unrep. 141

BURGESS *v.* SUPERIOR COURT. (No. 11,887.)

(*Supreme Court of California.* February 23, 1887.)

APPEAL—JUSTICE OF THE PEACE—CODE CIVIL PROC. CAL. § 975.

In California, on an appeal from a justice's court to a superior court, where all the papers in the case have been transferred except a copy of the justice's docket, the superior court has jurisdiction to order the transfer of a copy of the justice's docket, under Code Civil Proc. Cal. § 975.

Department 2.

Prohibition to restrain superior court from trying a case on appeal from justice's court.

J. W. Turner, for petitioner. *J. W. Bartlett*, for respondent.

BY THE COURT. It appears by the answer of respondent that an appeal has been duly perfected to said superior court from a judgment of a justice of the peace, who transferred all the papers in the case except a copy of his docket, which the superior court has made an order to have transferred as the law requires. Section 975, Code Civil Proc. Petitioner demurs to said answer, and upon the issue so raised the matter is submitted. The answer, in our opinion, shows that respondent is not acting without, nor in excess of, its jurisdiction.

The demurrer is overruled.

2 Cal. Unrep. 742

CASWELL *v.* HARRIS. (No. 8,591.)

(*Supreme Court of California.* February 23, 1887.)

PLEDGE BY OFFICERS OF BANK—ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD.

Where, on the question of an alleged fraudulent pledge made by the president and secretary of a corporation for the benefit of certain creditors, the court below

directs the jury that said president and secretary had power to make the pledge, and the jury find the same to be fraudulent, a judgment affirming such verdict will not be disturbed, the question of fraud being for the jury, and their verdict not necessarily contrary to the direction of the court.

Department 2.

This is an action in replevin, brought by B. F. Caswell, appellant, as a pledge-holder of certain personal property, against defendant, who took the said property as sheriff under two writs of attachment. The property belonged to a corporation named the Bear-creek Lumber Company, which turned it over, by way of pledge, to plaintiff, for the benefit of all its creditors except mortgage creditors. This pledge was to replace a prior agreement, assented to by all the creditors, placing the business in the hands of a trustee, who had not accepted. This agreement restrained the creditors from suing. The agreement to accept the pledge was signed by certain of the creditors only. Immediately after this pledge, the mortgage creditors brought suit by attachment, claiming that their security was worthless. They attached this property in that suit. They obtained judgment, and defendant, as sheriff, sold the property. Some of the other creditors also placed a second attachment on the property, and obtained judgment, notwithstanding the agreement, claiming it was void by reason of some of the signers to it being paid in full, in pursuance of a secret understanding to that effect when the agreement was signed. This was proved on the trial of the case of *Kauffmann* v. *Bear-creek Lumber Co.* Both Harmon and Kauffmann claimed the pledge was void, because made to defraud the creditors of the company. Judgment was rendered for defendant. Plaintiff moved for a new trial, on the ground that there was no evidence to support the verdict, and also on the ground of erroneous rulings of the court. The motion being denied, this appeal was taken.

S. F. Leib, *C. D. Wright*, and *Moore & Laine*, for appellant. *L. Archer*, *D. M. Delman*, and *J. A. Yoell*, for respondent.

THORNTON, J. Conceding that the court below erred in its direction to the jury, in which it affirmed the power of the president and secretary of the Bear-creek Lumber Company, a corporation, to make a pledge of its property in satisfaction of a just claim of the company, still the jury might have based their verdict on the conclusion that such assignment was void as made with intent to hinder, delay, and defraud creditors. On this issue certain circumstances were before the jury for their consideration. The jury were the proper triers of the intent, for the fraudulent intent of such an assignment is always a question of fact, and not of law, and is so expressly declared by statute in this state. Civil Code, § 3442. See section 3449. In this view, the jury might, and no doubt did, find a verdict which was not at all in conflict with any instruction given them. The learned judge of the court below does not appear to have thought that the jury disobeyed any instruction which was given them. The motion for a new trial was denied by him, and we think properly denied. We find no error in the record.

The judgment and order are affirmed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

2 Cal. Unrep. 744

FITZGERALD *v.* LIVERMORE and others. (No. 11,322.)

(*Supreme Court of California.* February 25, 1887.)

WITNESS—HUSBAND AND WIFE—REVERSAL.

In an action for the recovery of personal property, the admission of the testimony of plaintiff's wife against him, without his consent, is ground for reversal, under Code Civil Proc. Cal. § 1881.

Department 1. Appeal from superior court, Alameda county.

F. B. Ogden, for appellant. *Saml. B. Wiggin*, for respondent.

By the Court. This is an action for the recovery of personal property. The wife of the plaintiff was called as a witness for the defendant, and gave testimony against the plaintiff without his consent. Her testimony was material, in fact covered nearly all the matters included in the findings of the court. The ruling admitting the testimony over plaintiff's objection was duly excepted to. We think the evidence in regard to the proceedings in insolvency was incompetent, and the objection on that ground should have been sustained. It is plain that the findings would not support a judgment for plaintiff.

Judgment and order reversed, and a new trial ordered.

72 Cal. 117

People *v.* Huff. (No. 20,238.)

(*Supreme Court of California.* February 25, 1887.)

1. Criminal Practice—Appeal—Record—Omissions in Minutes.
 Where, on an indictment for murder, the minutes of the court show the following: "Thereupon the defendant and the jurors go in charge of a sworn officer to inspect the premises where the crime was committed, and, subsequently returning into court, were called, and all answered to their names,"—error will not be presumed from the fact that the minutes do not show that the "sworn officer" in charge was the sheriff, or that the place of the crime was shown by a person appointed by the court for that purpose, or that the defendant's counsel and the judge of the court were present, but the error must be affirmatively shown.
2. Same—Sentence—Recommendation to Mercy.
 Where, on trial of an indictment for murder, the jury render a verdict of murder in the second degree, therein recommending the defendant to the mercy of the court, which passes a judgment of imprisonment for life, the appellate court cannot reverse for that reason.

In bank. Appeal from superior court, San Francisco.

L. I. Mowry, *W. W. Foote*, and *T. C. Coogan*, for appellant. *The Attorney General*, for respondent.

Belcher, C. C. The defendant was accused of the crime of murder, committed in the city and county of San Francisco. At the trial it was admitted that he committed the homicide charged, by shooting the deceased with a pistol, but it was claimed that the killing was justifiable, or, at most, amounted only to manslaughter. He was, however, convicted of murder in the second degree, and sentenced to imprisonment for life. He moved for a new trial upon all of the statutory grounds, and now prosecutes this appeal from the judgment and order denying his motion. During the progress of the trial, and after several witnesses had been examined for the prosecution, the minutes of the court, as kept by the clerk, show that "thereupon the defendant and the jurors go, in charge of a sworn officer, to inspect the premises where the crime was committed, and, subsequently returning into court, their names were called, and all answered to their names." Nothing else in reference to this matter is found in the transcript, but it is claimed that error should be presumed, because it does not appear that the "sworn officer" in charge of the jury was the sheriff, or that the place where the offense was charged to have been committed was shown to the jury by a person appointed by the court for that purpose, or that the defendant's counsel and the judge of the court were present. The settled rule is that error is not to be presumed, but must affirmatively appear in the record, and all omissions and uncertainties in a bill of exceptions are to be construed against the party presenting it. *People* v. *Williams*, 45 Cal. 25. It will be presumed, therefore, in the absence of a showing to the contrary, that the sworn officer who accompanied the jury was the sheriff or his deputy; that the place which the

jury were sent out to view was properly shown to them by a person appointed by the court for that purpose; and that, if need be, the counsel and judge were present.

No instructions appear to have been asked on either side, but the court charged the jury at length in reference to murder in both degrees,—manslaughter and justifiable homicide. Counsel for defendant excepted to sundry portions of the charge, and now assigns them as errors. After carefully reading the whole charge, we fail to see how it could have misled the jury. Detached passages are open to criticism, but, as a whole, we think it stated the law of the case fairly and correctly. The jury by their verdict recommended the defendant to the mercy of the court, and yet he was sentenced to undergo imprisonment for life. It may be that his punishment is more severe than it ought to have been under the circumstances disclosed by the evidence, but we cannot reverse the judgment for that reason. That is a matter which can only be considered by the governor in case of an application for commutation of sentence or pardon.

No other grounds for reversal being called to our attention, the judgment and order should be affirmed.

SEARLS, C. I concur.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

71 Cal. 353

In re Disbarment of TYLER. (No. 11,442.)

(*Supreme Court of California.* February 6, 1887.)

ATTORNEYS—DISBARMENT BY SUPREME COURT—MOTION FOR NEW TRIAL.

Where the supreme court has, by its judgment, disbarred an attorney, a motion for a new trial will not be heard by it.

In bank.

This was a motion for a new trial of the case of *In re Tyler*, 12 Pac. Rep. 289, which was heard before the supreme court of California, December 3, 1886, when said attorney was disbarred by the judgment of the supreme court.

Pillsbury & Blanding, for complainant. *James Crittenden*, for respondent, Tyler.

BY THE COURT. The motion for a new trial is not the proper remedy in this cause. Considered as a petition for a rehearing, we see no reason to grant it.

Motion for a new trial and a rehearing denied.

2 Cal. Unrep. 740

Ex parte CASS. (No. 20,279.)

(*Supreme Court of California.* February 26, 1887.)

MUNICIPAL CORPORATIONS — COUNTY ORDINANCE — DEFINING WHARFAGE AS INCLUDING TRANSPORTATION.

An ordinance passed by county supervisors, regulating wharfage charges, defining "wharfage" as including payment for transportation over the wharf, as well as for the privilege of landing on it, and affixing a penalty for violation of the ordinance, is valid.

Department 2. Petition for writ of *habeas corpus*.

The petition alleged a prosecution, conviction, and sentence (under which petitioner was imprisoned) in the justice's court of San Luis Obispo township, for a violation of an ordinance passed by the supervisors of San Luis Obispo county, October 9, 1885, regulating wharfage charges, making it an offense to charge more than the rates specified, and defining "wharfage" as

including payment for transportation across and along the wharf. It set out the evidence upon which the conviction was had, showing that the extra charge made by petitioner, above the rate fixed by the ordinance, was for transporting the merchandise along and across the wharf, a distance of about 900 feet, by a rail and tram-way on cars drawn by a horse; that an appeal was taken from the conviction to the superior court, which affirmed the judgment of the justice's court; that petitioner had also applied to the superior court for a writ of prohibition to prevent the justice's court from proceeding with the trial, which application was denied; "that said justice's court had no jurisdiction of the subject-matter embraced in the complaint against this petitioner; that said complaint did not state facts sufficient to constitute a crime or public offense; that the said board of supervisors had no power to make, enact, or pass the ordinance hereinbefore set forth; that petitioner has not legally been found guilty of any crime or public offense." The principal ground for claiming a release seemed to be that the ordinance could not legally define "wharfage" as including charges for transportation. It was also claimed that a penalty could not be affixed for violation of the ordinance.

Jas. M. Wilcoxson, for petitioner. *Graves, Turner & Graves*, for respondent.

BY THE COURT. We can find no reason for the discharge of the petitioner in this case. He is therefore remanded to the custody of the proper officer. So ordered.

(72 Cal. 114)

In re LINEHAN. (No. 20,281.)

(*Supreme Court of California.* February 25, 1887.)

MUNICIPAL CORPORATIONS—ORDINANCE—VALIDITY—COWS IN CITY—CONST. CAL. ART. 11, § 11; ACT APRIL, 25, 1863.

An ordinance prohibiting any person from keeping more than two cows within certain parts of the city of San Francisco is valid, under Const. Cal. art. 11, § 11, providing that "any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws," and the act of April 25, 1863, authorizing the board of supervisors of San Francisco to regulate or exclude occupations detrimental to good morals, or contrary to order, or dangerous to the public safety.

Commissioners' decision. Department 1.

On *habeas corpus*.

Davis Louderback, for petitioner. *Geo. D. Shadburne*, for respondent.

SEARLS, C. The petitioner, John Linehan, was convicted in the police judge's court of the city and county of San Francisco, upon a complaint charging him with keeping more than two cows within certain limits in said city and county, in violation of order No. 1,587 of the board of supervisors of said city and county, as amended by order No. 1,705. A fine was imposed upon defendant, and, in default of payment thereof, he was adjudged to be imprisoned, etc. He appealed to the superior court, where the judgment was affirmed, and, upon the return of the *remittitur*, he was committed in default of payment, and, being in custody, sues out this writ.

Section 1 of said order is as follows:

"Section 1. Any person violating any of the provisions of this order shall be deemed guilty of a misdemeanor, and be punished by a fine not exceeding $1,000, or imprisonment not exceeding six months, or by both such fine and imprisonment."

Section 63, as amended, reads as follows:

"Sec. 63. No person or persons shall keep, or cause to be kept, any swine whatsoever, nor more than two cows, within that portion of the city and county of San Francisco bounded as follows: Commencing at the intersection

of Lombard street with the waters of the bay; thence, along Lombard street, to Broderick street; thence southerly, along Broderick street, to Waller street; thence easterly, along Waller street, to Devisadero street; thence southerly, on Devisadero street, to Ridley street; thence easterly, on Ridley street, to Castro street; thence southerly, on Castro street, to Seventeenth street; thence westerly, on Seventeenth street, to Douglass street; thence southerly, on Douglass street, to Twenty-sixth street; thence easterly, on Twenty-sixth street, to Harrison street; thence northerly, along Harrison street, to Channel street; thence, along Channel street, to the waters of the bay; thence following the water front and waters of the bay to the point of commencement."

Under our constitution, "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Article 11, § 11. By an act of the legislature of the state of California, entitled "An act to confer further powers upon the board of supervisors of the city and county of San Francisco," approved April 25, 1863, it is provided that the board of supervisors shall have power by regulation or order, among other things, "to authorize and direct the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of public health, and the prevention of contagious diseases; * * * to prohibit and suppress or exclude from certain limits, or to regulate, all occupations, houses, etc., * * * which are against good morals, contrary to public order and decency, or dangerous to the public safety."

Here, then, we have, as authority for the proceedings of which petitioner complains, (1) the provision of the constitution authorizing the city and county to make and enforce such local, police, sanitary, and other regulations as are not in conflict with general laws; (2) the statute from which we have quoted, expressly authorizing the board of supervisors to regulate or exclude occupations, etc., detrimental to good morals, or contrary to order, etc., or dangerous to the public safety; and (3) the order or ordinance against keeping more than two cows within certain portions of the city, for the violation of which defendant was convicted.

Subject to constitutional limitations, legislative authority extends to the suppression or regulation of those things which are hurtful to the general good, and, as a general rule, the law-making power will be deemed the exclusive judge of what is or is not hurtful. *Ex parte Andrews*, 18 Cal. 679. The necessity of legislation to restrict the unlimited herding of swine and cows in thickly populated districts is too apparent to need argument. Keeping swine or cows is, or may be, an occupation, and, within certain limits, may be detrimental to health and dangerous to the public safety. We suppose these animals are kept in large numbers, not for the company, but for the profit they afford; and, when so kept, it is a business—an occupation—equally with any other.

There is no constitutional question involved in this case which has not been in effect and principle passed upon heretofore by this court. *Ex parte Heilbron*, 65 Cal. 609, 4 Pac. Rep. 648; *Ex parte Shrader*, 33 Cal. 279; *Ex parte Smith*, 38 Cal. 702; *Ex parte Casinello*, 62 Cal. 538; *Johnson* v. *Simonton*, 43 Cal. 242; *Ex parte Andrews*, 18 Cal. 679.

We deem the reasoning in these cases conclusive of the several positions assumed on behalf of the petitioner here, and are of opinion the prayer of the petition should be denied, and the petitioner remanded to the custody of the chief of police.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the petitioner is remanded.

2 Cal. Unrep. 740

KIRBY *v.* HARRINGTON. (No. 12,011.)

(*Supreme Court of California.* February 15, 1887.)

APPEAL—DAMAGES ON DISMISSAL.

On the dismissal of an appeal, damages will not be awarded in the respondent's favor on his *ex parte* affidavit that he has been informed and believes the appeal to be without merit.

Department 1. Appeal from superior court, San Francisco. Mortgage foreclosure.

A motion to dismiss the appeal was made upon a certificate, in the form required by rule 4 of the court. It was not contended that the certificate was insufficient. The only opposition of appellant was to the imposition of damages. Respondent's (plaintiff's) affidavit was to the effect that the action was brought to foreclose a mortgage; that defendant admitted a balance due, for which judgment was entered; that plaintiff was about to enforce the judgment by proper process, when defendant took an appeal, December 20, 1886, and more than 40 days elapsed since appeal was perfected; that plaintiff was put to the expense of extra counsel fees; "and affiant is informed, and on such information avers, that said appeal is wholly without merit, and taken solely for the purpose of delay." Prayer for damages.

Matthew I. Sullivan, for appellant. *John J. Coffey*, for respondent.

BY THE COURT. The certificate of the clerk of the superior court is in due form, and the appeal should be dismissed. But the application of respondent

for damages on appeal must be denied. We are not authorized to decide an appeal to be frivolous on the *ex parte* affidavit of respondent that he has been informed and believes it to be without merit. *Vaughn* v. *Werley*, 62 Cal. 181.

Appeal dismissed.

72 Cal. 120

WILLIAMS *v.* SOUTHERN PAC. R. CO. (No. 9,272.)

(*Supreme Court of California.* February 25, 1887.)

NEGLIGENCE—RAILROAD COMPANY—PERSON ON TRACK—STOPPING TRAIN—NONSUIT.

Plaintiff was struck by a train while lying beside a railroad track. The engineer testified that, when approaching the place of the accident, he first saw a bundle of blankets, and kept his eye on it for about half a minute before he saw plaintiff; that he then did his utmost to stop the train as quickly as possible, sounding the whistle, among other things. It was claimed that he should not have sounded the whistle, as, by doing so, he lost time in stopping the train. *Held*, upon a rehearing, that there was no evidence of negligence on defendant's part to go to the jury.[1]

In bank. Appeal from superior court, Monterey county.

On reargument. See 11 Pac. Rep. 849.

S. F. Geil and *H. V. Morehouse*, for appellant. *D. M. Delmas*, for respondent.

TEMPLE, J. After reargument, we still adhere to the former conclusion in this case. As the motion for nonsuit was not granted, the court will now examine the testimony in the whole case in reviewing the ruling of the court. It does not become important now, therefore, to inquire whether the case was one which ought to have been taken from the jury, on the proposition that, when the evidence is not conflicting, the question as to contributory negligence is a question of law for the court. There was a motion for a new trial, and a statement of the case, and the point was there made that the evidence was insufficient, because it failed to show negligence on the part of the defendant, and did show that the injury was caused by the negligence of the plaintiff. On the whole case, can the judgment be sustained? This really depends upon the inquiry as to whether there was a real conflict in the evidence on the point of negligence.

It is admitted that the plaintiff was grossly negligent, and that such negligence contributed to the accident; but it is claimed that, notwithstanding such gross negligence on the part of plaintiff,—in fact, in consequence of the danger to plaintiff occasioned solely by his own gross negligence,—the defendant owed him a certain duty, which it failed to perform, and that the injury would not have been received if such duty had been performed.

Counsel concedes that the defendant did not owe plaintiff, who was a trespasser upon its roadway, the duty of looking out for him. It had a right to assume that no trespasser would be on its track. If, for instance, the engineer had been reading instead of being on the lookout, and therefore had not seen the plaintiff, and in consequence had run over and crippled him, the defendant would not have been liable, although it were admitted that had the usual lookout been kept up the engineer would have seen plaintiff, and would easily have prevented the accident.

Taking the admitted negligence of the plaintiff as a premise, *i. e.*, as a circumstance, in view of which the defendant is to be judged, did the defendant, even then, fail in some duty which it owed the plaintiff? This will depend upon two propositions: Did the engineer, as a matter of fact, see the plaintiff, helpless or unjudging, in a dangerous position, in time to have stopped the train? And, having so seen him, did he use ordinary diligence to stop the train?

[1] As to the liability of railroad companies for injuries sustained by trespassers on their tracks, see Little Rock, M. R. & T. Ry. Co. v. Haynes, (Ark.) 1 S. W. Rep. 774, and note.

The plaintiff was lying beside, not on, the track. There were weeds where he was lying, but not sufficient to prevent his being seen. The plaintiff proved that such an object might have been seen in that position at a distance of 400 or 500 yards by the engineer, if he had been looking for it. After the accident, the plaintiff was picked up about 15 feet from the crossing; and there was a clot of blood on the rail at the crossing. The whistle was sounded 400 or 500 feet from the place of the accident, and the engine was stopped right abreast of where the plaintiff was lying. It appears that the plaintiff, besides having his foot crushed, was injured somewhat on his head and one shoulder. Here the evidence on the part of plaintiff really ended. Plaintiff's own testimony was more favorable to the theory of the defendant. He thought he was sitting on the end of a tie outside the track. There is here no evidence whatever that the engineer saw plaintiff, except the fact that the train was stopped, and no evidence of want of diligence. The engineer, however, testified for defendant that, when he approached the place of the accident, he first saw the bundle of blankets by the road, and kept his eye on it for about a half minute before he saw the plaintiff. That, as soon as he saw that the plaintiff was in a dangerous position, he used every effort, and as quickly as possible, to stop the train. There is no conflict as to what the engineer did, unless it consists in the fact that it is shown that he sounded the whistle; by doing which, it is claimed, he lost time in stopping the train. But we cannot now say that any time was lost by this, or that it was not proper, under the circumstances, both as an alarm to plaintiff, whom the engineer did not know to be absolutely unjudging, and notice to the train hands to assist at the brakes. Then, the engineer was not called upon for the highest possible diligence, but only for ordinary diligence; and even should it appear in judging afterwards that something different might perhaps have been better, it would not make the case against the defendant. We do not think there is here a substantial conflict, if it can be said that there is a conflict at all. The rule is not, as counsel seems to suppose, that any degree of conflict in the evidence, however slight, will avail to support a verdict and judgment on appeal. Where we can plainly see that the conflict is not a substantial one, we do not hesitate to interfere. Indeed, the testimony of the witnesses in the case discloses no conflict at all. The evidence, which it is claimed tends to prove neligence on the part of the engineer, consists simply of inferences, which are uncertain and remote, and required considerable ingenuity on the part of counsel to make apparent. Admitting the general rule to be that the case will not be taken from the jury, where there is any evidence tending to show negligence capable of producing any degree of uncertainty, we think, even tested by that rule, a new trial ought to be granted in this case.

Judgment and order reversed, and a new trial ordered.

We concur: MORRISON, C. J.; PATERSON, J.; MCFARLAND, J.

I concur in the judgment: MCKINSTRY, J.

I dissent: THORNTON, J.

72 Cal. 124

PACKARD *v.* WILSON and others. (No. 9,459.

(*Supreme Court of California.* March 1, 1887.)

COSTS—PERCENTAGE—DEMURRER.

A case litigated on demurrer comes within St. Cal. 1865-66, p. 68, providing that a percentage of 5 per cent., to the extent of $100, may be allowed to the prevailing party for costs in *litigated* cases.

Department 2. Appeal from superior court, San Francisco.

This was an action to foreclose a lien on a promissory note. The complaint alleges that on the eleventh day of August, 1883, the defendants John D. Wilson and John Elbert jointly made their certain promissory note, as follows:

"$6,738.96. SAN FRANCISCO, August 21, 1883.

"On the twenty-first day of October, 1883, without grace, for value received, we jointly and severally promise to pay to A. Packard or order, the sum of six thousand seven hundred and thirty-eight 96-100 dollars, in U. S. gold coin, with interest thereon from date until paid, at the rate of one per cent. per month. JOHN D. WILSON.

"JOHN ELBERT."

—And did then and there deliver the said promissory note to the said plaintiff; that the said plaintiff is now the lawful owner and holder of the said promissory note; that no part of the said promissory note, or of the interest thereon, has been paid; that there is now due and unpaid to the said plaintiff on said promissory note the sum of $6,738.96, with interest from August 21, 1883, at the rate of 1 per cent. per month; that the said defendants, to secure the payment of the said promissory note, according to the tenor thereof, did, at the same time, assign to the plaintiff all their right, title, and interest in a certain promissory note, then and now in the possession of plaintiff, of the Mono Lake Hydraulic Mining Company, bearing date the thirteenth day of November, 1882, the following being a copy of the same with the several indorsements thereon:

"$45,241.60. SAN FRANCISCO, November 23, 1882.

"Six months after date, for value received, the Mono Lake Hydraulic Mining Company Corporation promise to pay to D. E. Jones, J. D. Wilson, and John Elbert, the sum of forty-five thousand two hundred and forty-one 60-100 dollars, being eight thousand eight hundred and seventy-one 68-100 dollars to D. E. Jones; eighteen thousand one hundred and eighty-five 26-100 dollars to J. D. Wilson; and eighteen thousand one hundred and eighty-five 26-100 dollars to John Elbert,—with interest thereon at the rate of one per cent. per month from date until paid. Any payments made on this note are to be divided to and among the said Jones, Wilson, and Elbert, in the proportions of their respective amounts as aforesaid.

"MONO LAKE HYDRAULIC MINING COMPANY,
"By CHAS. H. SINCLAIR, Vice-President.

[Corporation Seal.]

"SAN FRANCISCO, February 20, 1883.

"I hereby assign and transfer my interest in the within note to D. E. Jones, as security for the payment of the note or obligation of $9,185.26 this day executed by me to said Jones. JOHN ELBERT.

"SAN FRANCISCO, March 3, 1883.

"I hereby assign and transfer my interest in the within note to Albert Packard, as security for the payment of the note or obligation of $7,000 this day executed by me to said Packard. JOHN D. WILSON."

—That no part of the principal or interest of the said last-mentioned note has been paid, nor is the same yet due, the payment of the same previous to its becoming due having been extended by the payees unto the thirteenth day of May, 1884.

The plaintiff prayed judgment against the defendants, jointly and severally, for the sum of $6,738.96, with interest at the rate of 1 per cent. per month from the twenty-first day of August, 1883, and that all the interest of the defendants in the said note of the Mono Lake Hydraulic Mining Company, so assigned to plaintiff, be sold according to law, and the proceeds of such sale

applied in payment of the amount due plaintiff, and that plaintiff may have judgment and execution for any deficiency, and that plaintiff may become a purchaser at such sale, and that he be awarded the costs of this action.

The defendants demurred on the grounds that (*a*) the complaint alleges that defendants made a note, dated August 11, 1883, and recites a note dated August 21, 1883. (*b*) It does not appear whether the note for $6,738.96, copied in the complaint, is the note sued upon. (*c*) It does not appear whether the assignment, by way of security, was made on the eleventh or twenty-first day of August, 1883. The demurrer was overruled, and judgment was rendered decreeing sale of the note. And defendants filed the following bill of exceptions:

"Be it remembered that, after judgment ordered in this action, and in due time, the plaintiff duly filed and served a memorandum of costs and disbursements, and that one of the items thereof is as follows: 'Percentage allowed by law on judgment of $7,053.61, $100.' That within five days thereafter the defendants moved to have the plaintiff's said bill of costs taxed, and to strike out therefrom the said item of $100, on the grounds—*First*, that the action was brought to foreclose a lien, and was not an action wherein percentage is allowed by law; *second*, that no issue of fact was raised in said action, and the same was not a litigated case. The said motion was made upon the papers on file. That said motion came regularly on for hearing on the twenty-fifth day of January, 1884; and the same, after being heard, submitted, and considered, was by the court denied; to which ruling and decision the defendants then and there duly excepted."

Wm. & Geo. Leviston, for appellant. *J. T. Fleming* and *A. Packard*, for respondent.

By the Court. The complaint is sufficient. The case was litigated on demurrer, and the sixth section of the statute of February 9, 1866, (St. 1865–66, p. 68,) applies to it. We think it proper to say that it was conceded on the argument by both parties that the statute above referred to is still in force. We decide the case on this concession, and hold nothing as to whether the statute is in force or not.

Judgment and order affirmed.

2 Cal. Unrep. 701

People *v.* Brown and another. (No. 20,177.)[1]

(*Supreme Court of California.* September 1, 1886.)

1. Jury—Challenge—Exceptions.
 No exception lies to a ruling denying a challenge to a juror for actual cause.
2. Evidence—Medical Expert—Person's Ability to Make Affidavit.
 Upon trial of an indictment for preparing a false affidavit, *held* proper to ask medical experts whether the person making the affidavit, who was ill at the date thereof, was at the time able to make such a statement as appeared in the affidavit.

In bank. Appeal from superior court, San Francisco.

Defendants were informed against, under section 134, Pen. Code, for the crime of preparing a false affidavit, to be used on the hearing of a motion for new trial in the case of *Sharon* v. *Sharon*, then pending in superior court, San Francisco. They were convicted. Defendant Brown was a notary public, and the affiant, one Isabella Clark, was a patient in the almshouse of the city and county of San Francisco. The affidavit was prepared by an attorney here, and Brown was requested by the attorney to go to the almshouse, and

[1]The delay in the publication of this case was caused by our inability to obtain at an earlier date such a statement of the facts as we considered necessary to a satisfactory report.

get Mrs. Clark to sign and swear to it. Mrs. Weile (defendant) went with Brown. The question asked Dr. Geary is: "Was she [Mrs. Clark] at that time able to make such a statement of things past and present as appears in this affidavit?" To Dr. Ayer: "From your personal examination of her while living, and from your examination of her brain when she died, whether in your opinion this woman, upon the eighteenth of May, 1885, [when the affidavit was made,] could have made this statement of facts and dates as appears in this affidavit, or could have comprehended them, if questioned or if spoken to her or read to her?"

Tyler & Tyler, for appellants. *The Attorney General*, for respondent.

By the Court. We have examined the points presented on behalf of the appellants, and we find no error in the rulings of the court below, nor in the instructions. The court did not err in denying the challenges to jurors. They were challenged for actual bias, and no exception is by law allowed on such ruling. Pen. Code, § 1170; *People* v. *Cotta*, 49 Cal. 166; *People* v. *Vasquez*, Id. 560; *People* v. *Taing*, 53 Cal. 602; *People* v. *Riley*, 65 Cal. 107, 3 Pac. Rep. 413. The court did not err in its ruling permitting the questions objected to to be put to Drs. Geary and Ayer. The court did not err in its ruling admitting in evidence the deposition of Sharon. *People* v. *Cunningham*, 6 Pac. Rep. 703. In the instructions given by the court we find no error. They fairly presented the law to the jury. There was no error in the instructions asked by defendants and refused.

Judgment and order affirmed.

72 Cal. 125

Ex parte FISKE. (No. 20,287.)

(*Supreme Court of California.* March 7, 1887.)

1. MUNICIPAL CORPORATION—CITY OF SAN FRANCISCO—FIRE ORDINANCE—CONSTITUTIONAL LAW.
 Section 40 of an ordinance of the city and county of San Francisco entitled "An ordinance to define the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county," providing that "no wooden building within the fire limits shall be altered, changed, or repaired without permission in writing signed by a majority of the fire wardens, approved by a majority of the committee on fire department and the mayor," is not void, as being in contravention of the fourteenth amendment to the federal constitution.
2. SAME—PUBLICATION OF ORDINANCE.
 An ordinance which provides for its publication for five successive days in a daily newspaper is properly published by publication for five successive week-days, although a Sunday intervenes on which there is no issue of the paper.

Department 2. *Habeas corpus.*
Tilden & Tilden, for petitioner. *Davis Louderback*, for respondent.

MCFARLAND, J. The petitioner was convicted in the proper court of a violation of section 40 of an ordinance of the city and county of San Francisco entitled "To define the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county." He was sentenced to pay a fine of $250, and, in default of payment, to be imprisoned in the county jail at the rate of one day for each one dollar of the fine. Not having paid the fine, he is in the custody of the chief of police of said city and county. Said section 40 is as follows: "No wooden building within the fire limits shall be altered, changed, or repaired without permission in writing signed by a majority of the fire wardens, approved by a majority of the committee on fire department and the mayor, which permit shall fully express the alterations, changes, or repairs allowed, a copy of which shall be filed by the grantee," etc. Other parts of the ordinance describe the fire limits; and the acts of petitioner for which he was convicted were done within them.

The grounds relied on by petitioner for his discharge which we deem it proper particularly to notice, are that the attempted enactment of said section 40 was beyond the legislative power of the municipal government, or of the state; that

said section 40 is unreasonable, oppressive, and not general in its operation; that it is an unwarrantable delegation of power to the officers named therein, that it attempts to grant to said officers absolute power, which may be used arbitrarily to the advantage of favorites, and to the prejudice of others; that it denies to petitioner the equal protection of the law, and deprives him of liberty and property without due process of law, in violation of the fourteenth amendment of the federal constitution; and that for these reasons, expressed in various forms, the said section is invalid and void.

It is, no doubt, difficult to keep always in view the precise line which definitely bounds the proper exercise of what is called the police power of a state, and separates it from an improper infringement upon the constitutional rights of individuals; but it is often not difficult to see whether a particular exercise of that power is on the right or wrong side of that line. And it has become the settled law that a state,—and under our system a municipality of the state,—in order to protect the property of all its citizens from the ravages of fire, may establish fire limits, and regulate or prevent the use of wooden buildings within such limits; and that, although this may disturb the enjoyment of the rights of an individual, he is, in contemplation of law, compensated by sharing the general benefits derived from it. Tied. Lim. Police Power, § 122*e*, and cases cited. There would therefore be no doubt as to the validity of the section of the ordinance under review if it were not for the provision that certain officers may grant permissions to make repairs. It is clear, however, that a literal compliance with a regulation prohibiting the repairing of a wooden building might work, in some instances, useless hardships. The repair of a leaking roof or broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to provide against; and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise it wantonly, or for purposes of profit or oppression. Neither is the granting of permissions in particular instances to be considered as the taking away of any rights from those to whom such permissions are not given. The latter would be in no better position if such permissions were given to none, or if there was no power to give them at all.

It is difficult to determine, in many cases, whether or not there has been an unwarranted delegation of powers by the legislative bodies of municipal governments. But powers similar in character to those conferred upon the officers named in the section of the ordinance under discussion have been so often upheld that their validity seems to be established. Cases in point decided by this court are *Ex parte Moynier*, 65 Cal. 33, 2 Pac. Rep. 728; *Ex parte Casinello*, 62 Cal. 538; *Ex parte Frazer*, 54 Cal. 94,—and in other states, *Vanderbilt* v. *Adams*, 7 Cow. 351; *In re Nightingale*, 11 Pick. 168; *Whitten* v *Mayor of Covington*, 43 Ga. 421.

In *Barbier* v. *Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, the supreme court of the United States held that an ordinance of the city and county of San Francisco providing that no person should carry on the business of a public laundry within certain limits without a certificate of the health officer, and another certificate of the board of fire wardens, was valid, and not in violation of the fourteenth amendment of the federal constitution. The same thing was held by that court in the case of *Soon Hing* v. *Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730. We see no difference, in principle, between those cases and the one at bar.

It is true that, at first glance, a somewhat different doctrine seems to have been stated in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. A

correct understanding, however, of the extent to which that case goes, can be had only by considering that the proof, which the court looked into, showed that the ordinance there under review was so administered as to exclude the subjects of the emperor of China, *and none others*, from the business of keeping a laundry. The court, after alluding to our treaty with China, says: "In the present cases *we are not obliged* to reason from the probable to the actual, and pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a *particular class* of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state herself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution." After alluding to the proof that the petitioners and 200 other Chinamen were refused permission to carry on the business, while such permission was given to a large number of persons not Chinamen, the court says further: "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the *race and nationality* to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal; and the public *administration* which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution."

It is evident from this language that the decision rested mainly upon the admitted discrimination against a class of persons in the *public administration* of the ordinance. Indeed, the admitted facts, which the court considered, showed that the intent of the ordinance was to exclude Chinamen from a business which should be open to all other persons, as clearly as if that intent had been boldly written on its face. The decision, therefore, *as an authority*, goes no further than to hold that, under a state of facts similar in character to the facts of that case, an ordinance similar in character to the one there passed upon would be invalid. But there are no such facts in the case at bar. There is no evidence here that petitioner asked for permission to repair, or that such permission had been given to others. Neither the face of the ordinance, nor its administration, shows any intent to discriminate against a class of persons, or against any person. To hold the ordinance invalid we would have "to reason from the probable to the actual." And there is no more reason to presume that the officers named in the ordinance would unjustly discriminate for or against classes or individuals than there is to presume that a harbor-master would abuse the power to station vessels at a wharf, or a police officer the power to station carriages at theaters, or during public processions. Our opinion, therefore, is that the ordinance in question is not invalid for any of the reasons above noticed.

The objections of petitioner to the sufficiency of the complaint are not tenable,—at least in the proceeding of *habeas corpus*.

We see no force in the objection that the ordinance was not published according to law. A provision requiring a publication for five successive days in a daily newspaper is complied with by such publication for five successive

week-days, although a Sunday intervened on which there was no issue of the paper.

There are no other points in the case necessary to be noticed.

The prayer of the petition is denied, and the petitioner remanded to the custody of the chief of police.

We concur: THORNTON, J.; SHARPSTEIN, J

74 Cal. 151

PHILLIPS and another *v.* GOLDTREE and others. (No. 9,504.)

(*Supreme Court of California.* March 14, 1887.)

PARTNERSHIP—ACTION—PLEADING—FAILURE TO FILE CERTIFICATE.

Where, in an action by partners doing business under a fictitious name, the complaint is perfect in all other respects, there is no failure to state facts sufficient to show a cause of action merely because it contains no statement that a certificate of partnership has been filed, as provided by Civil Code Cal. §§ 2466, 2468, attaching a legal incapacity to maintain an action upon any contracts made or transactions had in the partnership name to a failure to file such a certificate; and an objection that no such certificate has been filed must therefore be taken by answer; otherwise, under Code Civil Proc. Cal. § 434, it is waived. *Sweeney* v. *Stanford*, 67 Cal. 635, 8 Pac. Rep. 444, distinguished.

Department 2. Appeal from superior court, city and county of San Francisco.

J. R. Brandon, for respondents. *W. J. & E. Graves* and *J. M. Wilcoxon*, for appellants.

MCFARLAND, J. The complaint in this case avers that the plaintiffs, L. A. Phillips and A. Phillips, were and are partners doing business under the firm name of Phillips Bros.; that defendants, also partners in business, received from one Souza $729.22 in money to the use of plaintiffs, which they promised to remit to plaintiffs; that plaintiffs demanded said money of defendants; and that defendants refused to deliver the same. The answer denies all the averments of the complaint; and then, again averring the partnerships of plaintiffs and defendants as alleged in the complaint, sets up as a defense that the two firms formed a special copartnership for the purpose of buying, selling, and speculating in beans; that such speculation resulted in a loss of $4,731, all of which defendants paid; that plaintiffs owe defendants for one-half of said loss; and that plaintiffs have not paid defendants any part thereof except said $729.22 sued for in this action, which should be credited on said beans account, and that defendants should have judgment for the balance. The issues thus made were fully litigated, and a large amount of evidence taken, and the court found and gave judgment for plaintiffs; but neither in the pleadings, nor in the evidence, nor in any part of the proceedings in the court below, did the defendants make, or in any way allude to, the point that plaintiffs had not filed the certificate of partnership required by section 2466 of the Civil Code, or had failed to aver such filing. The transcript on appeal shows nothing of such a point, but now, in this court, appellants for the first time make the point in their brief that the judgment should be reversed because there is no averment in the complaint that such certificate of partnership had been filed.

The Code of Civil Procedure, after stating the various grounds upon which a defendant may demur to a complaint, among which is want of legal capacity to sue, and stating also that when any of the matters enumerated as a ground of demurrer does not appear on the face of the complaint, the objection may be taken by answer, provides as follows: "Sec. 434. If no objection be taken either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the

court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

As there is no objection here to the jurisdiction of the court, appellants' contention must rest upon the objection that the complaint does not state facts sufficient to constitute a cause of action; and this, in turn, rests upon the proposition that, in a suit by partners doing business under a fictitious name, there can be no sufficient statement of a cause of action without the statement that the certificate of partnership required by the Civil Code had been filed. But this latter proposition cannot be maintained. The only penalty attached by the Code to a failure to file the certificate is the legal incapacity to maintain an action upon "any contracts made or transactions had in their partnership name." Section 2468. There is no disability imposed to *make* contracts or to *have* transactions. They may own property, whether it consists of goods, wares, and merchandise, or choses in action. When the property consists of a cause of action, it may be assigned to a person laboring under no incapacity to sue, who may bring and maintain an action thereon. *Cheney* v. *Newberry*, 67 Cal. 126, 7 Pac. Rep. 445. But that could not be if the cause of action did not exist before the assignment. The assignment could impart no new virtue to the *thing itself*, although it would place it in hands which could use it. The cause of action is as complete before as after the assignment,—just as a book is as complete in the hands of a man entirely illiterate as after it has passed to one who can read it. If, therefore, in a suit brought by partners the complaint is perfect in all other respects, there is no failure to "state facts sufficient to constitute a cause of action" merely because it contains no statement that a certificate of partnership had been filed. The objection which appellants here for the first time present is an objection to the legal capacity of plaintiffs to sue. But that objection must be taken by demurrer if the grounds for it appear on the face of the complaint, or by answer if they do not; otherwise it is waived. There seems to be no other tenable position to be taken on the question, and this court has substantially so held in *District No.* 110 v. *Feck*, 60 Cal. 403, and *Mora* v. *Le Roy*, 58 Cal. 8.

Appellants rely mainly on the case of *Sweeney* v. *Stanford*, 67 Cal. 635, 8 Pac. Rep. 444. But the point did not arise in that case. There the complaint averred that plaintiffs had filed the certificate of partnership; this averment was denied in the answer; and, upon the issue thus made, plaintiffs having failed to show a substantial compliance with the statute, the court held that the lower court should have granted a nonsuit. Reference is made in the opinion to *Byers* v. *Bourret*, 64 Cal. 73, in which case the defendants in their answer *averred* that plaintiffs had not filed the certificate of partnership, and the court expressly called the averment a plea "in the nature of a plea in abatement." And it has never yet been *decided* in any case that, without the issue having been made in any way in the lower court, it could be successfully suggested here for the first time that plaintiffs had not filed a certificate of partnership; and, while there may be language used in the opinion rendered in the case of *Sweeney* v. *Stanford*, not necessary to its decision, which is somewhat favorable to appellants' views, the case *decides* nothing more than that, *when the issue* of the filing of the certificate *is made in the court below*, it becomes a vital issue to the plaintiffs. There is nothing, therefore, in that case which precludes us from entertaining the views above expressed.

The only other point made by appellants is that the evidence does not justify the findings. This point was not much pressed at the argument, and cannot be maintained.

Judgment and order affirmed.

SHARPSTEIN, J.: I concur.

THORNTON, J., (*concurring.*) I concur in the judgment on the ground that the failure to file the certificate required by section 2466 of the Civil Code

was not set up by the answer. *Sweeney* v. *Stanford*, 67 Cal. 635, 8 Pac. Rep. 444. Such a defense must be specially pleaded, where, as in this case, there is no averment in the complaint in relation to the filing of the certificate. This is expressly ruled in the case above cited.

72 Cal. 133

CANNON v. HANDLEY and another. (No. 9,743.)

(*Supreme Court of California.* March 16, 1887.)

1. VENDOR AND VENDEE—ESCROW—REVOCATION—TENDER OF PAYMENT—REASONABLE TIME.

 Where a contract is entered into for the sale and purchase of land, without stating any date for payment, and a deed is made out and delivered to a third party to be handed to the vendee on payment of the purchase money, and possession is delivered by the vendor, and taken by vendee, and within four days the purchaser offers the purchase money to the party holding the deed, the deed so given is an escrow, and not revocable by the grantors either before or after the offer of payment, and the party holding it is bound to deliver it on payment being made; nor is the purchaser bound to keep the tender good after making the offer, and until bringing action to enforce the contract.

2. SAME—PURCHASER WITH NOTICE—BREACH OF CONTRACT FOR SALE—DECREE.

 Under such circumstances a party who has purchased with notice of vendee's claim, and forcibly taken possession from him, will be compelled to surrender possession, and convey the legal title, and to account to vendee for the value of the use and occupation, and plaintiff must pay legal interest from the date of his tender, and pay the purchase money into court for the benefit of the purchaser from his vendor.

3. REPORT AND CASE MADE—TITLE.

 A provision in an agreed case upon a question as to the title of land, submitted to the court under Code Civil Proc. Cal. § 1138, to the effect that the facts therein admitted are to be taken by the court subject to all legal objections to their competency, relevancy, and admissibility, and shall be admitted or excluded, in whole or in part, as the court may determine after hearing objections thereto, is outside of the statute.

4. STATUTE OF FRAUDS—SALE OF LAND—ESCROW.

 An oral contract of sale, where a deed is executed in escrow at the same time, is not within the statute of frauds.

In bank. Appeal from superior court, Santa Cruz county.

Chas. B. Younger and *J. M. Lesser*, for appellant. *Burke & Hall*, for respondents.

BY THE COURT. This case comes before this court upon an agreed case under section 1138, Code Civil Proc. The facts agreed on are as follows: On the eighth of May, 1882, John J. Handley, Jr., and Catharine Handley were the owners in fee-simple and in possession of a lot of land situate in the city of Santa Cruz, known as lot five, (5,) in block No. two, (2,) and on that day executed a mortgage on the same, with other property, to the Santa Cruz Bank of Savings & Loan, as security for the payment of the sum of $1,800, maturing on the eighth day of May, 1885, with interest at the rate of 10 per cent. per annum. The bank aforesaid, on the fifth day of February, 1883, for value received, assigned the note and mortgage to Elbert Austin, who, on the eighth of December, 1883, was the owner of the securities above mentioned. On the ——— day of March, 1883, John J. Handley, Jr., took out a policy of insurance for $300 on one of the buildings on the lot above mentioned against loss or damage by fire, payable to himself in case of loss, and also a policy of insurance for $800 on another of the buildings on said lot, against loss or damage by fire, payable as the other policy. About a fortnight prior to December 8, 1883, John J. Handley, Jr., proposed to plaintiff's wife to sell said lot for $1,100. Mrs. Cannon reported this proposal to plaintiff, who examined the lot, and told his wife that he would purchase said lot of land at that price, and that she could purchase it for him at the price above named. The plaintiff is and has been a laboring man for years, and at home only nights and on holidays.

On the eighth of December, 1883, John J. Handley, Jr., and Catharine Handley entered into an oral agreement with plaintiff's wife for the sale and conveyance of said lot of land; that, in this transaction of purchase, plaintiff's wife was acting for him, (plaintiff,) a fact of which said Handley was ignorant until the drawing of the deed, when she instructed him to make the deed to plaintiff as grantee, for the sum of $1,100, to be paid to said Austin on said mortgage; that Austin, at the same time, agreed to release said lot from the lien of the mortgage on the payment of $1,100 on the indebtedness evidenced by the note and mortgage aforesaid. In pursuance of the above agreement of sale, John J. Handley, Jr., and Catharine Handley, on the eighth of December, 1883, signed, sealed, and duly acknowledged a certain deed in writing, dated on that day, purporting to grant, bargain, sell, and convey such lot of land to plaintiff, the sum of $1,100 being therein stated as the consideration. This deed was drawn for the grantors by defendant Cox, who was then and there paid therefor by them. This deed was then and there left and deposited by the grantors with said Cox, for delivery by Cox to the grantee therein, upon the payment of the said $1,100 to Cox for said Austin; but no definite time was agreed upon or stated when the purchase money should be paid or the deed delivered. It was, however, known and understood by the parties that plaintiff's wife had $303 on deposit in the Hibernia Savings & Loan Society in San Francisco, and that said last-named sum would be collected by the Bank of Santa Cruz County, and applied towards the payment of said sum; that this would take several days; and that plaintiff's wife would deliver her Hibernia Society's pass-book to the Bank of Santa Cruz County on December 10, 1883.

At the same time that this deed was deposited with Cox, said Austin signed, sealed, and acknowledged a release of this lot from the lien of the mortgage, and delivered this release to Cox, to be by him delivered upon the payment to him (Cox) of the said $1,100. At the same time, John J. Handley, Jr., with the consent of the insurance company, indorsed on each of the policies above mentioned, and signed an assignment to plaintiff of all his interest in said policies and all advantage to be derived therefrom, and then and there delivered the policies to A. J. Hines, to be delivered to plaintiff at the time of the delivery of said deed.

On the morning of December 10, 1883, plaintiff's wife delivered to said Bank of Santa Cruz County her pass-book of the society above mentioned, together with an order on the society to collect the sum of $303, and directed that money to be applied towards the payment of said $1,100, and applied to said bank to borrow the balance of said $1,100, but no agreement to loan was made by the bank. On the morning of December 11, 1883, she stated to Cox that she had heard that the father of John J. Handley, Jr., had some claim to said property, and instructed Cox not to forward the order and pass-book for collection until she knew about the title to the lot purchased.

On the eighth of December, 1883, and after the delivery of the deed to said Cox, the grantors in the deed delivered the key of the door to the house on the lot to the plaintiff's wife, and told her to take possession of the premises. The house was then unoccupied. On the evening of the day last named, plaintiff was informed by his wife what had been done in relation to said premises, and he approved of what had been done, and the key was then delivered to plaintiff by his wife. On December 9, 1883, plaintiff unlocked the door of said house, went through it and examined it, and again locked the door, and has ever since had possession of the key. On December 10, 1883, plaintiff's wife, by direction of plaintiff, placed a clock and two chairs in the house, and left them there. On the next day, plaintiff entered the house, and barred all the doors on the inside, except the door to which he had the key, and then locked the door, and retained the key in his possession.

On the tenth of December, 1883, John J. Handley, Jr., and Catharine Hand-

ley executed and acknowledged a deed dated on that day, purporting to grant and convey said lot to defendant Thomas Handley, a brother of John J., the consideration therein expressed being $1,100. This deed was drawn by said Cox, and was delivered to defendant Handley on the tenth of December, 1883, by the grantors, and the above sum was paid by said Handley to the grantors. Handley, Jr., then paid this sum to Cox for Austin. Cox then delivered the release above named to said Handley, Jr., who immediately caused the same to be recorded in the office of the county recorder of Santa Cruz county. The deed to Thomas Handley was, on the eleventh of December, 1883, recorded in the office of said county recorder. Defendant Handley, prior to the tenth of December, 1883, and to the making, signing, execution, and delivery of the said deed from the Handleys to defendant Handley, and to the payment of any of the purchase money by him, had notice of the entire transaction between plaintiff and said Handleys, but did not then know that the key to one of the buildings on the lot had been delivered to plaintiff's wife, or that she had, as stated above, put a clock and two chairs in said house. At the time of the execution of the deed above named to defendant Handley, the grantors therein then and there ordered and directed Cox not to deliver the first-mentioned deed to plaintiff, and at the same time requested Cox to deliver that deed to him, which Cox refused to do.

On the eleventh of December, 1883, Cox informed Mrs. Cannon that the Handleys had executed to Thomas Handley a deed purporting to convey the said lot of land, and that he had received the money for Austin as above stated. On the twelfth of same month, plaintiff offered and tendered to Cox the sum of $1,100, and demanded of him that he deliver to plaintiff the deed above mentioned deposited with him, and Cox refused and still refuses to deliver this deed to plaintiff, or any one for him, and still retains it in his possession.

On the night of December 14th, Thomas Handley broke open the door of said house above mentioned, and took forcible possession of the premises, and removed therefrom the clock and two chairs placed there by plaintiff, and ever since has been in possession of said lot of land. On the twelfth of same month, defendant Handley served on plaintiff a written notice that plaintiff deliver and surrender the possession of said lot to him.

The rights of the parties are to be determined on the above state of facts.

It clearly appears that Cannon was a purchaser of the lot in question from the Handleys, John J., Jr., and Catharine, for the agreed price of $1,100. There is no indefiniteness in the contract. No time was fixed for the payment of the money. The money was then to be paid in a reasonable time. The contract was entered into on the eighth of December, 1883, on which day a deed of conveyance of the lot sold was drawn up with the plaintiff's name inserted as grantee, as agreed on, and the Handleys as grantors, and deposited with defendant Cox, to be by him delivered to the plaintiff on the payment to him by plaintiff of $1,100 for one Austin. Austin held a mortgage on the lot, which he was to release from its lien on the payment of the sum aforesaid, who on the day of the date of the deed executed and deposited with Cox a release, duly executed by him, of the lot from the lien above mentioned, to be delivered by Cox on the payment to him (Cox) of the sum above mentioned. It will be further observed that an assignment of the policies of insurance mentioned in the case was drawn up, signed, and delivered to one Hines, to be delivered to plaintiff at the same time that the deed was delivered to him. Further, the possession of the property was delivered by the Handleys to plaintiff, and he actually took possession of the same by direction of the grantors, and kept possession of it by taking possession of a building on it, and retaining possession of the key thereof, which had been handed to him, through the medium of his wife, by the vendors.

Here, then, was a valid contract, certain in all its parts, partly executed and performed by delivery of the property sold, and a deed perfect in every

respect executed by the grantors to the vendee, and placed in the hands of defendant Cox, to be delivered by Cox to plaintiff on the payment of the purchase money. That plaintiff took possession, and possession was delivered to him by the grantors in pursuance of the contract, cannot, we think, be doubted. The deed was delivered as an escrow to Cox, and he so held it. He was to hold it, and deliver it to the vendee as soon as he paid the purchase money. The payment of the purchase money was the condition on which the deed was to be delivered by the depositary. This makes the deed an escrow, which name is applied to a deed or other instrument delivered to a third person, to be held by him until the performance of a specified condition, and then to be by him delivered to the grantee. 3 Washb. Real Prop. (5th Ed.) 583; Abb. Law Dict. "Escrow."

We cannot concur in the view that Cox was the mere agent of the vendors, and held the paper as such, being bound to deliver the paper to the vendors when demanded of him by them. He was to hold it, and deliver it to the vendee when the money was paid; and the vendee was to make payment to Cox, and not to his vendors; and, further, to make payment to Cox for Austin, and not for his vendors. Cox held the release as an escrow, also to be delivered to Cannon when the purchase money was paid to Cox. The question is so clear that further discussion would darken instead of elucidating it.

The deed being then delivered as an escrow, it is no longer *revocable by the vendor*, but it will take effect whenever the condition has happened or been complied with on which it is to be delivered. *Millett* v. *Parker*, 2 Metc. (Ky.) 608, 616. In this case the court said of a deed delivered as an escrow: "It cannot be revoked by the party who makes it, and he in whose favor it is made is entitled to it whenever the condition is complied with by which it becomes absolute." In *Shirley* v. *Ayres*, 14 Ohio, 308, it was held that the depositary of an escrow was as much the agent of the grantee as of the grantor. The court said: "He is as much bound to deliver the deed, on performance of the condition, as he is to withhold it until such performance." From this it would clearly follow that the grantor cannot recall the deed after the delivery as an escrow; and, when the condition is complied with by the grantee, he is absolutely entitled to it. The Ohio supreme court in the case of *Shirley* v. *Ayres*, above cited, held that, inasmuch as the depositary of the escrow was the agent of the grantee as well as grantor, the deed takes effect the moment the condition is performed without any formal delivery into the hands of the grantee. In other words, it may be said, when the condition is performed, the depositary becomes the custodian of the grantee, holding the deed for him, and this possession as such custodian is the possession of the grantee. We think this rule is based on sound principles, and should be upheld.

The order by the vendors (the Handleys) to Cox, on the tenth of December, not to deliver the deed to Cannon, had no effect to alter the relation of the parties. The vendors had no right to revoke the deed, or take it from the possession of Cox. The offer by Cannon, on the eleventh of December, to pay the $1,100 to Cox, and his refusal to deliver the deed, was an offer of compliance with the condition on which the deed was to be delivered. The plaintiff then became entitled to it. Cox then had it and, as between them, would still hold it for the plaintiff, on payment of the money. The offer and tender of the money was within a reasonable time. The contract was made on the eighth of December, 1883, and the money was offered and tendered on the twelfth day of the same month. No stress is to be laid on the fact that it was known to and understood by the parties that plaintiff's wife had $303 deposited in the Hibernia Savings & Loan Society, which would be collected by the Bank of Santa Cruz County and applied *pro tanto* to the payment of the purchase money, any further than it bears on the question of time within which the money was to be paid by plaintiff. Plaintiff was not bound to use this specific fund so deposited with the society. Payment could be made

with any other money. All that was required was payment of the $1,100. This sum of money was actually offered and tendered by plaintiff to Cox as above stated. The fact that the wife of plaintiff, on hearing that the father of John Handley, Jr., had some claim to the lot sold, instructed Cox, on the eleventh of December, 1883, not to forward her order and pass-book for collection until she knew about the title to the lot purchased, interposes no obstacle to plaintiff's recovery here, as he actually did offer to pay, and tendered the money in payment, on the 12th of December, within a reasonable time. The tender was made with promptitude.

Nor was it necessary to keep the tender good. *Washburn* v. *Dewey*, 17 Vt. 92; *McDaneld* v. *Kimbrell*, 3 Iowa, 335; *White* v. *Dobson*, 17 Grat. 262. The money was to be paid when the deed was delivered. It would be unjust to require the plaintiff to keep the tender good, which is usually done by paying the money into court, when the deed is withheld from him, and when, as in this case, he is by violence deforced from the possession of the lot sold to him. Under proper circumstances he may be required to pay interest on the money.

Thomas Handley, defendant, with full notice of all the facts of the sale and purchase by Cannon, as above stated, on the tenth of December, 1883, bought the land of the vendors of plaintiff, received from them a deed conveying the lot in controversy, and paid $1,100 to Cox for Austin; then received from Cox the release above mentioned, which he caused to be recorded on the eleventh of the same month. On the twelfth of the same month, defendant Handley served on plaintiff a written notice that plaintiff deliver and surrender possession of said lot to him, and in the darkness of the night of the fourteenth of December he broke open the door of the house on the lot, made a forcible entry on the plaintiff's possession, and took possession of the premises, and ever since has been in possession of the land.

The circumstances having greatly changed since the contract was entered into, and Cox having received the money for Austin, and delivered the release to defendant Handley, it may be that the plaintiff was in doubt to whom the money was to be paid, and therefore did not offer to pay to any one since the tender to Cox. As Handley (defendant) is a purchaser with notice, he is bound by all the equities of the plaintiff; and conceding the legal title remained in the vendors until the deed was actually delivered by Cox, and that it passed to the defendant by the deed executed to him, he (defendant Handley) holds it for the plaintiff, and is bound to convey to him. We are of opinion that defendant Handley holds the legal title in trust for the plaintiff, to be conveyed to him as hereinafter directed.

The plaintiff would have a right to be restored to the possession which was taken from him by force by Thomas Handley, and defendant must be directed to surrender possession to the plaintiff. The plaintiff will also be entitled to have an account from Handley, defendant, of the value of the use and occupation while he has been in possession of the land, and plaintiff must pay interest on $1,100, the purchase money, at the rate of 7 per cent. per annum, from the twelfth of December, 1883, until paid; or, at plaintiff's option, the interest on the purchase money may be regarded as liquidating the value of the use due by defendant, and no account need then be taken. The plaintiff will pay the purchase money into court for defendant Handley, as he has become the purchaser from the vendors of plaintiff of the lot in suit, and the court will direct it to be paid to defendant above named. There is in the agreed statement of facts a provision in these words:

"It is expressly agreed by the parties hereto that the facts herein admitted are to be taken by the court subject to all legal objections to their competency, relevancy, and admissibility where the nature of the evidence necessary to establish said facts is apparent on the face of said statement, and the same shall be admitted or excluded, in whole or part, as the court may determine, after hearing objections thereto."

This would seem to be a provision outside of the statute. The statute (section 1138, Code Civil Proc.) permits the parties to agree upon a case containing the facts upon which the controversy depends, "and present a submission of the same to any court which would have jurisdiction if an action had been brought. * * * The court must thereupon [*i. e.*, the case agreed] hear and determine the case, and render judgment thereon as if an action were depending." The parties must agree on the facts, and such agreed facts are the facts on which the case is to be determined. It might well be doubted whether the court on an agreed statement, with such a provision in it as the one above quoted, should not refuse to hear the case at all, or, if hearing it, disregard the provision.

But waiving this, we proceed to determine the question. It is said the contract was oral, and should not be enforced. But the deed is a note or memorandum in writing of the contract, and subscribed by the party charged, and this satisfies the statute. Code Civil Proc. § 1973; Civil Code, § 1624, subd. 5. Here it is signed by the party to be charged, and there is mutuality. *Worrall* v. *Munn*, 5 N. Y. 229; *Rutenberg* v. *Main*, 47 Cal. 213. In *Cagger* v. *Lansing*, 57 Barb. 421, the question is decided, and properly decided, that the deed is sufficient evidence to take the case out of the statute of frauds. So held under the statute of New York, which is substantially the same as that in force in this state.

But it is said there was nothing in writing authorizing Cox to hold or deliver the deed. There is nothing in the statute which requires this to be in writing. The statute only requires a note or memorandum in writing as evidence of the contract. Nothing in it has reference to any arrangement for the delivery of the deed in escrow, or its subsequent delivery by the party so holding it to the grantee. The contract is fully proved herein by writing.

It cannot elude observation that the efforts made by the Handley vendors and defendant Handley to deprive the plaintiff of the benefit of his purchase were made with an alacrity which, though astonishing, was not commendable. The contract with plaintiff was made on the eighth of the current month, the delivery in escrow and the delivery of possession to plaintiff were made on the same day, and plaintiff took possession on the 10th, and the tender of payment was made on the 12th. Still the same vendors executed a deed to defendant Handley as purchaser with notice, and therefore a confederate with them in the object intended, on the tenth of the same month, and this last purchaser paid the purchase money, recorded his deed, and took possession by violence on the 14th. This activity was worthy of a better cause, and, if exhibited in behalf of right, would be a vigilance which the law would aid. But activity to defeat a right cannot command action in its favor. The plaintiff is entitled to recover of defendant Handley his costs on appeal.

The judgment must be reversed, and cause remanded, with directions to the court to enter judgment in accordance with this opinion, with the provision inserted in the judgment that if the plaintiff does not pay the purchase money ($1,100) within 20 days after the entry of the judgment in the court below, that plaintiff shall take nothing under the judgment except his costs on appeal. So ordered.

(72 Cal. 131)

In re Estate of KILE, Deceased. (No. 11,294.)

KILE *v.* WILHOIT and others.

(*Supreme Court of California.* March 16, 1887.)

APPEAL—ORDER ADMITTING WILL TO PROBATE—WHAT CONSIDERED.

Where, on appeal from an order admitting a will to probate, it appears that the only written ground of opposition to the probate taken by appellant, as provided by Code Civil Proc. Cal. § 1312, was the incompetency of the deceased to make a will, questions relating to the due execution and attestation of the will will not be considered.

In bank. Appeal from superior court, San Joaquin county.

Stanton L. Carter and *D. S. Terry*, for appellant. *Aug. Muenter* and *W. L. Dudley*, for respondents.

McFARLAND, J. This is an appeal from an order of the superior court admitting a will to probate. Counsel for appellant elaborately argues questions relating to the due execution and attestation of the will; but the only written ground of opposition to the probate thereof taken by appellant, as provided by section 1312 of the Code of Civil Procedure, was the incompetency of the decedent to make a will. She divides her alleged grounds into three distinct paragraphs; but they all three together mean only this: that at the time the will was made the deceased was not of sound and disposing mind and memory. The issue thus raised was presented to a jury in the form of the following question: "Was the testator, Joseph Kile, on the fourth day of April, 1883, and at the time of the execution of the will in contest, of sound and disposing mind?" And the jury, after hearing a great deal of evidence, returned an affirmative answer to the question. There was a substantial and very marked conflict in the evidence as to the point of decedent's mental condition at the time the will was made, and we would not be at all warranted in holding that it did not support the verdict. This view disposes of the case; for appellant can be heard only as to those matters which she presents in her written grounds of opposition.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McKINSTRY, J.; PATERSON, J

I dissent: TEMPLE, J.

THORNTON, J. I concur in the judgment. The evidence as to the sound and disposing mind and memory of the testator is conflicting, and the order should not be reversed on that ground. Conceding, but not deciding, that the testimony on the other points argued is properly before us, I am of opinion that as to those points the statute as regards execution of the will has been complied with.

72 Cal. 154

DALY v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11,698.)

(*Supreme Court of California.* March 16, 1887.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT—ASSESSMENT.
 The act of California of April 4, 1870, in regard to street work in San Francisco, providing that, in case the assessment for the payment of a contract is adjudged invalid through no fault of the contractor, the board of supervisors shall pay the amount due the contractor out of the street department fund of the city, presupposes a valid contract binding on the city and county; and, where it was adjudged by the court that there was no assessment because there was no contract, there was no liability attached to the municipality.
2. SAME—CONTRACTS OF AGENTS—LIABILITY OF CITY.
 Those dealing with a city must see to it that its agents have power to act; and the city incurs no liability for work done under a void contract; nor is there any guaranty on its part that the forms of law have been complied with because its officers, without authority, attempt to contract.

In bank. Appeal from superior court, city and county of San Francisco

William M. Pierson and *Wm. H. Sears*, for appellant. *George Flournoy, Jr.*, and *Garber, Thornton & Bishop*, for respondent.

TEMPLE, J. The real question involved in this case is whether the act of April 4, 1870, in regard to street work in San Francisco, dispenses with the preliminary steps which seem to be required to vest the board of supervisors with jurisdiction or power to order work to be done. These are the same

statutory requirements which have always existed, a substantial compliance with which has often been held essential to the validity of the acts of the board. It is contended that all this is changed, because the act of 1870 directed that after the work had been performed, instead of having the assessment delivered to the contractor as formerly, the assistant city and county attorney should proceed to collect the assessments for the contractor, and, in case of failure through no fault of the contractor, the board of supervisors should pay the amount due out of the street department fund. But this presupposes a contract binding on the city and county. Without a contract there cannot be, legally, an assessment at all. The position seems to be this: There really was no contract binding on the city and county, but there was something which purported to be a contract, under which work was done and an assessment made. A suit was brought on this against the lot-owners, in which it was adjudged that there was no assessment because there was no contract. Now it is said the condition has happened which entitled the contractor to be paid out of the street fund; *i. e.*, the assessment has been adjudged invalid. This is very much like claiming the contract has been adjudged invalid; therefore the city and county is liable. This is, of course, not the case of one who really had a good contract, which was erroneously adjudged to be bad in the suits on the assessments, where he could not be heard.

The fact that the lot-owner, when sued on the assessment, is expressly authorized to plead in defense that the board of supervisors had no jurisdiction to order the work to be done very much strengthens the case against appellant. It cannot be supposed that the legislature would authorize a defense on the part of the lot-owner, in a suit upon the assessment, that there was no valid contract, and yet provide that the contract should thereupon become binding upon the city and county; that, in fact, the obligation upon the city and county to pay might depend upon its being declared invalid for lack of power in the officers to make it. Of course, it would be competent for the legislature to so provide, but we see nothing in the act to indicate such an intention. Such construction is contrary to the whole policy of the statute in regard to municipal contracts. The rule here has always been that there must be a valid contract before any liability can attach to the municipality. It can only act in the mode prescribed by law. This principle has been too often declared here to require reiteration. The city and county incurs no liability for work done under a void contract; nor is there any guaranty on the part of the city and county that the forms of law have been complied with because its officers, without authority, attempt to contract. Those dealing with the city must see to it that its agents have power to act.

Holding these views, it becomes unnecessary to consider the other points discussed. Judgment affirmed.

We concur: PATERSON, J.; MCFARLAND, J.; THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.

(2 Cal. Unrep. 744)

CUMMINGS *v.* CUMMINGS and others. (No. 11,881.)

(*Supreme Court of California.* March 16, 1887.)

APPEAL—UNDERTAKING—STAY OF EXECUTION.

Upon taking the appeal, the filing of the undertaking for $300, required by section 941, Code Civil Proc. Cal., had the effect of staying execution of the judgment as to appellant. Motion to stay execution granted.

Department 2. Motion to stay execution pending appeal.

The "undertaking" referred to was one for $300, under section 941, Code Civil Proc.

A. S. Kittredge, for appellants. *Thos. H. Laine* and *Goldsby & Jeter*, for respondent.

BY THE COURT. In this cause the appellant Ketchum, on taking an appeal, filed the undertaking on appeal required by law. This had the effect of staying the execution of the judgment as to him, in all respects, pending the appeal.

The following order is directed to be entered: On motion of appellant Ketchum, it is hereby ordered that the execution of the judgment herein, as to him, be, and is hereby, in all respects stayed pending the appeal.

72 Cal. 157

DUFFY v. GREENEBAUM. (No. 11,206.)

(*Supreme Court of California.* March 17, 1887.)

APPEAL—SUPERSEDEAS BOND.

An undertaking stating that its purpose is to stay execution on appeal, and following section 942, Code Civil Proc. Cal., which provides for undertaking for that purpose, will not be construed to include the $300 undertaking on appeal required by sections 940, 941, Code Civil Proc. Cal. MCFARLAND, J., dissenting.

In bank. See 12 Pac. Rep. 74. A rehearing had been granted, and this is the bank opinion.

THORNTON, J. Motion to dismiss appeal. The opinion in department 2 is correct, and will stand as the opinion of the court. 12 Pac. Rep. 74. We add, the requisition of an undertaking on appeal (of $300) is clear and distinct, (Code Civil Proc. §§ 940, 941;) and, without this undertaking, it is declared "the appeal is ineffectual for any purpose," (Id. § 940.) The undertaking to stay execution is also prescribed, and its requisites distinctly declared. Code Civil Proc. § 942. It so happens that, by the requirement of the statute, (section last cited,) the provisions of the undertaking on appeal are also, with other terms, to be inserted in the undertaking for a stay of execution. But the former is required for one purpose, and the latter for a different purpose. It cannot be denied that the legislature had the power to enact the statute in the form which it bears. Now, when an undertaking is required to render an appeal effectual for any purpose, how can the contention be sound that since an undertaking prescribed for another purpose, *i. e.*, for a stay, contains in it the same terms and conditions, with others, as are to be inserted in an undertaking on appeal, that, therefore, the stay undertaking is sufficient for both purposes? The statute is one, and its various sections must be construed together, and it would be a singular conclusion that the legislature intended that an undertaking required for a declared purpose should operate to accomplish a different purpose; and that, when it is expressly declared that it shall have no such effect. That would be to deduce of a declared intention a different intention by implication; that the legislature, when it declared one thing, meant another and different one. We cannot declare of a statute making in words an express declaration of its intent a different intent. When an intent is declared, there can be no implication of a different intent. "The express mention of one thing implies the exclusion of another." Broom, Leg. Max. (6th Amer. Ed.) *626.

In this case there is no undertaking on appeal, and the section of the Code (Code Civil Proc. § 954) allowing an undertaking to be filed on the insufficiency of the undertaking filed, has no application, (*Biagi* v. *Howes*, 63 Cal. 384.)

Motion to file an undertaking on appeal denied, and the appeal is dismissed. So ordered.

We concur: TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.

MCFARLAND, J. I dissent. The undertaking provided for in section 942 has all the conditions of an undertaking on appeal; and when given, in my opinion, renders the undertaking mentioned in section 941 unnecessary.

72 Cal. 75

MONTGOMERY *v.* LOCKE and another. (No. 9,740.)

(*Supreme Court of California.* February 19, 1887.)

1. STATUTE OF LIMITATIONS—PLEADING.
 In an action for flooding plaintiff's lands by a levee constructed by defendant, an answer averring that the levee was built more than 20 years before the commencement of the action, and was constructed and maintained with the consent of plaintiff, does not amount to a plea of a prescriptive right.
2. DAMAGES—DESTRUCTION OF FRUIT-TREES.
 The measure of damages for the destruction of fruit-trees is their value on the premises in a growing state, and not as taken up and removed from the place.

Commissioners' decision. In bank.

Appeal from superior court, San Joaquin county.

Byers & Elliott and *W. L. Dudley*, for appellants. ***J. C. Campbell, F. T. Baldwin***, and *Ansel Smith*, for respondent.

SEARLS, C. This cause was decided in department 2, in an opinion filed August 30, 1886, 11 Pac. Rep. 874. A reargument in bank was ordered, and it is again brought under review. It is submitted by appellants that the former opinion shows a misapprehension of important facts when it states that levee No. 1 was built by defendants in 1879 or 1880. Levee No. 1 was originally constructed many years prior to 1879, but, having been repeatedly broken by action of water, was, in 1879, practically incapable of restraining the flow of water, until such portions of it as had been destroyed were rebuilt. Such portions were rebuilt by defendants in the winter of 1879–80. We did not deem it important whether they built a new levee or rebuilt an old one so long as their acts resulted in flowing the water back upon plaintiff. Had defendants pleaded a prescriptive right to maintain levee No. 1, the contention of appellants would have force, but no such plea is found in their answer. It is true, the answer avers that "the levee first set out in plaintiff's second count [levee No. 1] was erected more than twenty years before the commencement of the action," and that all the levees upon the lands of defendants were built, and have been maintained, with the knowledge and consent of plaintiff, etc. An adverse possession or prescription, as it is termed, when applied to an easement, may, under our system of practice, be pleaded either by reference to the statute, as provided by section 458 of the Code of Civil Procedure, or by stating at length the facts showing that the user, commenced and continued under a claim of right, was peaceable, without interruption, open, notorious, and exclusive, and maintained with the knowledge of the plaintiff, etc. It was in this view of the case that we deemed the facts in reference to the old levee unimportant.

The complaint contains two causes of action, based upon different theories: (1) A cause of action against the defendants for constructing a levee across a natural stream, whereby the water was turned back upon the land of plaintiff; (2) a cause of action based upon the theory that defendants had prevented the flow from plaintiff's land of the surface water accumulating thereon. There was a conflict of evidence upon both these causes of action. So, too, the plea that plaintiff consented to the construction of the levee, interposed, as we suppose, in view of the maxim that "he who consents to an act is not wronged by it," was met by evidence denying such averment, and the jury having passed upon all these questions of fact, their verdict concludes the defendants.

The evidence was abundant to show that defendant Locke participated with Holman in the repairs to levee No. 1, whereby the damage was caused. A number of witnesses who worked upon the levee testified that they were employed by him to do so, and whether or not he was personally present upon the work more than once was wholly unimportant. We see no error in the admission of testimony in reference to the damages sustained by plaintiff. "The value of fruit-bearing trees is to be estimated with reference to what they are worth on the premises in their growing state and not as taken up and removed from the place." Sedg. Dam. (7th Ed.) 276; *Mitchell* v. *Billingsley*, 17 Ala. 391. In the case of forest trees, having no value except as timber, the means by which to determine the damage occasioned by their removal must be quite different from that pursued in determining the value of fruit-trees, which may have no value whatever when removed from the soil, and which, at any rate, are chiefly valuable for that which they produce in a growing state.

The record does not purport to contain all the instructions given by the court. We see no error in the giving or refusal to give instructions calling for a reversal, and are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 745

DAGGETT *v.* VANDERSLICE. (No. 9,541.)

(*Supreme Court of California.* March 18, 1887.)

NEW TRIAL—ACTION AGAINST BAILEE—DISCRETION OF COURT.

Where an action was brought to recover the value of certain goods left with a defendant for safe-keeping, and the court rendered a judgment in favor of defendant, and afterwards granted the plaintiff a new trial, *held*, upon the facts of the case, that there was no such abuse of the discretion vested in the trial court as would warrant a reversal of the order.

Commissioners' decision. Department 1.

Appeal from superior court, city and county of San Francisco.

This action was brought to recover the value of certain silver ware deposited by the plaintiff with defendant in the year 1872, at his store in San Francisco, for her own personal accommodation, and without any reward to be paid therefor. In 1883 she made a demand for the same, when defendant discovered that all of the ware except one piece had been surreptitiously abstracted and taken from his possession, by some unknown person, without his knowledge or consent, and against his will. The goods had been purchased of defendant, who was a dealer in silver ware and jewelry, and presented to the plaintiff, who requested that they might be placed in show-cases in the store, and in which defendant did place them, and keep them for more than four years. Afterwards they were removed from the show-cases, and placed in the store-room of the defendant, at his own instance, for the purpose of making room in the case for his own goods, and without the consent or knowledge of the plaintiff. The chief question was whether the defendant exercised the care required of him under the circumstances for the preservation of the goods. The court decided in favor of the defendant, and afterwards, on motion of plaintiff, granted a new trial. And from this order defendant appealed.

S. F. Gordon & Young, for Vanderslice, appellant. *Byrne & Cross*, for Daggett, respondent.

FOOTE, C. This is an appeal from an order granting a new trial. The action was instituted to recover from Vanderslice, the defendant, the value of

some silver ware left with him for safe-keeping. Judgment was rendered for the defendant. The plaintiff then moved for a new trial, which was granted, and from the order made therein this appeal is prosecuted. We perceive no such abuse of the discretion vested in the trial court as would warrant a reversal of the order made in the premises, and in our opinion it should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

72 Cal. 161

SAN FRANCISCO SAV. UNION *v.* MEYERS and others. (No. 11,325.)

(Supreme Court of California. March 18, 1887.)

1. APPEAL—JUDGMENT AGREED TO—INDORSEMENT ON BACK OF JUDGMENT.
 A. moved to dismiss an appeal of B. on the ground that the judgment appealed from was entered "upon the mutual consent" of B. and the other parties to the action. In the margin opposite to the copy of the judgment contained in the transcript appear the words: "Indorsed in lead-pencil on the back of the original judgment is the following: 'Agreed to. PILLSBURY & BLANDING. LEWIS SHEARER. WILLIAM T. HERRIN.'" *Held*, that there is nothing in the indorsement itself, separated from the other portions of the transcript, to indicate that the names written in lead-pencil were the names of attorneys for any of the parties.
2. SAME—TRIAL COURT—AMENDING JUDGMENT PENDING APPEAL.
 The trial court cannot deprive an appellate court of jurisdiction of an appeal from its judgment by amending the judgment pending the appeal.

Department 1. Appeal from superior court, Alameda county.

Edward Lynch, for appellant. *Wm. T. Herrin* and *Lewis Shearer*, for respondents.

MCKINSTRY, J. The respondent moves to dismiss the appeal of the defendant McDonald on the ground that the judgment appealed from was entered "upon the mutual consent" of the appellant and the other parties to the action. In the margin, opposite to the copy of the judgment contained in the transcript, appear the words: "Indorsed in lead-pencil on the back of the original judgment is the following: 'Agreed to. PILLSBURY & BLANDING. LEWIS SHEARER. WILLIAM T. HERRIN.'" The answer of defendant McDonald is subscribed "WALLACE, GREATHOUSE, AND BLANDING," as his attorneys, for whom, after the entry of the judgment, was substituted Edward Lynch, Esq. The notice of appeal is signed "EDWARD LYNCH, Attorney for Defendant McDonald." There is nothing in the indorsement itself, separated from the other portions of the transcript, to indicate that the names written in lead-pencil were the names of attorneys for any of the parties. It does not appear whether they were signed before or after the judgment was rendered or entered, or, if signed before, that the words "agreed to" were intended to mean anything more than that the draft of the decree or judgment prepared to be presented to the judge was agreed to as properly expressing the judgment ordered by the court.

There is no recital in the judgment showing it was based on the consent of the defendant-appellant. The judgment commences with the recital: "This cause came on regularly to be heard in open court on this seventh day of July, 1885, Wm. Herrin, Esq., appearing for plaintiff, and Lewis Shearer, Esq., appearing as the attorney of defendants Robinson and Meyers, and Pillsbury and Blanding, Esqs., for defendant McDonald. The court having heard *all the evidence and proofs* produced herein, and duly considered *the same*, and being fully advised in the premises, and it *appearing therefrom* to the satisfaction of the cou[illegible]." etc. Important issues were made by the pleadings on the part of defendant McDonald, and the presumption is that the judgment

which determines those issues was based upon the evidence bearing on them, and not upon the pencil memorandum made, so far as appears, after the trial was concluded.

A former motion to dismiss the appeal was denied "without prejudice." Even if it be conceded that we would be authorized to grant the renewed motion on the same evidence as that submitted on the hearing of the former motion, we think such evidence does not require of us that the appeal be now dismissed. It is urged, however, that the new motion is based upon evidence of facts not presented nor relied upon when the former motion was made. The only new fact submitted on the hearing of the present motion is that, after the order denying the former motion to dismiss, the court below, on application of plaintiff, amended, or attempted to amend, the judgment appealed from by inserting therein "Pillsbury and Blanding, attorneys for the defendant M. L. McDonald, * * * agreeing thereto." If it be conceded the court below had power to amend the judgment, the amended judgment was substituted for the original, and, from the time of its entry, became the "final judgment" in the superior court. We think it very plain that the superior court cannot deprive this court of jurisdiction of an appeal from a judgment by amending the judgment while the appeal is pending here. It is contended the amended judgment of the superior court is *evidence* that the original judgment was entered by consent. Aside from the proposition that the superior court had no power to affect the appeal from the judgment by amending it, the amended judgment, whether valid or invalid, was appealable, and, in fact, (if we look at the record of that appeal,) has been appealed from by the defendant McDonald. We ought not now to determine such appeal, and it would be to anticipate its determination to decide the amended judgment to have been a valid and conclusive adjudication that the original judgment was made and entered by consent. Motion denied.

We concur: PATERSON, J.; TEMPLE, J.

72 Cal. 164

In re Estate of STEVENSON. (No. 9,502.)

(*Supreme Court of California.* March 19, 1887.)

EXECUTORS AND ADMINISTRATORS—NOMINATION—RIGHT OF NON-RESIDENT SURVIVING WIFE—SECTIONS 1365, 1369, 1383, CODE CIVIL PROC. CAL.

Section 1369 of the California Code of Civil Procedure, which renders a non-resident surviving wife *incompetent* to *serve* as the administratrix of her husband's estate, does not take away the right given her by section 1365 to have letters issued to some competent person, whom she shall have requested to act as administrator, the latter section being in no respect in conflict with section 1383, revoking letters of administration.

Commissioners' decision. Department 2.

Appeal from superior court, San Francisco.

Sawyer & Burnett, for appellant. *Wright & Cormac* and *O. P. Evans,* for respondent.

FOOTE, C. John Stevenson died in Scotland some time in the year A. D. 1882, leaving a will which was probated in that country, by the terms of which instrument he devised his entire estate to trustees for the benefit of his widow and niece. P. A. Roach, the public administrator for the city and county of San Francisco, on the thirtieth day of July, A. D. 1883, filed in the superior court of said city and county an authenticated copy of said will, and its probate in Scotland, accompanied by a request in writing from the said widow that he be appointed administrator of the estate of the decedent with the will annexed, and petitioned for the probate of the copy of the will, and the issuance of letters of administration thereunder to him. Robert Steven-

son, a brother of the decedent, on the second day of August, A. D. 1883, petitioned that said letters be issued to him. Both petitions were heard together. The court below admitted the copy of the will to probate, granted letters as prayed for to the public administrator, and denied the application of Stevenson, who appealed from the order made by the court in the premises.

To us it is very evident that the public administrator, the nominee of the surviving wife of the decedent, was the proper party to whom letters of administration were rightfully granted. Section 1365, Code Civil Proc., reads as follows: "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof, and they are respectively entitled thereto in the following order: (1) The surviving husband or wife, or some competent person whom he or she may request to have appointed. * * *"

It clearly appears that this section contains no restriction whatever on the power of the surviving husband or wife first to administer on the estate of the deceased consort, or, failing in that, to request, and thereby have appointed, some competent person as administrator. Section 1369, Code Civil Proc., renders a non-resident surviving wife *incompetent* to *serve* as the administratrix of her husband's estate, but does not take away the right given her by section 1365, *supra*, to have letters issued to some competent person whom she shall have requested to act as administrator. *Estate of Cotter*, 54 Cal. 215. Section 1379, Code Civil Proc., accords to persons other than a surviving husband or wife the right of nominating an administrator, but has no reference to such husband or wife, and their rights in that matter, which are fixed and determined by section 1365, *supra*, (*Estate of Cotter*, *supra*;) and that section does not conflict, as the appellant contends, in any respect with section 1383, Code Civil Proc.

It is unnecessary to determine any other question raised by counsel, and the order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

72 Cal. 170

TOWN OF SAN LEANDRO *v.* LE BRETON, Adm'r, etc., and others.
(No. 9,399.)

(*Supreme Court of California.* March 23, 1887.)

1. DEDICATION—PLAT OF PUBLIC SQUARE.
Where one owning land lays off a town or village thereon, and makes a map of the town-site, on which is represented a public square or plaza, and then sells lots with reference to such map, he thereby makes an irrevocable dedication to the use of the public of the space so represented on the map as a public square.[1]

2. SAME—ACCEPTANCE.
Where a town plat, on which a public square was represented, was filed in 1855, and the town was not organized by the legislature until 1872, *held*, that until such organization of the town the former owners held the title of the public square dedicated in trust for the public, no formal acceptance by the town being necessary to make the dedication complete.[2]

3. SAME—TAXATION OF PUBLIC PROPERTY.
When a block in a town plat has been dedicated to the use of the public as a public square, it becomes a part of the public grounds of the town, and cannot legally

[1]As to the dedication of a street to public use by making and recording a plat on which it is designated, see Fulton v. Town of Dover, (Del.) 6 Atl. Rep. 633; Donohoo v. Murray, (Wis.) 22 N. W. Rep. 167; and Quinn v. Anderson, (Cal.) 11 Pac. Rep., note, 747.

[2]See Maywood Co. v. Village of Maywood, (Ill.) 6 N. E. Rep. 866.

be assessed or taxed for state, county, or municipal purposes; and the erroneous action of the public officials in taxing the same cannot impair the rights of the public, or confer rights upon the person paying such taxes.

4. SAME—ADVERSE OCCUPANCY—LIMITATIONS.
No one can acquire by adverse occupation, as against the public, the right to a street or square dedicated to public uses, and an action by a town for the possession of such street or square cannot, therefore, be barred by the statute of limitations.[1]

Commissioners' decision. In bank.
Appeal from superior court, Alameda county.
Pillsbury & Blanding, for appellants. *H. F. Crane*, for respondent.

BELCHER, C. C. This is an action to determine whether a certain block of land, situate within the corporate limits of the town of San Leandro, in Alameda county, is a public square, dedicated to the use of the town and the inhabitants thereof, or is owned and rightfully occupied by the defendants. In the court below the plaintiff prevailed, and the appeal is by the defendants from the judgment and an order denying a new trial. It appears from the record that in 1854 the widow and children of Jose Joaquin Estudillo were the owners of the Rancho de San Leandro, situate in Alameda county, and embracing about 6,000 acres of land, and were desirous of founding a town or village thereon. As a site for the proposed town or village they selected about 200 acres of the *rancho*, which included the residence of the owners, and is the present site of the town of San Leandro, and caused it to be surveyed into streets, blocks, and lots. They then caused a map of the survey to be made, on which the streets were represented and named, and the blocks, with the exception hereinafter noted, were numbered and divided into lots. The blocks were 300 feet square, and were designated by numbers from 1 to 66 inclusive, and each full block was divided into 14 lots, designated by the letters of the alphabet, "A" to "N," inclusive. One of the blocks—the one bounded by Davis street, Estudillo street, Ward street, and Martinez street, and which is here in controversy—was marked "Court Square" on the map, and was not numbered or divided into lots. The map was certified as a plat of the town, and was filed by the owners of the land in the office of the recorder of Alameda county on the twenty-seventh day of February, 1855, and has ever since remained and now is a part of the records and files of that office. A duplicate of the map was kept by the proprietors at their place of business in the town, and was by them and their agents exhibited to all purchasers of lots and blocks, and all said lots and blocks were negotiated and sold to purchasers in accordance with the map or plat, and all deeds were made with reference to it. The town was first incorporated and made a body politic and corporate by an act of the legislature approved March 21, 1872, and during the months of June and July of that year the board of trustees caused a new survey and plat of the town to be made. This new plat or map, so far as the 200-acre tract before spoken of is concerned, was an exact duplicate of the map filed in 1855, and was adopted and approved as the plat of the town by a resolution and ordinance passed by the board of trustees on the ninth of December, 1872.

The foregoing facts are alleged in the complaint, and not denied by the answer. It further appears that not less than eight blocks and thirteen lots in other blocks were sold and conveyed by the proprietors between February, 1855, and March, 1857. One of the blocks so sold was on Davis street, opposite to the block in question, and at the time of the sale it was represented to the purchaser that the said block in question was a public square. For eight or nine years after the map was filed, in 1855, "Court Square" remained open and uninclosed. In 1862, '63, or '64 it was inclosed by one of the defendants, in connection with an adjacent block on which he resided, and a small barn

[1] See Hoadley v. City and County of San Francisco, (Cal.) 12 Pac. Rep. 125, and note.

was placed upon it. Since that time the inclosure has been kept up, and a part of the ground has been annually cultivated by him.

Upon these facts the court below found, as conclusions of law, "that the town proprietors, in making the map and plat of the town, as stated, and in placing the same as a public record of the county in the office of the county recorder, it operated as a declaration on their part to dedicate the place named 'Court Square' to the purposes of an open, public town square for the use of the inhabitants of the town and the public; that in immediately following up the making and filing of the said map and plat by sales and conveyances by them of lots and blocks in the town to *bona fide* purchasers, in accordance with such map and plat, such dedication became absolute and irrevocable." These conclusions are assailed by the appellants as not warranted by the facts, and whether they are or not is the principal question presented in the cause.

It is settled law that where one owning land lays off a town or village thereon, and makes a map of the town-site showing it to be divided into streets, alleys, blocks, and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space as represented on the map as streets to the use of the public. There are many cases to this effect, but only a few need be cited. *Rowan's Ex'rs* v. *Town of Portland*, 8 B. Mon. 232; *Briel* v. *City of Natchez*, 48 Miss. 423; *Bartlett* v. *Bangor*, 67 Me. 464; *Wiggins* v. *McCleary*, 49 N. Y. 346; *Kittle* v. *Pfeiffer*, 22 Cal. 489; *Stone* v. *Brooks*, 35 Cal. 501. And if there be public squares or places represented on the map the same rule applies to them, and dedication thereof may be established in the same manner. *Cincinnati* v. *White's Lessees*, 6 Pet. 431; *Trustees of Watertown* v. *Cowen*, 4 Paige, 510; *Huber* v. *Gazley*, 18 Ohio, 18; *Logansport* v. *Dunn*, 8 Ind. 378; *Carter* v. *City of Portland*, 4 Or. 339; *Ruch* v. *Rock Island*, 5 Biss. 95; *Grogan* v. *Town of Hayward*, 6 Sawy. 498. To make the dedication complete no formal acceptance of it is necessary. In this case no such acceptance could have been had till the town was organized by the legislature in 1872; and until then the former owners held the title of the property dedicated in trust for the public. *Grogan* v. *Town of Hayward, supra; Jersey City* v. *Morris Canal & Banking Co.*, 12 N. J. Eq. 547; *School-district* v. *Heath*, 56 Cal. 478.

But it is urged that the proprietors never intended to dedicate the premises in question as a public square, and so no dedication was in fact made; that at the time the map was made and filed, San Leandro was striving to become the county seat of the county, and that the proprietors, hoping and expecting the adoption of the town as the county seat, and that they would derive a benefit and advantage therefrom, for the purpose of showing to purchasers of lots that the county buildings were to be located in the town, marked and designated "Court Square" for county purposes, intending it to be used for the erection of a court-house and such other buildings and offices as customarily accompany and are used with the court-house; that the name shows that the block was intended to be used for county buildings and county purposes, and not otherwise, and that it carries on its face notice of the use for which it was designed. In support of this contention it was shown that on the twenty-ninth day of December, 1854, the proprietors executed and delivered to the county of Alameda their deed for four acres of land, "to be located in such part of the town of San Leandro as any persons who shall be authorized to act and decide upon the matter may choose," and the land so chosen was to be "for the exclusive use of said county for the erection of a court-house and such other buildings and inclosures as may be needed for the use of said county." It was further shown that on the twenty-fifth day of August, 1856, and after San Leandro had been made the county seat of the county, the proprietors executed another deed and thereby conveyed to the county "block number nineteen, (19,) in the town of San Leandro, in said county of Alameda, according to the records, plat, or other official plan of said town, con

taining two (2) acres, more or less; said block of land having been selected by the board of supervisors of said county as a site for the erection of a court-house and jail upon, as contemplated by the deed of the said party of the first part to the said party of the second part above referred to."

No other evidence upon this subject was offered by defendants, and the court found "that neither at the time of the making of said survey and plat by the proprietors, to-wit, some time previous to the twenty-ninth day of December, 1854, or at the time said plat was filed as aforesaid, or at any time, did said proprietors intend that said place, named on the plat 'Court Square,' should be used for the erection of county buildings, or be used in any manner for county purposes; but, on the contrary, it was the intention of said owners and proprietors, in laying out said town as aforesaid, that this place, so left by them open and vacant, and by them named 'Court Square,' should forever be and remain an open, public square for the use of the town and the inhabitants thereof and the public." We are unable to see any such significance in the word "court" as is claimed by the appellants, or that this finding should be set aside because not justified by the evidence.

It is further insisted that because after 1871 the town and county assessors included this square in their assessment lists, and it was included in the general tax levy, and the defendants' intestate paid the taxes, and, in obedience to the municipal ordinances, improved the streets bordering on the square, the plaintiff is now estopped from claiming it as against the defendants. The answer is, that when the block was dedicated to the use of the public as a public square it became a part of the public grounds of the town, and could not be legally assessed or taxed for state, county, or municipal purposes; and the erroneous action of officials in the respects named could not impair the rights of the public, or confer rights upon the defendants. The doctrine of estoppel has, therefore, no application.

As to the defense that the action is barred by the statute of limitations, it is sufficient to refer to the cases of *Hoadley* v. *City of San Francisco*, 50 Cal. 265, and *People* v. *Pope*, 53 Cal. 437, in which it was held by this court that no one can acquire by adverse occupation, as against the public, the right to a street or square dedicated to public uses.

It follows that the judgment and order should be

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing ment and order are affirmed.

72 Cal. 146

GAFNEY v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11,316.)

(*Supreme Court of California.* March 16, 1887.)

1. MUNICIPAL CORPORATIONS—CONTRACTS—STREET WORK.

Under St. Cal. 1869-70, p. 890, relating to street work in San Francisco, allowing a contractor for such work to resort to the city for payment, if the assessment upon lot-owners is declared invalid by the courts, so that the money cannot be collected from them, and if such invalidity appears by the decision of the courts not to have been caused by any fault of the contractor, the judgment of invalidity need not find affirmatively that the invalidity was not caused by any fault of the contractor, nothing appearing therefrom to suggest that it was.

2. Estoppel—Municipal Corporations—Judgment.
If, in the action against the lot-owners upon the assessment, the assessment is found invalid upon grounds affecting the validity of the contract, such finding is not conclusive upon the contractor in his action to enforce the liability of the city.

3. Municipal Corporations—Contract—Validity—Streets.
A contract for macadamizing, made by municipal officers, will not be invalid because the resolution ordering the macadamizing embraced grading also, and no grading could legally be done for want of a petition of property owners.

4. Same—Grade of Streets.
A statute fixing the grade of a street at points of intersection with other streets fixes the grade of the entire length of the street.

5. Same—Map—Construction.
The width of a street is sufficiently shown on an official map by figures printed across the space denoting the street, without the word "feet" added, if the scale of the map shows that feet is intended

6. Same—Extensions of Time.
Extensions of time for completing a contract for macadamizing streets in San Francisco, granted after the act of 1872 took effect, under a contract providing for such extensions made prior to that act, are valid.

7. Interest—Contractor's Claim—Municipal Corporation.
A debt due a contractor for street work, for which a city is liable only in case an assessment levied on property owners to pay it is declared by the courts to be invalid, only bears interest, as against the city, from the date of the adjudication of invalidity, although, under the statute, the assessment itself bears interest from the time it becomes due.

In bank. Appeal from superior court, city and county of San Francisco.

George Flournoy, Jr., and *Garber, Thornton & Bishop*, for appellant. *Mich. Mullany*, for respondent.

Temple, J. Appeal from a judgment in favor of plaintiff, and from an order denying a new trial. Prior to 1870 street work in San Francisco had been inaugurated by a resolution and notice of intention, followed by certain notices and advertised proposals, ending in a contract. The superintendent of streets was required to approve the work, when satisfactorily performed, and to issue to the contractor an assessment on the adjoining lots in payment for the work. Here the concern of the city ended. The contractor assumed control of all further proceedings, and the issuance of the assessment discharged the city from all further liability to him. Under this system the lot-owner could set up to defeat the action, not only defects in the proceedings before the contract was let, but defects in the assessment, which assessment could only be made after the superintendent of streets had determined that the contract had been fully performed. Here was an obvious hardship. The contractor could not control the action of the city official, but still he was liable to lose the entire reward of his labor through an oversight of the officer. The proceedings having been held to be *in invitum*, a strict compliance with the statute was exacted, and very frequently great hardship resulted without fault on the part of the contractor.

In the statute passed April 4, 1870, (St. 1869–70, p. 890,) this system was changed. All the proceedings down to the assessment were left substantially as before. From this point a new system was adopted. The assessment made by the superintendent of streets was delivered to the tax collector, and in lieu of the assessment the superintendent gave the contractor a warrant for the amount due him, payable only out of the funds collected from the property holders, and in amounts as the same should be collected at the end of each month. An assistant was provided for the city and county attorney, specially to sue for and collect the street assessments, and it was made mandatory upon him to commence these suits within 10 days after the assessments were delivered to him. It was further provided that "when any contract for street work shall have been made by the proper officers of said city and county,

and shall be fully and faithfully performed by the contractor thereof, or his assigns, in every respect, and in accordance with the terms of said contract, and afterwards the assessment for the payment of such street work shall be declared to be invalid by the highest courts in the state, and if such invalidity shall appear by the decision of such courts not to have been caused by the frauds, acts, conduct, or omission of said contractor, it shall be the duty of the said board of supervisors of said city and county to order the full amount or amounts of such contract, or whatever amount or amounts shall be due and owing on said contract, to be paid to said contractor or his assigns out of the street department fund, together with all such fees to the said attorney as he, the said attorney, would have been entitled to if the same had been collected after judgment, and the city and county auditor shall audit, and the treasurer shall pay the same; * * * and, upon such payment to such contractor as aforesaid, the said contractor or his assigns shall assign said contract to the city and county of San Francisco."

This action is upon a contract for macadamizing Railroad avenue, entered into in 1871. The work was performed, the assessment made, suits brought upon the assessments, which were finally held invalid by the highest courts of the state, November 1, 1882. The suits were decided in favor of the defendants on the ground: (1) The grade and width of the street had never been officially established; (2) the board of supervisors had no jurisdiction to order the work to be done.

Now, it was necessary for the plaintiff to put in evidence this judgment, and show by it that it had been finally adjudicated that the assessment was invalid, as a condition precedent to his right to recover. It is now contended that it is conclusive as to the grounds upon which it was held to be invalid, not, of course, as *res adjudicata* in the ordinary sense, but because by his contract he made his right to recover depend upon this judgment. Or, to put the matter in the strongest possible terms, he cannot rely upon this as an adjudication that the assessment was invalid, and at the same time claim a right to recover on the ground that the court erroneously so held. This certainly seems a very plausible argument, but the matter cannot be so easily disposed of. It is necessary to examine into the purpose and scope of the amendatory act before disposing of the question. As already stated, the change effected in the proceedings by the amendment commences after the work has been performed. Up to that time the former law was in force. It was necessary that there should be a valid contract, binding upon the city. Whether there was power to contract, or the power, if it existed, had been exercised as directed by law, were matters which the contractor was bound to ascertain for himself, and to decide correctly at his peril. The *data* for such conclusion were easily accessible to him. But under the former system his right to recover did not depend altogether upon his faithful performance of a valid contract. He took the assessment as payment, and this was liable to be declared void, through the omission or mistake of the street superintendent, after he had fully performed his labor. As he had no control over the superintendent of streets, who was a municipal officer, this was a great hardship. The invalidity of the contract, if it existed, he could ascertain beforehand; but in regard to the assessment, if invalid, it was in consequence of failure of duty on the part of the officials, which he could neither anticipate nor prevent. Here the new law steps in, and (disregarding for the present the necessity of an adjudication of the invalidity of the assessment before a recovery can be had) declares, in effect, that if there be a valid contract, and the contractor has faithfully performed his work, he shall be paid. The condition is only that the assessment fails through no fault of the contractor.

Having been compelled to decide upon the validity of the contract at his peril, it would be hard measure, after he had faithfully performed his work, if that question could be decided against him without his having an oppor-

tunity to be heard. The presumptions are all against a construction which would not allow him his day in court. The language of the act does not necessarily require this construction. It provides that he shall be paid by the city if he fully performs, and afterwards the street assessment shall be declared invalid, "and if such invalidity shall appear by the decision of said courts not to have been in any manner caused by the frauds, acts, conduct, or omissions of said contractor."

The contractor was not and could not have been a party to those suits. The litigation was between the city and the lot-owners. If the construction contended for be correct, both parties to the suit would gain by a decision in favor of the lot-owners establishing the invalidity of the contract. The city, by simply failing to put in proof, could escape liability, and the contractor, who would be the only one to suffer loss, could not prevent it. The statute allows the lot-owner to defend, not only for defects in the assessment, but on the ground that the supervisors had no jurisdiction to order street work done. As to only two matters does the statute seem to require an adjudication before the contractor can have recourse to the city for payment. These are: (1) That the assessment is invalid; (2) the invalidity was in no manner caused by the fault of the contractor.

The essential thing here is, there being a valid contract, and the work having been done, the city fails to collect without fault on the part of the contractor; and we think the judgment conclusive only on those two points.

But it is said there was in fact no valid contract.

First, there was no petition signed by a majority of the owners of property, etc. The contract was for macadamizing, and it is not claimed that such petition was required as a preliminary to such a contract, but such petition was necessary to authorize the work of grading, and here both were embraced in one resolution, and ordered at the same time; and it is claimed that there could be no power to contract for macadamizing unless there was jurisdiction to order the grading. But we do not see why the validity of this contract should depend upon the other. It seems that they may both be let at the same time, and that a contract for macadamizing may be let before the grading is completed. *Dyer* v. *Hudson*, 65 Cal. 374, 4 Pac. Rep. 231; *Emery* v. *San Francisco Gas Co.*, 28 Cal. 375. Of course, in such cases, although the contract for grading may be valid, there is still a contingency as to whether the work will be performed. If the grading be not done, the contract for macadamizing must fail. If the grading fail because the contractor is not legally bound, it will be no worse than a failure for any other reason. After a street is graded, though under a void contract, the power to macadamize would be the same. We think the contract not invalid for that reason.

It is next objected that the grade of Railroad avenue had not been established. But we think the statute referred to has that effect. It enacts that the grades of the streets and avenues mentioned shall be with reference to the base line of city grades, for the intersections named, as follows, etc. We understand this to be the usual mode of designating grades for streets, and that it fixes the grade not only at points specially mentioned, but at all points intermediate, by simply connecting the named points by a straight line. The width was shown by the official map by the number of the feet being printed across the space denoting the streets, without indicating what the numbers stood for. For instance, across the space indicating Railroad avenue was printed the number "100." The word "feet" was not added. The scale of the map, however, would show that the space was 100 feet. These two facts, taken together, sufficiently show what the figures were intended to represent.

Nor do we think there can be any doubt as to the extensions of time within which the work was done. It could not have been intended by the act of 1872 to render the completion of existing contracts impossible. The contract itself provided for extensions, and, as it was known when entered into that

its performance would depend to some extent upon the grading, a reasonable exercise of this power was expected.

But it is contended that the statute makes it a condition precedent to the right of the contractor to be paid that it should affirmatively appear in the judgments on the assessments that the assessment was invalid, and that such invalidity was not caused by any fraud, act, conduct, or omission of the contractor. The contractor could not have been made a party to these proceedings. If there was in fact no fault on his part affecting the validity of the assessment, and no charge of any such, there could not possibly be such adjudication. It would rest altogether with the lot-owners,—defendants in the suits on the assessment,—whether they would interpose such defense, and, if the appellant be correct upon this proposition, a failure on the part of the contractor to be guilty of any conduct capable of raising a suspicion of wrong would insure his loss of all claim to compensation if there were a failure from any cause to collect the assessment, for instance, through the fault of the superintendent in making the assessment. Such a construction of the statute cannot be the true one. The only reasonable meaning which can be given to the law is that such fact, to-wit, the invalidity of the assessment without fault on the part of the contractor, does appear when the judgment discloses the grounds upon which the court finds the assessment invalid, and the fault of the contractor does not appear to have contributed to such invalidity. If that be not so, then the condition is an impossible one in the literal sense, and it is sufficient that in the suit brought upon that contract such facts appear.

We do not understand upon what ground the court allowed interest upon plaintiff's claim at the rate of 10 per cent. per annum. This is an action upon the contract, and that contains no warrant for such judgment. Neither does the act contain any provision which would justify such a claim. The assessment to be paid by the lot-owner, at least after it becomes delinquent and suit is brought, is to bear interest. Probably it was intended that the interest when collected should go to the contractor, although we find no express direction in the statute upon the subject. But there is no provision for interest on the contract, and the board is directed simply to allow the amount due on the contract. This could only bear legal interest from the time it became due. Section 1917, Civil Code. It became due from the city only when the adjudication of the invalidity of the assessment became final, which was November 1, 1882. There was no forbearance in favor of the city, or detention of the money by the city, until then. Section 1915, Civil Code.

The judgment must be modified in regard to the matter of interest as herein indicated, and also so that it shall be payable only out of the street department fund, and not from the general fund. In other respects the judgment and order are affirmed.

We concur: McFARLAND, J.; THORNTON, J.; McKINSTRY, J.; SHARPSTEIN, J.

72 Cal. 166

TOWN OF DIXON *v.* MAYES and others. (No. 11,633.)

(*Supreme Court of California.* March 23, 1887.)

1. TAXATION—MUNICIPAL CORPORATION—AGRICULTURAL LAND.
Land situate within the limits of a city, although used solely for agricultural purposes, is subject to municipal taxation; following *City of Santa Rosa* v. *Coulter*, 58 Cal. 537.

2. SAME—ACTION TO RECOVER—WHEN TAXES DELINQUENT.
Under the California act of March 13, 1883, which provides for the incorporation and government of municipalities, no time is fixed for payment of municipal taxes, and a tax levied by a town cannot become delinquent until the board of trustees

has determined by ordinance the date when the same should be paid. An action to recover a tax, brought under these circumstances, without any such determination, will be dismissed.

Commissioners' decision. In bank.

Appeal by plaintiff from a judgment of the superior court of the county of Solano, where the cause was tried by BUCKLES, J., without a jury.

A. Manning and *A. L. Hart*, for appellant, Town of Dixon. *J. McKenna* and *Geo. A. Lamont*, for respondents, Mayes and others.

BELCHER, C. C. The town of Dixon was regularly incorporated, with fixed and defined boundaries, by an act of legislature approved March 30, 1878. St. 1877–78, p. 712. It was afterwards reorganized, with the same boundaries as a municipal corporation of the sixth class, under the provisions of an act of the legislature entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883. St. 1883, p. 93.

The defendant Mayes owned certain real property, situate within the corporate limits of the town, and among other pieces a strip of land 400 feet wide and 73 rods long, which was a part of an adjoining farm owned by him. In 1884 all his real and personal property within the corporate limits was assessed for municipal purposes, and a tax of 50 cents on the $100 was levied thereon. He refused to pay the tax, and this action was brought to recover it.

Two points were made by the defendant in the court below, and are made here: *First*, that the strip of land referred to was used solely for farming purposes, and so was not subject to municipal taxation; and, *second*, that the board of trustees of the town had never provided by ordinance any system for the assessment, levy, and collection of taxes, as required by the act of March 13, 1883, § 871, and for that reason the levy was not authorized, and the tax was not delinquent, and therefore its collection could not be enforced.

Upon the first point the court found as follows: "That said strip includes at its extreme west end the dwelling-house, *corral*, barn, orchard, water-tank, and out-buildings of said John S. Mayes, and is part of the farm of said John S. Mayes, consisting of 1,000 acres, and is used entirely in connection therewith, and had been inclosed with a fence and so used for some years prior to the incorporating of said town in 1878, and is now so used; that said land is not benefited by being within said limits of said town; is not laid out in lots or platted; has no streets or alleys, or sidewalks, sewers, gas-mains, or other municipal improvements or appliances and conveniences, and is not needed by said town for any of these purposes." The court further found as a conclusion of law that the strip of land was not subject to taxation for municipal purposes, and that the tax levied against it and the improvements thereon was therefore illegal and void.

In some of the states decisions have been rendered sustaining, and in others holding against, the views of the court below. The same question was presented to this court in *City of Santa Rosa* v. *Coulter*, 58 Cal. 537, and it was there held that land situate within the city limits, but used solely for agricultural purposes, was subject to municipal taxation. That case was, in our opinion, rightly determined, and is decisive of this. It should perhaps be added that the case is not referred to in the briefs filed by counsel, and was therefore probably not called to the attention of the court below at the time of the trial.

Upon the second point the court found, in effect, that no ordinance had been passed providing a system for the assessment, levy, and collection of taxes, but that all the taxable property within the town, including that of defendant, was duly assessed by an assessor elected, qualified, and acting for that purpose; that the assessor made a true list of the property, and that the same, properly verified, was submitted to the board of trustees, acting as a

board of equalization, and all of the returns of the assessor thereon were by the board examined, considered, and rectified; that the tax was levied by the board of trustees on the sixteenth day of September, 1884, by a resolution duly passed and entered upon its records, and was thereafter properly apportioned upon the assessment roll, but no provision was made for its collection, or as to the time when it would become delinquent; that the tax-list was placed in the hands of the town marshal for collection, and in January following a delinquent list was delivered to the town attorney, and this action commenced.

Upon these facts the court was of the opinion that the tax levied against the defendants' property, other than the strip of land, improvements, and personal property thereon, before referred to, was valid and lawful, and the plaintiff was entitled to a judgment therefor, which was accordingly entered. From that judgment, entered in the court below, the plaintiff appealed, but the defendant did not appeal.

Section 871 of the act of March 13, 1883, provides as follows: "The board of trustees shall have power, and it shall be their duty, to provide by ordinance a system for the assessment, levy, and collection of all city or town taxes, not inconsistent with the provisions of this chapter, which system shall conform, as nearly as the circumstances of the case may permit, to the provisions of the laws of this state in reference to the assessment, levy, and collection of state and county taxes, except as to the times for such assessment, levy, and collection, and except as to the officers by whom such duties are to be performed. All taxes assessed, together with any percentage imposed for delinquency, and the costs of collection, shall constitute liens on the property assessed from and after the first Monday in March in each year; which liens may be enforced by a summary sale of such property, and the execution and delivery of all necessary certificates and deeds therefor, under such regulations as may be prescribed by ordinance, or by actions in any court of competent jurisdiction to foreclose such liens."

Other sections of the statute provide for the levy of a tax, the amount thereof, and by whom it shall be levied; the assessment of property, and the time when and by whom it shall be assessed; the equalization of the assessment; and the manner of collecting the tax, and apportioning the money when collected; but we fail to find any provision as to the time when a tax may be levied, or when it will become delinquent if not paid. Assuming, in the absence of any statutory provision as to the time when a tax may be levied, that the board of trustees may levy it at any time when it suits their convenience and the needs of the town, still it cannot become delinquent until there has been some authoritative determination as to the time when it must be paid. As no time has been fixed by statute or ordinance when the tax involved in this case should be paid, it did not become delinquent, and the action for its recovery was therefore improperly brought.

It follows that the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(72 Cal. 178)

BENNETT *v.* HOBRO. (No. 11,156.)

(*Supreme Court of California.* March 25, 1887.)

1. NEW TRIAL—SPECIFICATION OF ERROR—INADEQUATE DAMAGES.

In an action for damages for personal injuries sustained by plaintiff, a specification of errors in the statement on a motion for a new trial, to the effect that the injuries of plaintiff were very serious, and that the sum found by the verdict was unreasonably and grossly inadequate, is a sufficient specification.

2. APPEAL—DISCRETIONARY ORDER—NEW TRIAL.
The superior court of California has power to grant a new trial where it is of opinion that the verdict is contrary to the weight of evidence, and the supreme court will not interfere with the discretion of the superior court in so doing, except in extreme cases, or in cases where it is apparent the court below has proceeded upon an erroneous hypothesis.

Commissioners' decision. Department 2.
Appeal from superior court, San Francisco.
Wigginton, Creed & Hawes, for appellant. *Crittenden, Thornton* and *F. H. Merzbach*, for respondent.

SEARLS, C. This is an action to recover damages laid at $10,000, for injuries sustained by plaintiff by falling through a trap-door in a building of one E. J. Bennett, alleged to have been carelessly and negligently left open by the servants and employes of said defendant. The cause was tried by a jury, and a verdict rendered in favor of plaintiff for $200 upon which judgment was entered. In due time plaintiff moved for a new trial upon the grounds of "(1) insufficiency of the evidence to justify the verdict; (2) that said verdict is against law and against the evidence." The motion was granted, and defendant appeals from the order of the court thus awarding a new trial.

Among the specifications of error in the statement, is one to the effect that it appears from the evidence that the injuries of plaintiff were very serious, and that the sum paid [found] by the jury, of $200, was unreasonably and grossly inadequate, etc.

In *DuBrutz* v. *Jessup*, 54 Cal. 118, it was held that, where a party against whom a verdict was rendered depended upon the circumstance that the verdict was too large or too small, he might rely upon the ground that the verdict was not sustained by the evidence, the specification being that "the said verdict, in respect to the said damages, is not sustained by the evidence, and is contrary to the law and the evidence;" and this was held a sufficient specification.

Reference to the evidence on this point shows that it tended to prove the injuries sustained by the plaintiff to have been very severe, resulting in her long confinement, with a reasonable apprehension that they may permanently disable her. Under such circumstances, the court may well have concluded that the sum awarded her was insignificant in proportion to the injuries received. It is within the province of the superior court to grant a new trial where it is of opinion the verdict is contrary to the weight of evidence. *Bauder* v. *Tyrrel*, 59 Cal. 99; *Irving* v. *Cunningham*, 58 Cal. 306. And this court will not interfere with its discretion in so doing, except in extreme cases, or except in cases where it is apparent the court below has proceeded upon an erroneous hypothesis.

We are of opinion the order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

2 Cal. Unrep. 747

SIMON *v.* SUPERIOR COURT. (No. 11,986.)

(*Supreme Court of California.* March 20, 1887.)

REVIEW—APPEAL—FROM JUSTICE'S COURT—STATEMENT OF FACTS.
Upon an application for a writ of review of a judgment of the superior court of California, dismissing an appeal taken on both law and facts from a justice's court, where no statement of the case on appeal had been made and filed as provided by section 975, Code Civil Proc. Cal., the application was denied on the ground that the petition did not set forth sufficient facts.

Department 2.

The petition set forth, in substance, that one B. commenced an action for $123 against petitioner, in a justice's court; that on June 12, 1885, defendant in the said action (petioner here) served on plaintiff's attorneys, and filed in said justice's court, his answer, denying all the allegations of the complaint. On said last day named judgment was entered against Simon, "but without determining the issues raised by said answer, and as if the same had not been filed." July 3, 1885, Simon appealed to superior court on questions of both law and fact, and filed undertakings for costs and stay of execution. B. subsequently moved the superior court (respondent here) to dismiss the appeal upon the grounds "that the appeal is on both law and fact, and no question of fact was taken in the court below, the defendant having failed either to demur or answer to the summons and complaint duly served on him, and his default was duly entered in said cause, and judgment as prayed for entered against him; and on the further ground that no statement of the case was made and filed in said cause as provided by section 975, Code Civil Proc." September 23, 1885, the motion to dismiss was denied, but subsequently, on January 14, 1887, the order of denial was vacated, and the motion to dismiss granted; the court refusing to entertain the appeal because no statement on appeal had been filed or settled, and the court considering the appeal from questions of law only. Wherefore petitioner prays a writ of review, etc.

J. M. Lesser and *H. I. Kowalsky*, for petitioner. *H. C. Firebaugh*, for respondent.

BY THE COURT. Application for a writ of review denied. The petition does not set forth sufficient facts.

72 Cal. 192

TYRRELL *v.* BALDWIN and others. (No. 11,408.)

(*Supreme Court of California.* March 26, 1887.)

APPEAL—TIME OF TAKING—SERVING AND FILING NOTICE.

Under Code Civil Proc. Cal., an appeal from a judgment is taken by filing *and* serving a notice of appeal; and where the notice was served on the seventh of December, 1885, and filed on the eighth day of December, 1885, the day on which the judgment was entered, *held*, that the appeal was not premature, the notice not being served and filed before the entry of judgment.

Department 1. Appeal from superior court, San Francisco.

A. L. Rhodes, for appellant. *Wm. Royal*, for respondent.

MCKINSTRY, J. Motion to dismiss appeal. If the notice of appeal from the judgment was served and filed the day before the judgment was entered, the appeal must be dismissed. Code Civil Proc. §§ 936, 939; *McLaughlin* v. *Doherty*, 54 Cal. 519; *Thomas* v. *Anderson*, 55 Cal. 43; *People* v. *Center*, 66 Cal. 567, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Kimple* v. *Conway*, 10 Pac. Rep. 189; *Schroeder* v. *Schmidt*, 12 Pac. Rep. 302.

At the foot of the decree appealed from, as the same is set forth in the transcript, are the words, "Decree recorded December 8, 1885," and attached to the transcript as amended is the clerk's certificate that "the decree was entered of record on the eighth day of December, A. D. 1885, in judgment book," etc. Section 668 of the Code of Civil Procedure reads: "The clerk must keep with the records of the court a book, to be called the 'Judgment Book,' in which judgments must be entered." And section 939 of the same Code provides that an appeal from a final judgment may be taken within one year "after the entry of the judgment." It has been repeatedly held that an appeal from a judgment may be taken within one year after its entry, although more than a year after the judge has announced or rendered the judgment;

also, in the cases cited above, that an appeal taken before such entry is premature, and should be dismissed. An appeal is taken by filing *and* serving a notice of appeal. In the case now here the notice of appeal was served on the seventh and filed on the eighth of December, 1885, the day on which the judgment was entered. There is nothing in the transcript, as amended on suggestion of diminution, to indicate that the notice of appeal was filed before the judgment was recorded. Moreover, we would not be justified in dividing a day for the purpose of rejecting jurisdiction of the appeal. In the original transcript, written immediately below the acceptance of service of the notice of appeal, are the words and figures, "Duly filed with the clerk of said court, December 7, 1885." This is evidently not a transcript of any indorsement or certificate of the clerk, and it is not covered by the stipulation of appellant's attorney that "the foregoing are correct copies of papers on file," etc.

Motion to dismiss appeal denied.

We concur: PATERSON, J.; TEMPLE, J.

72 Cal. 183

PALMER *v.* GALVIN. (No. 9,556.)

(*Supreme Court of California.* March 25, 1887.)

EJECTMENT—TITLE—TRUST—WHO IS BENEFICIARY.

A person who is not a beneficiary under the act of congress of July, 1870, by which the United States relinquished to the city of San Francisco, Point San Jose Military Reservation, in trust to grant and convey the same to the persons actually in possession or entitled to the possession thereof, cannot raise the question whether a grantee in a deed from the city was a beneficiary, and entitled as such to the conveyance; and in an action of ejectment the deed is conclusive evidence in the grantee's favor, as against one who has no claim to the title of the city.

Commissioners' decision. Department 2.

Appeal from superior court, San Francisco.

M. G. Cobb, for appellant. *Thomas C. Huxley*, for respondent.

BELCHER, C. C. This is an action of ejectment to recover possession of a 50-vara lot lying at the south-west corner of Beach and Hyde streets, in the city and county of San Francisco. The plaintiff claimed to be the owner of the lot, and to establish his title proved at the trial the following facts:

On the sixth of November, 1850, the president of the United States made an order exempting and reserving from sale, for public purposes, certain lands situate on the peninsula of San Francisco, at point San Jose, or Black Point. On the thirty-first of December, 1851, this order was modified by the president so as to embrace at Point San Jose only the following described tract, viz.: "The promontory of Point San Jose within boundaries of not less than 800 yards from its northern extremity."

On the first of July, 1870, an act of congress was approved, entitled "An act to relinquish the interest of the United States in certain lands to the city and county of San Francisco." By this act a portion of the "Point San Jose Military Reservation" was granted to the city and county for the following uses and purposes: "*First*, to maintain all streets and alleys as now laid out upon the official map of the city of San Francisco; *second*, and then in trust to grant and convey the remainder of said lands to the parties severally who are, at the date of the passage of this act, in the actual *bona fide* possession thereof by themselves or their tenants, and in such parcels as the same are so held and possessed by them, or who, if they have not such possession, were deprived thereof by the United States military authorities when they went into the occupancy of the said military reservation, or were deprived thereof by intruders or trespassers against whom possession may be recovered by legal process."

The plaintiff claimed to be one of the beneficiaries provided for in the act, and thereafter, in pursuance of its provision, a deed of the lot in question, dated December 24, 1870, and duly executed, was made and delivered to him by the city and county. The plaintiff then went into possession of the lot, and remained in possession of it until within five years before the commencement of the action, when the defendant entered.

The defendant by his answer denied all the allegations of the complaint, and pleaded the statute of limitations, but at the trial introduced no testimony bearing upon the issues presented. The court found all the facts, and rendered its judgment in favor of plaintiff. The defendant then moved for a new trial, and now prosecutes this appeal from the judgment and order denying his motion.

Only two points are made by the appellant here. They are: (1) that the lot in question was not a part of the Point San Jose Military Reservation, and so was not granted to the city by the act of congress; and, (2) if it was, the plaintiff was not a beneficiary provided for in the act, and so the deed from the city did not convey to him any title.

As to the first point, it is enough to say that the court found that the lot was within the boundaries, and a part of the military reservation, and that it so remained until the passage of the act of congress of July 1, 1870, whereby it was relinquished and granted to the city. There was direct and positive testimony in support of this finding, and, in the absence of all contradictory evidence, we do not see how this court can take judicial notice that the facts proved were not true.

The second point is met by the decisions of this court. In *Le Roy* v. *Cunningham*, 44 Cal. 600, it was held that a person who is not entitled to a conveyance from the city cannot raise the question whether the city of San Francisco made the conveyance of a portion of the "Point San Jose Military Reservation" to the person who was entitled to it under the act of congress of July 1, 1870. In that case, as in this, the defendant was an intruder upon the plaintiff's possession, and the court, at page 609, said: "The defendant having intruded upon the actual possession of the plaintiff, the possession which he thus acquired was *mala fide*, as between themselves and in the sense of the statute. He was therefore not entitled to a conveyance of the fee, and is not in a position to inquire whether it was rightfully conveyed to the plaintiff. That was a question for the board of supervisors, in which the defendant had no concern, inasmuch as he was not entitled to the conveyance." In *Naglee* v. *Palmer*, 50 Cal. 642, it was held that one who was not a beneficiary under the act of congress of July 1, 1870, cannot question the right of the city to convey land, under the provisions of the act, to another. And in *McCreery* v. *Sawyer*, 52 Cal. 257, it was decided that if a city holds the title to lands within its limits as a trustee for the parties in possession of the same, and the proper authorities of the city convey the land, one who has no claim to it himself cannot raise the question whether the grantee was a beneficiary, and entitled as such to the conveyance, and that in an action of ejectment by the grantee the deed is conclusive evidence in his favor, as against one who has no claim to the title of the city.

These cases are decisive of the point in controversy, and the judgment and order should therefore be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 180

PIERCE *v.* GERMAN SAV. & LOAN SOC. (No. 9,686.)

(Supreme Court of California. March 25, 1887.)

NUISANCE—ACTION FOR—VENDOR AND VENDEE—LIABILITY OF VENDEE.

One who, with full knowledge of the existence of a nuisance upon real estate for which the owner would be liable, purchases the reversionary interest in such real estate, and receives the rents thereof from the tenant in possession, thereby voluntarily assumes the responsibility of such nuisance, and becomes liable for the damages sustained in consequence thereof subsequent to his purchase.

Commissioners' decision. Department 2.

Appeal from superior court, San Francisco.

Jarboe, Harrison & Goodfellow, for appellant. *E. F. Swortfiguer, Geo. A. Wentworth*, and *Lloyd Baldwin*, for respondent.

SEARLS, C. This action is brought to recover damages claimed to have been sustained from a nuisance maintained upon the premises of the defendant, adjoining those of the plaintiff. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff for $1,050; for which sum judgment was entered. Defendant appeals from the judgment and from an order denying a new trial.

The facts shown by the evidence are that the plaintiff and the defendant are the owners of contiguous lots of land on Montgomery street, in San Francisco, separated by a party-wall; that the plaintiff has been the owner of his lot of land for upwards of 20 years, and that the defendant has been the owner of the adjacent lot of land since August 3, 1882; that upon the premises of the defendant there has been maintained a steam-bathing establishment for 10 or 12 years, and that, by the manner in which the said bathing establishment has been maintained, the plaintiff has sustained damage. It also appeared that the said steam-bathing establishment was placed there by the former owner of the premises, and, during the period of the alleged nuisance and damage, was maintained by one Justin Gates, who was in possession under a lease from August Alers, the owner of the said premises at the time of making said lease. Gates had been in possession of the premises, and had maintained the steam-bathing establishment, since January 1, 1880. He had taken a new lease from Alers, January 11, 1882, for the term of two years, and had remained in possession under that lease until after the commencement of this action. While Gates was so in possession of the premises under this lease, Alers, on the third of August, 1882, conveyed the premises to the defendant, and after that date Gates attorned to the defendant, and paid it the rent provided for in the lease. In the summer of 1883 the premises were repaired by the defendant, and since then no damage has been sustained.

It would seem that the injury complained of commenced as early as 1881, and in January or February of 1882 plaintiff notified August Alers of the fact that Alers then claimed to have nothing to do with the property, and referred plaintiff to the defendant as the owner. Defendant held a mortgage upon the property, but did not become the owner thereof until August 3, 1882, as before stated. Prior to and at the time of becoming the owner of the property defendant had full notice of the existence of the alleged nuisance.

Section 3483 of the Civil Code provides that "every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it."

Addison, in his work on Torts, states the rule as applicable to the facts of this case thus: "If a nuisance be created on the premises, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet, by purchasing the reversion with the existing

nuisance, he makes himself liable for the continuance of the nuisance." The doctrine thus enunciated is taken from the opinion of LITTLEDALE, J., in *Rex* v. *Pedly*, 1 Adol. & E. 827, and the learned judge proceeds to say: "But if, after the reversion is purchased, the nuisance be created by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord desired to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it."

This limitation of the liability of the landlord, in cases were he has no right of entry to abate a nuisance created by the tenant after the demise, comports with justice. On the other hand, the landlord who demises premises with a nuisance existing thereon is a consenting party thereto. In the present case, the former owner of the premises created the nuisance, and demised the same, with such nuisance upon them, to Dr. Gates. Thereafter defendant, with full knowledge of the nuisance and of the tenancy, purchased the reversion, and received the rent from the tenant, who attorned to it, and during this state of things plaintiff sustained the damage for which he had verdict and judgment. He who, with full knowledge of the existence of a nuisance upon real estate for which the owner would be liable, purchases the reversionary interest in such real estate, and receives the rents thereof from the tenant in possession, thereby voluntarily assumes the responsibility of such nuisance, and becomes liable for the damages sustained in consequence thereof subsequent to his purchase.

The instructions of the court below were in consonance with this theory, and the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

72 Cal. 194

SNYDER *v.* TUNITAS PETROLEUM CO. (No. 9,655.)

(*Supreme Court of California.* March 26, 1887.)

1. PLEADING—SURPLUSAGE—CORPORATION—VERDICT.
 In an action against a corporation for a sum of money which said company had promised to pay to plaintiff in consideration of his transferring certain shares of the company's stock, owned by him, to a third person, at the company's request, an averment in the complaint that said stock was delivered to said third person "for the purpose of paying him for work and labor done for and on behalf of the defendant corporation" is surplusage, and a finding of the trial court as to the precise nature of the indebtedness from defendant to said third person is immaterial.
2. TRIAL—BY COURT—FINDINGS.
 In such a case, the finding of the trial court need not state what was the value of the stock when delivered, or that the corporation, or any of its officers, had authority to employ said third person, or by whom he was employed, or what was the value of the labor performed by him.

Department 1. Appeal from superior court, San Francisco.
Robert Ash, for appellant. *Thornton & Merzbach*, for respondent.

MCKINSTRY, J. The questions presented on this appeal arise out of an examination of the findings in connection with the second cause of action set forth in the complaint, and the answer thereto. The complaint avers "that heretofore, to-wit, on or about October 1, 1882, this plaintiff delivered unto one H. H. Bodwell one thousand (1,000) shares of the capital stock of the Tunitas Petroleum Company, then and there belonging to this plaintiff, at the special instance and request and for the sole benefit of the defendant; that the said stock of the defendant corporation was given by this plaintiff to the

said Bodwell by way and for the purpose of paying him, the said Bodwell, for work and labor done for and on behalf of the defendant corporation; that the defendant then and there promised to pay this plaintiff one thousand (1,000) dollars for the said stock then and there delivered in its behalf to the said Bodwell." The answer to the averments is: "Defendant denies that it is indebted to said plaintiff in any sum of money whatever for any stock of said company; denies that said plaintiff delivered to H. H. Bodwell 1,000 shares of the capital stock of the Tunitas Petroleum Company belonging to him, or any part thereof, or any stock whatever; and denies that the alleged stock, or any stock whatever, was given by plaintiff to said Bodwell for the purpose of paying him for work and labor; denies that the said corporation defendant promised to pay the said plaintiff one thousand dollars for the alleged stock or any stock of said plaintiff, or any part of the sum of one thousand dollars for any such stock."

The findings on these issues are: "(1) That the defendant corporation employed the plaintiff as its superintendent for a long period of time; that on or about the first day of October, 1882, the defendant corporation entered into a contract with the plaintiff by which he was to receive nine months' pay, at one hundred and fifty dollars for each and every month,—that is to say, one thousand three hundred and fifty dollars as payment in full for his services as superintendent of the said defendant corporation; that the said defendant corporation paid nine hundred and nineteen dollars of the said sum of one thousand three hundred and fifty dollars which it had agreed to pay to the said plaintiff, and no more. (2) That on the first day of October, 1882, the defendant corporation was indebted to the plaintiff in the sum of $431 for his labor and work performed as superintendent of the defendant, at defendant's special instance and request. (3) That heretofore on the first day of October, 1882, this plaintiff delivered to one H. H. Bodwell 1,000 shares of the capital stock of the defendant corporation; that the said stock was the property of this plaintiff, and was delivered to the said H. H. Bodwell at the special instance and request and for the sole benefit of the defendant; that the said stock was given by the plaintiff to the said Bodwell by way of and for the purpose of paying him, the said Bodwell, for work and labor done for and on behalf of the defendant corporation; that the said defendant corporation received tankage and moneys from the said H. H. Bodwell for the said stock, and then and there promised to pay the sum of $1,000 for the said stock then and there delivered in its behalf to the said Bodwell; that the defendant corporation has not paid the $1,000, or any part thereof, to the plaintiff, or any one in his behalf."

Appellant contends that the third finding does not respond to the issue made by the pleadings, because the finding is that the defendant "received tankage and money," not "work and labor," from Bodwell. But the averment in the complaint that the stock was delivered by plaintiff to Bodwell "for the purpose of paying him for work and labor done for and on behalf of the defendant corporation" might have been omitted. The finding as to the precise nature of the indebtedness (if any) from defendant to Bodwell was immaterial.

Appellant says the finding is insufficient because it is not found "who employed Bodwell," nor what was the value of the stock when delivered, nor that the corporation, or any of its officers, had authority to employ Bodwell, nor the value of the labor, or of the tankage. There was no necessity that these matters should be found. But the court did find that Bodwell worked for and on behalf of the defendant, and that the defendant received "tankage' and moneys from him. Judgment affirmed

We concur: TEMPLE, J.; PATERSON, J.

72 Cal. 197

COLBERT and others v. RANKIN and others. (No. 9,550.)

(*Supreme Court of California.* March 26, 1887.)

1. MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY—DEFECTIVE MACHINERY.
In an action for damages for the wrongful killing of an employe, where it appeared that the decedent was killed by the falling upon him of a large flat casting, then hoisted up by means of a crane on the premises of the defendant, and there was evidence tending to show that decedent had time to escape from under the casting before it fell upon him, the defendant requested the court to charge that, "if decedent had abundant time to escape after the accident occurred, but failed to do so, not from fright, but because of an error of judgment in supposing that he alone could hold up the casting, he contributed by his error of judgment to the accident, and defendants are not liable." *Held*, that the request for the instruction was properly refused.

2. SAME—KNOWLEDGE OF SERVANT.
In order that a servant may be declared guilty of contributory negligence in working about machinery that was defective,[1] it must appear that he knew or might have known that, by reason of such defect, his employment about said machinery involved danger to himself.

Department 2. Appeal from superior court, San Francisco.

Doyle, Barber, Scripture & Galpin, for appellants. *J. P. Merix* and *N. J. Manson*, for respondents.

BY THE COURT. An action for damages for the wrongful killing of one L. R. Colbert. Plaintiffs had judgment in the sum of $500, from which this appeal is prosecuted by the defendants. It is contended that the "bill of exceptions, on motion for new trial and on appeal," which appears in the transcript, should not be considered, and the reason assigned for such contention is that the appeal from the judgment was perfected six days before the bill of exceptions was signed and filed, and that, therefore, the court below did not have jurisdiction of the case, and consequently the bill of exceptions should not be considered by this court. We cannot agree to the view entertained by the respondents as to this matter. The settlement and filing of the bill of exceptions, after judgment and appeal taken, was a matter embraced in the action, and not affected by the judgment appealed from, and therefore the court below had a right to proceed as it did. Section 946, Code Civil Proc.; *Reilly* v. *Reilly*, 60 Cal. 626.

The only point made by the appellants for the reversal of the judgment is that certain instructions on the law of the case, asked by them to be given by the court to the jury, were erroneously refused. Those instructions were as follows: "If the decedent had abundant time to escape after the accident occurred, but failed to do so, not from fright, but because of an error of judgment in supposing that he alone could hold up the casting, he contributed by his error of judgment to the accident, and defendants are not liable." "There is no warranty by the employer, implied in the contract of service, that materials furnished should be sound or fit for the purpose. The law imposes on the employer an obligation to use ordinary care only in the selection thereof."

By the bill of exceptions it appears that on the trial of the case "evidence was offered and admitted which tended to show that the decedent in the complaint mentioned was killed by the falling upon him of a large flat casting, from nine to ten feet in diameter, then hoisted up by means of a crane, and on the premises of the defendants, as charged in the complaint; that said crane broke in that part thereof known as the box, which supported the journal or axle of the drum, whereon the chain was wound, whereby said casting was hoisted; that said crane was operated by the fellow-laborers of the decedent, none of whom held any higher, different, or superior position, with

[1] See White v. Nonantum Worsted Co., (Mass.) 11 N. E. Rep. 75, and note.

regard to said business, than the decedent." The court told the jury that there was no issue presented by the pleadings in regard to any wrongful act or neglect on the part of the fellow-laborers of the decedent, and that the defendants were responsible for such wrongful act or neglect, if any. As to this direction, no error is assigned. There was proof offered tending to show that decedent had time to escape from under the casting before it fell upon him. Under the facts of the case, as thus disclosed, we perceive no error on the part of the trial court in refusing to grant the instructions asked for. It is clear that the piece of machinery about which the decedent was working was unsafe; and in order that he should be declared guilty of contributory negligence, where an injury resulted to him from such defective machinery, it was necessary that it should appear in evidence that he knew, or might have known, that by reason of such defect his employment in and about said machinery involved danger to himself; and this proposition, as one of the conditions which rendered the decedent responsible for his injury, was not included in the instructions. *Sanborn* v. *Madera Flume & Trading Co.*, 11 Pac. Rep. 710.

Without such needful qualification, they were calculated to mislead the jury; the last one particularly being, at best, but a mere abstract proposition of law. Judgment affirmed.

2 Cal. Unrep. 748

YOUNG *v.* POOLE. (No. 9,472.)

(*Supreme Court of California.* March 25, 1887.)

SALE—DELIVERY AS AGAINST CREDITORS OF VENDOR.

Where negotiations for a sale by an employer to his employe of certain property, including safes, were made in March, but the sale was not consummated until April 1st, upon which day the vendor was sued by a creditor, and, after the sale, the property remained in the same building as before, but the vendee's name appeared on the sign as successor to the vendor, *held*, that the sale was not followed by immediate delivery, and an actual and continued change of possession, as required by Civil Code Cal. § 3440, and execution obtained by the vendor's creditor could be levied on the safes.[1]

Department 1. Appeal from superior court, city and county of San Francisco.

On September 14, 1881, the defendant, Poole, was United States marshal for the district of California. Upon that day, under an execution duly issued out of the circuit court of the United States for the district of California, on a judgment therein in favor of the Wallamet Falls Canal & Lock Company, and against one Jonathan Kittredge, he levied upon, and thereafter sold, as the property of said Kittredge, four iron safes. Richard Young, the plaintiff, brought this action in the nature of trover, in the superior court of the city and county of San Francisco, to recover the value of said safes; alleging that they were his property and in his possession at the time of the levy. Upon the trial below, before EVANS, J., a jury being waived, the evidence showed that the bill of sale of the property in question from Kittredge to Young, under which Young claims title, was executed April 1, 1881, the day upon which the summons in the said action by the Wallamet Falls, etc., Company, was served upon said Kittredge. After the sale to Young, the property remained in the same building as before; Kittredge and Young reversing their former positions of master and servant, and Young placing his name, "as successor," over the sign of Kittredge, in front of the building. The material facts in regard to the sale appear in the opinion. Judgment for plaintiff. Defendant appeals.

E. W. McGraw, for appellant. *Lattimer & Morrow*, for respondent.

[1]See Cook v. Rochford, (Cal.) 12 Pac. Rep. 568, and note.

BY THE COURT. This action is to recover personal property levied upon as the property of Jonathan Kittredge. The plaintiff claims as purchaser from Kittredge. The negotiations for the sale were made in March, but the sale was not consummated until April 1st,—the day on which summons was served on Kittredge. The levy of the execution was in September following. We think the undisputed facts show that the sale was not followed by immediate delivery, and an actual and continued change of possession, such as is required by section 3440, Civil Code.

Judgment and order reversed, and a new trial ordered.

2 Cal. Unrep. 749

PACIFIC BRIDGE CO. *v.* JACOBUS and others. (No. 9,851

(*Supreme Court of California.* March 26, 1887.)

ACTION—DISMISSAL—WANT OF PROSECUTION—SERVICE—DISCRETION.

Where the summons was not issued till nearly a year after the action was begun, and had not been served at the time of a motion to dismiss three years and eight months after its issuance, plaintiff explaining that he forebore to serve the summons for the reason that certain persons represented that defendant would abide the event of a test case, but not showing their authority to make the representations, and defendant denying it, *held*, that there was no abuse of discretion in granting the motion to dismiss.

Department 1. Appeal from superior court, Alameda county.

The record shows that this was an action to recover a street assessment; that it accrued November 6, 1877; that the action was commenced October 25, 1879; that the summons was issued October 6, 1880; that the summons has not been served; and that the plaintiff did nothing between the date of issuance of the summons till the motion to dismiss was made. The motion to dismiss the action for want of prosecution was made May 29, 1884, based upon an affidavit of defendant that he had been at all times within reach of process; that the plaintiff had been wanting in due diligence, and did not begin the action in good faith. The plaintiff in his affidavits showed that certain persons, representing themselves to be an executive committee of certain property holders, who intended to resist the assessments, represented that it was the desire of all that an action of plaintiff against Kirkham, one of said committee, should be a test case, by the result of which they would all abide, and that, by reason of such representations, plaintiff forbore to serve the summons and prosecute said actions. Defendant, by his counter-affidavits, showed that the agreement among the property holders was simply to combine together to resist the collection of the tax, and pay the expenses of the litigation, both in the Kirkham case, and in any other cases that might arise, *pro rata*. The action was dismissed.

Vrooman & Davis, *J. C. Martin*, and *D. M. Delmas*, for appellant. *B. McFadden* and *H. C. McPike*, for respondents.

BY THE COURT. A careful examination of the transcript of the record—including the affidavits used on the motion—satisfies us that the court below did not abuse its discretion in granting the defendants' motion to dismiss the action, but that it was justified by the evidence in making the order appealed from. Order and judgment affirmed.

PACIFIC BRIDGE CO. *v.* STEVENS and others. (No. 9,852.) SAME *v.* PATTEN and others. (No. 9,853.) SAME *v.* VINZENT and others. (No. 9,854.) SAME *v.* WILLIAMS and others. (No. 9,855.) SAME *v.* BADGER and others. (No. 9,856.) SAME *v.* KELLOGG and others. (No. 9,857.) SAME *v.* FELTON and others. (No. 9,858.)

(*Supreme Court of California.* March 26, 1887.)

Department 1. Appeals from superior court, Alameda county.

Vrooman & Davis and *J. C. Martin*, for plaintiff and appellant in Nos. 9,852, 9,853, 9,854, 9,855, 9,856. *Vrooman & Davis*, for plaintiff and appellant in Nos. 9,857, 9,858. *Mc-*

Fadden & McPike, for defendants and respondents in Nos. 9,853, 9,854, 9,855, 9,856. *McFadden & McPike* and *J. C. Plunkett*, for defendants and respondents in No. 9,852. *Taylor & Haight*, for defendants and respondents in No. 9,857. *Mr. Fouchard, Jr.*, for defendants and respondents in No. 9,858.

BY THE COURT. On the authority of *Pacific Bridge Co.* v. *Jacobus*, *ante*, 493, orders and judgments affirmed.

72 Cal. 187

STEWARD *v.* HINKEL and others, Ex'rs, etc. (No. 9,626.)

(*Supreme Court of California.* March 26, 1887.)

1. EXECUTORS AND ADMINISTRATORS—REFUSAL TO REPORT ACTION TO CLAIMANT—LIMITATIONS.
 Section 1496, Code Civil Proc. Cal., providing that, if an administrator or executor refuse or neglect to indorse his allowance or rejection of a claim for 10 days after its presentation, such refusal or neglect may be deemed by the claimant a rejection on the tenth day, does not require the executor or administrator to pass upon the claim within 10 days; and if he refuse to let the claimant know what he has done, the claimant can treat the proceeding as nugatory, and file a new claim, and thus avoid the running of the statute of limitations, which bars an action not brought within three months after the claim is rejected, according to section 1498, Code Civil Proc. Cal.
2. ASSUMPSIT—QUANTUM MERUIT—EVIDENCE.
 In an action upon a *quantum meruit*, a promise to pay a specific sum is admissible as evidence of value.
3. NEW TRIAL—JURY—OBJECTION.
 If a juror is absent during a part of a trial, the party who fails to call the court's attention to it cannot complain, the record failing to show that he was ignorant of the juror's absence.
4. SAME—STATEMENT BY JUROR TO JURY.
 A juror made affidavit that one of the jury told the rest that defendants were rich, and could afford to pay the claim, and that this statement affected the verdict. *Held*, that the verdict should not be disturbed, since the statement alleged to have been made was irrelevant.

Appeal from superior court, San Francisco.

The plaintiff presented her claim against the decedent to the defendants, his executors, October 5, 1882. October 12, 1882, they rejected the claim, and indorsed their rejection on it. Four months afterwards she asked one of the defendants about it, and he told her to go away; he did not want to have anything to do with her. Then she filed another claim, on the rejection of which she sued. According to an affidavit of an appeal, during the trial one of the jurymen slipped out of the jury-box, and remained absent during a considerable portion of the trial. The affidavit of a juror was produced that one of the jurors told the others, while they were deliberating, that the defendants and the estate of the decedent were rich, and could well afford to pay plaintiff's claim, and that these statements influenced the majority of nine, who found the verdict for the plaintiff.

O'Brien & Morrison, for appellants. *J. C. Bates*, for respondent.

MCKINSTRY, J. Section 1496 of the Code of Civil Procedure reads: "When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to a judge of the superior court for his approval, who must in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection, for 10 days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and, if the presentation be made by a notary, the certificate of such notary, under seal, shall be *prima facie* evidence of such presentation, and the date thereof. If the claim be presented to the executor or ad-

ministrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time. If the claim be payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency."

It has never been held that the executor must immediately, on its presentment, indorse a claim "allowed" or "rejected," or that it must be so indorsed within 10 days after it is presented. By the terms of the section, the executor is not limited to any specific period within which he must take formal action, by indorsing his allowance or rejection of a claim. It may be conceded that it is not the duty of the executor to seek out one who has presented a claim, to notify such person that he (the executor) has neglected or refused to act on the claim for 10 days after its presentation, or that he has indorsed it, "rejected." And it may also be conceded that it is the duty of the claimant to inquire of the executor whether the claim he has presented has been acted upon, and how. But, as there is no specific limitation of time within which the executor must allow or reject the claim, there is none within which the claimant is entitled to be informed of the action or non-action of the executor. If he neglects to inquire, within three months after his claim has been actually indorsed "rejected," his suit on the claim may, perhaps, be barred. Nevertheless, as he cannot maintain a suit on his claim until it has been rejected, he has an absolute right to be informed of its rejection by the executor, who alone knows what formal action has been taken with respect to it. If information with respect to the allowance or rejection of the claim is refused by the executor, the claimant may treat the previous presentation of his claim, and secret action, if any, of the executor, as going for naught, and again present the claim.

It is contended by appellants that the three-months limitation begins to run from the date of the rejection indorsed, whether that date precede or follow the expiration of 10 days from the presentation of the claim, and independent of the claimant's knowledge. But this might operate to deprive the claimant of his option to deem the claim rejected on the tenth day, and deprive him, without fault on his part, of three months' time from the tenth day. It is suggested that as, in the present case, the three months from the indorsement of rejection had expired when plaintiff demanded what action had been taken by the executor, it would have done her no good to inform her of the rejection. But she was entitled to be informed of the alleged fact,—to be informed of a fact on which her rights depended. Under the circumstances, we are satisfied the plaintiff was justified in presenting and delivering her claim to the executors in February, 1883, and in relying on the rejection of such, notwithstanding she had presented the same claim during the previous October.

There was a substantial conflict in the evidence as to the value of the plaintiff's services. A promise to pay a specific sum is some evidence of value.

There is nothing in the record to indicate that defendants and their counsel were not fully informed of the temporary absence of one of the jurors during the trial. *Berry* v. *De Witt*, 27 Fed. Rep. 723; *Parsons* v. *Huff*, 38 Me. 141. The court's attention should have been called to the absence of the juror.

Appellants say that, after the jury retired to find their verdict, "they received testimony in said cause that was not introduced at the trial." Even if it be admitted that the verdict of three-fourths of the jurors may be impeached by the affidavits of one or more of the jurors not agreeing to such verdict, no case has been called to our attention in which the statement as fact by a juryman, of a matter entirely irrelevant to the controversy, has been treated as ground for setting aside a verdict. The statement of the juryman that the defendants' testate was a rich man would not have been admitted as evidence at the trial, and cannot be supposed to have influenced the verdict.

Specific portions of the general charge of the court were not excepted to. Judgment and order affirmed.

I concur: PATERSON, J.

TEMPLE, J., (*concurring.*) I concur in the judgment and in the opinion. But I do not wish to be understood as holding that when a creditor has presented his claim, and it has been rejected, he may again present his claim for the same demand, and thus avoid the bar or prolong the time within which he may commence suit. Nor do I think the administrator bound to notify the creditor of his action in regard to a claim. But in this case, inasmuch as the executors not only failed to inform the creditor of their action, but refused to do so, we may regard the case as though they had not acted at all, and the presentation of the claim the second time could work no injury. Secret action, which the creditor has no means of knowing, is equivalent to no action at all.

72 Cal. 205

LAWLOR *v.* LINFORTH and others. (No. 9,627.)

(*Supreme Court of California.* March 26, 1887.)

JURY—COMPETENCY—ACTUAL BIAS.

In the trial of an action for treble rent and restitution of premises, after the jury was complete, a juror asked what kind of an action it was, and, being informed, declared himself hostile to all landlords, whereupon the court dismissed him. *Held* a proper exercise of discretion, since the juror evinced actual bias.

Commissioners' decision. Department 1.

App al from superior court, San Francisco.

Edward Linforth, for appellants. *Tyler & Tyler*, for respondent.

FOOTE, C. This was an action for treble rent for one month of certain premises, and for restitution thereof. The plaintiff had judgment against one of the defendants as prayed for, and for costs, but against the other defendant for restitution of the premises only. From that, and an order denying a new trial, the defendants have appealed. Their first contention is that the court erroneously dismissed from the panel a juror, who had been previously accepted as competent by all parties to the controversy, after the jury was complete, and the trial ready to proceed. It appears from the record that the juror, after being accepted, inquired what kind of an action was pending in which he was to engage, was informed what its nature was, and then declared himself hostile to all landlords. He was challenged for cause, but the precise cause was not stated. It is plain, however, that it was manifest to court and counsel that the juror was incompetent because of his declared bias against all landlords, one of whom was plaintiff in the action then about to be tried. It was the duty of the court, in the exercise of a sound legal discretion, to dismiss the juror from the panel, and its action in so doing was not erroneous. *Grady* v. *Early*, 18 Cal. 111. It is also alleged that the jury found contrary to the evidence; that there was no proof whatever which tended to show that either of the defendants had leased the premises, was the tenant of the plaintiff, or bound for the rent sued for. All those matters were submitted to the jury, and, as the evidence was conflicting, we do not feel disposed to disturb their verdict, or the judgment rendered thereon. It and the order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

2 Cal. Unrep. 750

In re Estate of SANDERSON. (No. 9,653.)

(*Supreme Court of California.* March 29, 1887.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTS—PRACTICE.
 A probate court has the power, in the settlement of an executor's account, to allow or disallow any items in the account, even though there is no contest; and, where it is brought to the knowledge of the court that the executor has failed to charge himself with money or property belonging to the estate, it is the duty of the court to examine the matter of its own motion.
2. SAME—AUTHORITY OF EXECUTOR—SALE OF CURRENCY.
 An executor has no authority, without an order of the probate court, to sell currency belonging to the estate for coin, and it rests in the discretion of the court to approve or disapprove the sale.
3. SAME—NEGLIGENCE—LIABILITY.
 If an executor delays to take steps for the collection of a debt until after the same is outlawed, and the delay is not in consequence of any mistake of law, or of advice given by his attorney, he will be liable to the estate for the loss occasioned by his negligence.
4. SAME—JOINT EXECUTORS—SEVERAL LIABILITY.
 Each executor of an estate is responsible severally for his own acts, and for money or property which has come to his own hands.

Department 1. Appeal from superior court, San Francisco.

This is an appeal by L. A. Sanderson, one of the executors of Robert A. Sanderson, from an order made upon the settlement of his accounts, requiring him to charge himself with $500 currency at its face value, which he had sold for gold coin, the court refusing to approve the sale, and to charge himself with the amount of a note and mortgage of one Braly, which he failed to collect. The note became outlawed, not having been sued on, and thereafter, the maker having died, his executor refused to pay anything. The executor sought to discharge himself for his neglect because his attorney did not advise him to foreclose the mortgage, but the evidence shows that his attorney, who had been employed for other and for specific purposes, advised him to present the claim against Braly's estate, which the executor undertook to do, and failed to attend to.

T. Z. Blakeman, for appellant. *Cope & Boyd*, for respondents.

TEMPLE, J. This is an appeal by the executor from an order settling an account rendered by him to the probate court. We do not think it necessary to consider the question as to whether the issues made at the contest were sufficient. The court had the power to examine, to allow or disallow, any items in the account, even though there were no contest; and, if it were brought to the knowledge of the court that the executor had failed to charge himself with money or property belonging to the estate, it would be the duty of the judge to examine the matter of his own motion. Such being the case, it must follow that the decree could not be held invalid for the lack of a proper contest or finding. If the contestant were appealing, his right to have the action of the court reviewed might depend upon a proper contest being inaugurated. That matter is not now before us, however.

The first point is in regard to the sale of currency for gold coin. It was sold without obtaining an order of court, and the sale was not approved. This was within the discretion of the court. The executor was properly charged with the Braly note. Had the executor followed the advice of a competent attorney as to a matter of law, the case would be different. Here it is a plain question of negligence. It was the duty of the executor to execute his trust himself, and he cannot rid himself of responsibility by employing an attorney to do that which he ought to have done himself. The delay was not in consequence of any mistake of law, or of advice given by the attorney. It is a simple failure on the part of the executor to do his duty. Nor is the liability joint with his co-executor. The note was in his individual possession,

and the neglect was his. Each executor is responsible severally for his own acts, and for moneys or property which come to his hands. He may also, it is true, under some circumstances, be held for the default of his co-executor. But that is because each is required to protect the estate, and prevent, if possible, injury from the misconduct of the other. But this is not a joint liability. When injury has resulted from the joint act of both, of course a different rule will prevail.

The order must be affirmed.

We concur: McKINSTRY, J.; PATERSON, J.

(72 Cal. 199)

PEOPLE *v.* SAN FRANCISCO SAVINGS UNION. (No. 9,466.)

(*Supreme Court of California.* March 28, 1887.)

BANKS AND BANKING—SURPLUS PROFITS—DIVIDENDS—SAVINGS BANKS.

Interest accrued, but not payable, and interest accrued, but not paid, though secured by safe mortgages, and drawing interest, are not "surplus profits," and therefore cannot enter into the dividends which savings banks are authorized to make out of their "surplus profits," by California act April 11, 1862, since profits must consist of earnings actually received.

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco.

G. A. Johnston, Atty. Gen., for appellant. *Jarboe, Harrison & Goodfellow*, for respondent.

SEARLS, C. This cause was submitted to the court below upon an agreed statement. Defendant had judgment, from which plaintiff appeals. The defendant is a banking corporation, existing under and by virtue of the laws of this state, and was incorporated as such on the eighteenth day of June, 1862, under and in accordance with the provisions of an act of the legislature entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings," approved April 11, 1862, (St. 1862, p. 199.) The act provides for the formation of corporations "for the purpose of aggregating the funds and savings of the members thereof and others, and preserving and safely investing the same for their common benefit." Corporations thereunder are authorized to loan and invest their funds, receive deposits of money, loan and invest the same, collect the same, with interest, "repay such deposits without interest, or with so much of the earnings and interest as the by-laws of the corporation may provide." They may make by-laws prescribing the conditions upon which deposits shall be received, and the time and manner of dividing the profits. Section 10 of the same act provides that "it shall not be lawful for the corporation or the directors to make any dividends, except from surplus profits arising from the business of the corporation; and the directors shall, at such times and in such manner as the by-laws shall prescribe, declare and pay dividends of so much of the profits of the company, and of the interest arising from the capital stock and deposits, as may be appropriated for that purpose by the provisions of the by-laws."

It is provided and declared by the by-laws of the defendant that "at the expiration of every six months, ending thirtieth June and thirty-first December each year, the board of directors shall ascertain the net profits of the corporation, and shall determine the amount to be appropriated for a general dividend." During the six months commencing June 30, 1883, the surplus profits arising from the business of the corporation, including the interest arising from its capital stock and deposits, amounted to the sum of $280,092. In this amount of surplus profits, and as a part thereof, is included—*First*,

the sum of $5,825 for interest which has accrued for the months of November and December, in the year 1883, upon the coupons of bonds of the United States held by the defendant, but which, by the terms of said coupons, is not payable until February 1, 1884; *second*, the sum of $23,917 for interest that has matured since thirtieth of June, 1883, but which has not been collected, upon a portion of the loans made by the defendant upon real-estate security. The value of the real estate held by the defendant as security for the said loans, and for each thereof, is more than double the amount of the respective loans and the matured interest thereon.

By the conditions of each of said loans, it is provided that, in case the interest thereon is not paid as it matures, it shall be added to the principal sum, and be secured by the real estate which is given as security for said principal sum, and thereafter bear interest at the same rate as said principal sum. The defendant being about to declare a dividend from the profits arising from its business during the six months ending December 31, 1883, expressed its intention to include in the amount which it should appropriate for that purpose its surplus profits aforesaid, amounting to the sum of $280,092, including therein the aforesaid sum of $5,825, for interest which had accrued upon the aforesaid coupons of bonds of the United States, but which would not be payable until February 1, 1884, and also the aforesaid sum of $23,917, for interest which had matured since the thirteenth day of June, 1883, (but which had not been collected,) upon the loans made as aforesaid, and secured as aforesaid. The "bank commissioners" objected to the action of the bank in including these sums, and this action is the result.

The question in difference and point of controversy upon which the decision and judgment of the court is sought, is the following: "Is the defendant authorized by law to appropriate and pay, as a dividend to its stockholders and depositors on the profits arising from its business, any portion of the interest upon its loans or investments that may have matured or accrued, but which have not been actually collected and received in money?" What are the *surplus profits* arising from the business of the corporation? The word "profits" signifies an excess of the value of returns over the value of advances. The excess of receipts over expenditures; that is, net earnings. *Connolly* v. *Davidson*, 15 Minn. 519, (Gil. 428.) The receipts of a business deducting current expenses; it is equivalent to net receipts. *Eyster* v. *Centennial Board of Finance*, 94 U. S. 500. In commerce it means the advance in the price of the goods sold beyond the cost of purchase. In distinction from the wages of labor, it is well understood to imply the net return to the capital or stock employed, after deducting all the expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself for superintending the employment of his capital stock. Adam Smith, Wealth of Nations, book 1, *c.* 6; Mill, Pol. Econ. *c.* 15. The "rents and profits" of an estate; the "income" or "net income" of it,—are all equivalent expressions. *Andrews* v. *Boyd*, 5 Me. 202; *Earl* v. *Rowe*, 35 Me. 420. Profits are divided by writers on political economy into gross and net, the former being the entire difference between the value of advances and the value of returns, and the latter so much of this difference as arises exclusively from the capital employed.

In *People* v. *Board Sup'rs Niagara Co.*, 4 Hill, 20, BRONSON, J., said: "It is undoubtedly true that 'profits' and 'income' are sometimes used as synonymous terms; but, strictly speaking, 'income' means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures; while 'profits' generally means the gain which is made upon any business or investment, when both receipts and payments are taken into the account. 'Income,' when applied to the affairs of individuals, expresses the same idea that 'revenue' does when applied to the affairs of a state or nation."

In *St. John* v. *Erie R. Co.*, 10 Blatchf. 271, it was said: "Net earnings are properly the gross receipts, less the expense of operating the road, or other business of the corporation. Interest on debts is paid out of what thus remains; that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders."

Under these definitions, it is not easy to comprehend how *profits, or surplus profits*, can consist of earnings never yet received. The term imports an excess of *receipts* over *expenditures*, and without *receipts* there cannot properly be said to be profits. Money earned as interest, however well secured, or certain to be eventually paid, cannot in fact be distributed as dividends to stockholders, and does not constitute *surplus profits* within the meaning of the statute. To hold the contrary would, we think, tend to open the door to a practice under which the assets of corporations would be liable to distribution as dividends upon no surer basis than the judgment of their directors as to the value of their bills receivable. Such is not and should not be the policy of the law.

The capital, and all the assets except surplus profits, are to be retained intact, and form a fund to which creditors of the corporation have a prior right over stockholders. If some portion of this fund may be distributed in lieu of interest earned, but not collected, then cases may arise in which all of it may be so distributed,—a practice which we deem subversive of the essential principles upon which corporations of this character are organized, and under which practically the rights of creditors *might* be greatly impaired. The fact that defendant has security for the interest due does not make the unpaid interest a profit. Until paid in, it is not money in hand. Contingencies may arise to prevent its being realized. It is time to distribute this interest when it is actually received by the bank.

It follows that the judgment of the court below nonsuiting plaintiff should be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of plaintiff as provided in the agreed statement contained in the record.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed, and cause remanded, with directions to enter judgment in favor of plaintiff as provided in the agreed statement contained in the record.

72 Cal. 212

PEOPLE *v.* KALKMAN. (No. 20,240.)

(*Supreme Court of California.* March 31, 1887.)

1. CRIMINAL PRACTICE—INVESTIGATING ATTEMPT TO BRIBE JURY—DISTRICT ATTORNEY.
 During a criminal prosecution the district attorney, hearing of an attempt to bribe the jury, called one of the jurors, and interrogated him in reference thereto. His testimony failed to show the attempted bribery. Then the attorney, at the request of the court, informed the court what he had heard; whereupon the court dismissed the jury from the court-room, and investigated the charge. The testimony showed only an attempt by a newspaper reporter, who was at the time intoxicated. Defendant's counsel demanded that the testimony be repeated before the jury. The court refused, but gave the jury full instructions not to consider the circumstance, and to dismiss it from their minds. *Held*, that it being the duty of the district attorney to bring the matter to the attention of the court, no error was committed, though he might have chosen a better time.
2. EVIDENCE—RES GESTÆ—CRIMINAL PRACTICE.
 In a prosecution for robbery, testimony of defendant and two witnesses as to conversations between him and them, as he met them on the night of the robbery on his way from his shop to the place where the crime was committed, *held* properly excluded, as being no part of the *res gestæ*.

3. APPEAL—HARMLESS ERROR—WITNESS—EXAMINATION.
A witness, who had known defendant four years before at a previous place of residence, was asked, "Did you know defendant's general reputation for honesty and integrity in that community?" An objection to the question was sustained. The witness had previously testified, "I never heard about his reputation for honesty. I know about his honesty. Never heard anything wrong about it." Other witnesses testified to defendant's good character. No opposing testimony was offered. *Held*, no prejudicial error was committed in excluding the question, since the witness had already answered it, and other witnesses testified to the same thing.

4. SAME.
Neither was it error to refuse to allow the deposition of the prosecuting witness, taken at the preliminary hearing, to be read to the jury for the purpose of contradicting his testimony; the deposition failing to show any material contradiction.

5. CRIMINAL PRACTICE—INSTRUCTIONS—CHARACTER.
It was not error for the court to add to the following instruction, given at the request of the defendant, "Proof of such good character may be sufficient to justify an acquittal, although without it no acquittal would have been had," the clause, "unless, in spite of such good character, the evidence yet convinces you beyond a reasonable doubt of defendant's guilt."

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

Bicknell & White, for appellant. *Atty. Gen. Geo. A. Johnston*, for respondent.

SEARLS, C. The defendant was convicted of an assault with intent to commit robbery. The appeal is from the final judgment entered therein, and from an order denying a new trial. It appeared at the trial that the prosecuting attorney had received information, from which he supposed an attempt had been made to bribe one or more of the jurors, and, upon the close of his testimony for the prosecution, he called A. J. Towner, one of the jurors impaneled in the case, and interrogated him in relation thereto. The testimony of the juror failed to show the attempted bribery. Thereupon the prosecuting officer, at the request of the court, stated that he was informed that morning by one Hathaway that he, Hathaway, was offered $100 to hang the jury. Hathaway was a juror in attendance upon the court, but not a juror in this particular case.

Both counsel for the people and the defendant thereupon asked for a full investigation of the matter, and the court, after discharging the jury and instructing them to leave court, heard further testimony tending to show that whatever offers of bribery had been made came from an intoxicated reporter, who was quite unconscious of any attempted wrong. After a portion of the testimony had been taken, counsel for defendant contended they were entitled to have the jury present to hear the testimony. The court held, in substance, that the jury was not entitled to hear the testimony on this point, and that he would give them proper instructions on the subject.

It is sufficient to say that no exception seems to have been taken on behalf of defendant to the action of the court in sending the jury out during the investigation of this question. Waiving this technicality, however, and we are of opinion no error was committed. The investigation was as to a matter entirely *dehors* the trial, and the jurors had practically heard nothing pertaining to it except the statement of the prosecuting attorney.

The jury was instructed by the court, very fully and most explicitly, that they must divest their minds of any and all statements, and those admitted in evidence, whether from counsel or witnesses, and that they were "not to consider at all the matter that was investigated, growing out of the placing of one of the jurors on the witness-stand. The court instructs you, you are to dismiss that matter entirely from your minds in considering this case. You will not consider it at all as bearing upon the case in any shape or form whatever." The district attorney was not only justified in bringing the matter to

the attention of the court, but it was his duty to do so. The manner of the exercise of that duty may not have been the best that could have been selected; but we see in it nothing calling for condemnation or a reversal of the judgment.

Defendant offered himself as a witness, and, among other things, for the purpose of proving an *alibi*, testified as to the hour at which he left the shop in which he was working, the distance therefrom to the scene of the alleged assault, the persons whom he met, what was done by him and such persons, his estimate of the time consumed, etc. The court refused to permit him to detail the particular conversations he had with persons whom he met, holding his declaration inadmissible, but permitted him to show what was done, time consumed, etc. Similar rulings were made on like offers to prove what was said by other witnesses who met and conversed with the defendant, and these rulings are assigned as errors. These declarations formed no part of the *res gestæ*, and, under the rule that declarations of a party in his own favor are not admissible, were properly excluded.

It is further urged that "the court erred in refusing to permit defendant to prove that his general reputation for truth, honesty, and integrity was good in the place of his former residence." The testimony shows that defendant had formerly lived at Sioux City and Le Mars, in the state of Iowa; that he came to California about one year previous to the trial, and had since lived in Los Angeles. The witness Charles Yager had left Iowa four years prior to the trial, and was asked the following question: "*Question.* Before you left—before the time you left—did you know his [defendant's] general reputation for honesty and integrity in that community?" The question was objected to as irrelevant and immaterial, and the objection sustained, to which ruling counsel for defendant excepted. By reference to the record, we find that prior to this ruling Yager had in fact testified as follows: "I knew him [defendant] four years, working in the east. I sent for him to come out. I never heard anything about his reputation for integrity. I know about his honesty. Never heard anything wrong about it." Albert La Rue testified to knowing defendant four years in Iowa, and that he had a good reputation there. B. Monahan testified similarly, and Jacob Bloomer testified to a knowledge of him for 12 or 13 years in Iowa, and that his reputation was good both there and here. Several other witnesses testified to his good reputation in Los Angeles. There was no conflicting testimony offered. If it be conceded that it was competent for the witness to testify as to the general reputation of defendant at the time he knew him in Iowa, although it was four years anterior to the trial, yet, in view of the fact that he had previously testified substantially to the same effect, and that this testimony was not stricken out, and in view of the number of witnesses who testified without contradiction to the same fact, we do not deem the error as one from which defendant has suffered in his rights.

The fifth error assigned is that the court did not allow the deposition of the prosecuting witness, taken at the preliminary examination, to be read in evidence to contradict the witness. The witness was asked at the trial if he had testified at the preliminary examination "that Kalkman had struck him behind," to which he answered, "No, sir. The first blow, I testified, I got in the face; I turned around, and he came behind me and struck me in the face. At the preliminary examination I testified that some one came behind and struck me. He did not strike me in the back." We need not discuss the question made by appellant, for the reason that the portions of the deposition sought to be introduced failed to show any material contradiction of the testimony of the witness as given at the trial.

There was no error in the addition made by the court to the instruction of defendant. The jury had been fully instructed upon the question of reasonable doubt, and had been very properly informed that testimony as to good

character was entitled to consideration in the case. The language of the instruction was as follows: "Proof of such good character may be sufficient to justify an acquittal, although without it no acquittal would have been had," —to which the court added, "unless, in spite of such good character, the evidence yet convinces you beyond a reasonable doubt of defendant's guilt."

In *People* v. *Samsels*, 66 Cal. 99, 4 Pac. Rep. 1061, the court below instructed the jury as follows: "If you should believe the defendant guilty, you must so find, notwithstanding his good character," and this court held the instruction proper.

We are of opinion the order and judgment appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

72 Cal. 217

HEINE v. TREADWELL. (Nos. 9,693, 9,694.)

(*Supreme Court of California.* April 2, 1887.)

1. CONTRACTS—CONSTRUCTION—DEPENDENT AND INDEPENDENT COVENANTS.
 In an agreement that a lessee may, at any time before the expiration of his term, purchase the land for $3,250, and that lessee shall have a prior right of purchase at a greater sum, and shall have notice in order to avail himself of the right, the execution of the conveyance, and the payment of the purchase money, are mutual and independent covenants. Neither party can put the other in default without a tender of performance, and the lessee must tender the money before he becomes entitled to a conveyance.
2. SAME—TENDER—PLEADING.
 An allegation "that defendant has been and is still ready and willing to perform each and all the covenants and conditions of his agreement on his part to be performed, and to pay plaintiff and H. the full sum to be paid upon the performance on their part of the covenants and conditions by them so to be kept and performed," is not an averment of a tender.
3. SAME—REPUDIATION.
 An averment by the lessee that the lessors repudiated the agreement to sell after the expiration of the term does not excuse a failure to tender performance before the expiration of the term.
4. JUDGMENT—MOTION TO SET ASIDE—NEW TRIAL.
 After a motion for a new trial on the ground of surprise has been denied because it is made too late, a motion to set aside the judgment on the same ground, according to section 473, Code Civil Proc. Cal., must explain the delay, or the motion must be denied.

Commissioners' decision. In bank.

Appeals from superior court, Lake county.

The lease referred to in the opinion provided, in regard to the sale of the land, as follows: "And it is hereby further covenanted and agreed that the party of the second part shall have the right, at any time before the expiration of said term, to purchase the said land and premises of and from the parties of the first part, for the sum of three thousand two hundred and fifty dollars ($3,250) in gold coin of the United States, by giving to the parties of the first part, or the survivor of them, their heirs or assigns, ten days' notice of his election so to purchase the same. And the parties of the first part covenant and agree that, upon the giving of the notice and payment of the purchase price aforesaid, they, or the survivor of them, their heirs or assigns, shall and will convey to the party of the second part, his heirs and assigns, by a good and sufficient deed of grant, bargain, and sale, all and singular the said land and premises, together with all the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, in fee-simple, free of all incumbrances: provided, however, and it is hereby expressly agreed, that if, at any time before the party of the second part shall have

given notice of his election to purchase as aforesaid, any person, able and willing so to do, shall offer, in good faith, to purchase said land and premises for a greater sum than three thousand two hundred and fifty dollars, ($3,250,) then the parties of the first part shall give notice in writing of such offer to the party of the second part, his heirs or assigns, and said party of the second part shall have the privilege, for the period of ten days after service of such notice, of purchasing the same at the price named in such offer, in preference to the person offering the same; but if the party of the second part shall fail or neglect, for the period of ten days after service of such notice, to give written notice to the parties of the second part, or one of them, their heirs or assigns, of his election to purchase said premises at such advanced price, then the parties of the first part shall have the right to sell and convey the same to the person making such offer at the price named therein, but for cash only, anything in this agreement to the contrary notwithstanding."

Geo. P. Harding, for appellant. *Welles Whitmore*, for respondent.

SEARLS, C. This is an action of ejectment to recover a tract of land situated in Lake county. Plaintiff had judgment, from which, and from an order dismissing and denying a motion for a new trial, defendant appeals, which appeal is No. 9,693. Subsequently defendant moved the court to set aside and vacate the judgment, upon the ground of "mistake, inadvertence, surprise, or excusable neglect," as provided by section 473 of the Code of Civil Procedure. The motion was denied, and appeal No. 9,694 is taken from the order denying such motion. For convenience sake, we shall consider the two appeals in the same opinion; stating separately, however, the views deemed applicable to each case.

Turning to appeal No. 9,693, and we find that the answer of the defendant, among other things, avers that he leased the demanded premises from plaintiff and his wife, who were the owners as joint tenants, for one year from October 15, 1882; that by the terms of said lease he was to have the privilege of purchasing at any time during the term for $3,250, upon giving 10 days' previous notice of his election so to purchase; that on the first day of October, 1883, he elected to purchase the premises under the terms of said agreement, and gave written notice thereof to plaintiff and wife; that they never tendered him a deed, and repudiated their agreement to convey, etc.

Defendant contends that the judgment should be reversed for want of any finding as to the matters set up in the answer by way of equitable defense. The findings on this branch of the case are as follows: "(5) That on the fifteenth day of October, 1882, the defendant went into possession of said premises as tenant, by virtue of the lease set forth in the answer, and continued in possession as such tenant until October 15, 1883, when said lease expired; and that within thirty days thereafter plaintiff made a demand upon said defendant for the possession of said premises in writing. (6) That the said defendant did not comply with the terms of the agreement mentioned in the answer in regard to the purchase of said land, or any part thereof."

These findings cover the material allegations of the answer. They cannot be true, and the defendant at the same time be entitled to recover upon the defense set out in his answer. The findings in favor of plaintiff were supported by the evidence. Defendant did not introduce any evidence whatever, and the affirmative allegations of the answer, which are to be deemed and taken as denied, were entirely unsupported by proofs. This view is taken upon the theory that the bill of exceptions is properly before us.

If, however, the court was correct in holding that the bill of exceptions was not served and filed in time, then there is no evidence in the record, and we cannot review the facts as found. Indeed, in our view of the case, the answer does not set out such an equitable defense as called for findings at all. According to the lease, which is set out in the answer, the payment of the

purchase price, and a conveyance by the lessors, were mutual and independent covenants, and neither could put the other in default without tendering a performance on his own part, unless the other party waived such performance. The allegation of the answer is "that ever since said first day of October, 1883, defendant has been, and still is, ready and willing to perform each and all of the covenants and conditions of said agreement on his part to be kept and performed, and to pay to said plaintiff and said Theresa Heine the full sum thereby agreed to be paid, upon the performance, on their part, of the covenants and conditions by them so to be kept and performed." This is not an averment that he tendered the purchase money.

In *Englander* v. *Rogers*, 41 Cal. 420, a similar allegation, under similar circumstances, was held insufficient. The court said: "This is not an averment that he tendered the purchase money. To constitute a valid tender in such a case, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but produce and offer to pay it to the other party, on the performance by him of the requisite condition." Citing *Bakeman* v. *Pooler*, 15 Wend. 637; *Dunham* v. *Jackson*, 6 Wend. 22; and *Strong* v. *Blake*, 46 Barb. 227.

Defendant, it is true, avers that on or about the first of November, 1883, the lessors repudiated the agreement to sell, and have ever since neglected and refused to perform any of said covenants and conditions. By reference to the lease, it will be seen that the agreement of the lessors was to convey "at any time before the expiration of the term." The term expired on the fifteenth day of October, 1883, and a refusal to convey after that time could not excuse defendant from making a tender previously due. The motion for a new trial was dismissed upon the theory that the bill of exceptions and affidavit were not filed and served in time. The notice of intention to move for a new trial, and the evidence of its service and filing, constitute no part of the judgment roll, and are not set forth in the bill of exceptions. We cannot, therefore, take notice of the time when the notice was served and filed.

As to the bill of exceptions, even if it should be conceded that it was filed in time, nothing therein contained would have authorized the court to grant a new trial. It is not necessary to say, therefore, whether the bill of exceptions was filed in time, or whether, if not, the objection that it was not so filed was waived by failure to raise the question at the settlement of the bill. As to the affidavit, however, showing accident and surprise, on account of which a new trial is asked, different considerations arise. The respondent was not called upon, and had no opportunity to object that it was not in time, until the motion was brought to a hearing; and as he then objected, and moved to strike out upon the ground that the affidavit came too late, he certainly waived no right in relation thereto. It follows that the judgment and order appealed from should be affirmed.

The appeal in No. 9,694 is from a special order made after final judgment, denying defendant's motion to vacate and relieve him, the said defendant, from the judgment, on the ground of excusable neglect. The judgment was rendered April 16, 1884. On the twenty-third day of April, 1884, defendant gave notice of a motion for a new trial, which motion was denied May 27, 1884. On the twenty-ninth day of May following, defendant served and filed notice of motion, under section 473 of the Code of Civil Procedure, to vacate said judgment on the ground of excusable neglect. The motion was heard and denied June 7, 1884, and this appeal is from the order of denial. The motion was heard upon the judgment roll in the case, and upon the affidavits of defendant and Woods Crawford, his attorney in the case, and the counter-affidavit of Josiah Johns on behalf of plaintiff.

In *McKinley* v. *Tuttle*, 34 Cal. 235, it was held that where a defendant appeared at the trial, the proper remedy for excusable negligence or surprise, whereby he was prevented from presenting his defense, was by motion for a

new trial, and not by motion for relief from the judgment under section 68 of the practice act. That section corresponds with section 473 of the Code of Civil Procedure.

Our attention is not called to any case in which a judgment has been set aside under section 473 of the Code, after the hearing of a motion for a new trial, for a cause or causes which could have been urged with equal force on such motion. The same affidavit of defendant to show excusable neglect relied upon here was presented on the motion for a new trial. True, the bill of exceptions and affidavit were disregarded on that motion, because not filed and served in time. We may concede that it would afford good cause in support of this motion, if a sufficient excuse for not serving and filing them in time was presented. The time for serving and filing these papers expired on the third day of May, 1884. According to the affidavit of Woods Crawford, the attorney of the defendant, he received these papers at Lakeport on the second day of May, and "that on the sixth day of May, 1884, and as soon as affiant could do so, affiant served and filed said affidavit and bill of exceptions." No reason is attempted to be given why the papers could not be served on the second or third of the month, instead of waiting until the sixth. To make a case of excusable neglect, the reasons for the delay should be set forth, in order that the court may pass upon their sufficiency. Assuming, then, without determining the fact, that defendant had a valid excuse for not being present at the trial, and the case stands thus: He moved for a new trial on affidavits and a bill of exceptions, in the former of which he set out his excuse for not appearing at the trial, but, without any cause, so far as appears, for the delay, he failed to serve and file these papers in time, and in consequence thereof they were disregarded on the motion. This was not such excusable neglect as will warrant the granting of a motion to set aside the judgment under section 473 of the Code of Civil Procedure.

The order appealed from in No. 9,694 should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order appealed from in No. 9,693 are affirmed, and in No. 9,694 the order appealed from is affirmed.

72 Cal. 207

RICHARDS, Ex'r, *v.* DONNER. (No. 9,579.)

(*Supreme Court of California.* March 30, 1887.)

DEED—INADEQUATE CONSIDERATION—CANCELLATION.

P., while a visitor in the house of D.'s mother, received a severe paralytic stroke, and, while suffering from it, deeded his property to D. on the representation of W., an intimate friend of D.'s family, that the deed would be the same as a will, and more convenient. After his recovery, P. requested a reconveyance, tendering a sum to cover expenses, and D. refused. There was no valuable consideration. P. brought an action to cancel the deed. *Held*, that P. was entitled to the property on the principle that the court will, on proper application by the injured party, or his legal representatives, set aside the conveyance of a person suffering from mental weakness, when the consideration was inadequate.[1] SHARPSTEIN, J., dissents.

In bank. Appeal from superior court, Santa Clara county. See 11 Pac. Rep. 770.

S. O. Houghton, *J. T. Campbell*, and *Rutledge & McConnell*, for appellant. *J. E. Richards*, *S. F. Lieb*, and *Moore, Laine & Johnson*, for respondent.

PATERSON, J. This action was originally brought by A. W. Peck in his life-time (for whom his executor, Richards, has been substituted) for the purpose of canceling a deed of gift made by said Peck to the defendant, M. E. Donner, while he was in such an enfeebled mental condition, and so circumstanced in his surroundings, as that he did not understand or appreciate the nature, effects, and consequences of the execution and delivery of that deed. A judgment was rendered for the plaintiff, and from that, and an order denying her a new trial, the defendant has appealed.

Several points are presented by appellant for consideration; but, in the view we take of the case as hereinafter set forth, it is unnecessary to pass upon them.

The court found, in substance, as grounds for rendering judgment for the plaintiff, that A. W. Peck, while a visitor at the house of the defendant's mother, where the defendant resided, on the twelfth day of April, 1882, received a severe paralytic stroke, which greatly weakened his physical and mental faculties; that while in such condition, on the twentieth day of April,

[1] As to the avoidance of deeds or contracts for mental incapacity, see Conley v. Nailor, 6 Sup. Ct. Rep. 1001; Davren v. White, (N. J.) 7 Atl. Rep. 682; Brigham v. Fayerweather, (Mass.) 10 N. E. Rep. 735; Hull v. Louth, (Ind.) 10 N. E. Rep. 270; Cole v. Cole, (Neb.) 31 N. W. Rep. 493; Leonardson v. Hulin, (Mich.) Id. 26; Woodcock v. Woodcock, (Minn.) 30 N. W. Rep. 894; Bussinger v. Bank of Watertown, (Wis.) Id. 290; Physio-medical College v. Wilkinson, (Ind.) 9 N. E. Rep. 167; Worthington v. Campbell, (Ky.) 1 S. W. Rep. 714, and note.

Respecting inadequacy of consideration as a ground for rescission, see McKinney v. Crady, (Ky.) 1 S. W. Rep. 404.

1882, still sojourning in the house of defendant's mother, he proposed to make a will of the property in controversy to the defendant, towards whose family for many years he had entertained intimate and familiar friendship; that on the next day, by the advice of John Walker, a neighbor and friend of that family, and the acting executor of the defendant's father, he was induced to consent that a deed, rather than a will, should be prepared, Walker having assured him it would be more advantageous, and less trouble and expense, so to transfer the property to Mary E. Donner; that he had no other advice on the subject, and that Walker did not explain to him the difference between a will and a deed in their effects and consequences as to him, A. W. Peck; that on that day, and following immediately such advice, and without such explanation, a deed of grant, bargain, and sale, upon consideration of love and affection, was prepared and presented to him, which he there and then signed and acknowledged, and that it was the deed under consideration in the cause,—he believing, at the time he signed the deed, that he was in imminent danger of death, having informed the party witnessing the same that "he might not be living on the following day;" that, after the signing and acknowledging of said deed, it was at his request taken in charge by the notary taking the acknowledgment thereof; that he afterwards, on the third day of May, 1882, procured his old friend Beach to correct the description therein of the property conveyed, and gave it to the mother of the defendant for the latter; that there was no consideration moving him, in the execution of the deed, save love and affection; that at all those several times he stated that he was to have the control of the property conveyed, and its usufruct as long as he lived, and that he was assured that such should be the case by said defendant; that he not only relied on her statement as true, but believed that such advantages, uses, and right of property were assured to him by the deed he had executed and delivered, and had he been made to understand that such was not the case he would not have made such deed; that during all those times of his illness, up to the sixth day of July, 1882, he remained in the family and at the house of defendant's mother, and the greater part of that time was under treatment by a physician called by said mother, which said physician had drafted said deed, and as a notary taken the acknowledgment thereof; that no other solicitations or representations were made to him about the relative characteristics and legal force of a will or deed by any one except said John Walker, nor any fraud or misrepresentation practiced by any one, except so far as he was deceived with the belief that he had by the terms of that deed reserved to himself during his life the use and occupation of the premises conveyed, which was brought about by the silence of the defendant, and that of her mother and others present; that on the ninth day of August, 1882, Peck demanded of the defendant in writing that she reconvey his property to him, and that a proper deed for such purpose was tendered for her execution, as also the money necessary for her attention to and proper acknowledgment thereof; that such demand and tender was made before suit brought, and the demand entirely refused; that at no time after the signing of said deed did Peck ratify or affirm it; that from the time he received the paralytic shock on the twelfth day of April, before the signing of the deed, until his death, he continued in feeble health, and greatly impaired in mind and body; that Peck died on the tenth day of September, 1882, in Santa Clara county; that he left a will, which was duly admitted to probate, of which John E. Richards, who has since his death been substituted for him as plaintiff, was constituted executor, and that he has duly qualified and acted as such.

As a conclusion of law from these facts it was found that the plaintiff was entitled to reconveyance of the property described in the complaint and the deed in controversy, and to recover his costs.

These findings, which are fully established by the evidence, clearly show that A. W. Peck, while in a condition of great mental weakness, made a

deed of gift of his entire property, without understanding the nature, effect, or consequences of his act. It is claimed that the donor was not entitled to relief from a court of equity, admitting the facts found to be true, because he failed to show undue influence on the part of the donee, and because the mistake of the donor, as to the character of his act, was the offspring of his own weakness, with which the donee had nothing to do. The learned judge of the court below evidently based his conclusion upon the doctrine enunciated and applied by this court in the case of *Moore* v. *Moore*, 56 Cal. 89. The court there refers to the case of *Allore* v. *Jewell*, 94 U. S. 506, and quotes approvingly from the opinion of Mr. Justice FIELD. That was an action brought to set aside a conveyance made by a person advanced in years, of great weakness of mind, though not amounting to absolute disqualification, for an inadequate consideration, and without independent advice. There was no showing or claim of undue influence on the part of the grantee. The court there said: "It may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside." See, also, *Haydock* v. *Haydock*, 38 Amer. Rep. 385.

It seems that the current of authority, English and American, is unvarying in its adherence to the same beneficient remedies in favor of the weak and ignorant, as against the wiles of the crafty and the greed of the avaricious, and, although judges have differed in the reasons given for the application of the rule, and the phases under which it has been applied are numerous and diverse, yet the conclusion reached is quite uniformly the same whether the donee act in good or bad faith.

The appeal from the judgment herein was dismissed January 26, 1887. We think, however, if the question can be considered on this appeal from the order, that the findings support the judgment, and that the failure to find on the question of undue influence or sanity—if such failure occurred—becomes immaterial, the court having found facts from which the same conclusion of law must be drawn, whether there was or was not undue influence on the part of the donee. As stated before, the evidence is sufficient to support the findings in all respects, and goes further, we think, and shows very clearly that in making the deed the donor believed he was making a testamentary disposition of the property. There was at least a substantial conflict.

The motion for nonsuit was properly denied. The right of plaintiff to recover did not depend on the question of the donor's sanity or soundness, nor upon the question of the donee's good faith or undue influence.

The order is affirmed.

I concur: MCFARLAND, J.

TEMPLE, J., (*concurring.*) Understanding that it is found, in effect, that imposition was practiced upon Peck, through which he was induced to execute the deed, in this: that he was permitted to so execute it under the belief that he was reserving and securing to himself during his life the control and revenues of the property, I concur in the judgment.

We concur: MCKINSTRY, J.; THORNTON, J.

I dissent: SHARPSTEIN, J.

68 Cal. 491

APPLEGARTH v. DEAN. (No. 9,969.)

(Supreme Court of California. January 29, 1886.)

1. LIMITATION OF ACTIONS—WHEN CAUSE ACCRUES—EXCESSIVE JUDGMENT—REVERSAL.
In an action to recover money paid on a judgment in excess of the sum declared actually due upon the same, as subsequently modified by the court conformably to a judgment of the supreme court on appeal, the cause of action accrues, not at the time of the payment of the money, but at the time of the judgment of the supreme court.

2. PLEADING—CERTAINTY.
The complaint alleged that defendant, D., in suit against plaintiff to foreclose a mortgage, had recovered judgment, had had the premises sold, had obtained a judgment for deficiency, and had had the judgment docketed; that defendant, D., was purchaser at such sale, and plaintiff redeemed the property by payment to the sheriff of the price for which it was sold, together with 2 per cent. a month, and paid defendant, D., the amount of the judgment docketed; that plaintiff in this case appealed from said judgment, which the supreme court modified, and subsequently the lower court modified its judgment; that plaintiff duly demanded the excess paid, together with interest and percentage. *Held*, that the complaint was not ambiguous, unintelligible, and uncertain, since it was easy of comprehension and free from reasonable doubt and showed what it intended as the facts constituting the cause of action.

3. SAME—DUPLICITY.
The excess paid the sheriff to redeem and the sum paid defendant on the deficiency judgment are not separate causes of action, and the fact that plaintiff unites them in his complaint does not make him chargeable with uniting separate causes of action.

Appeal from a judgment of the superior court, Merced county.

The facts are stated in the opinion.

J. K. Law, for appellant. *W. S. Goodfellow* and *E. Jackman*, for respondent.

FOOTE, C. Action to recover $504.75 paid upon a judgment in excess of the sum declared actually due upon the same as subsequently modified by the court. A demurrer was filed to the complaint in the action, and overruled. Defendant declining to answer over, judgment passed for the plaintiff, and the former appeals.

It is admitted by the pleadings herein that upon the thirty-first day of December, 1881, the defendant in the present action obtained, (in another suit brought for the foreclosure of a mortgage against the plaintiff, then defendant,) in the superior court of Merced county, a judgment for $2,317.26, and $253.52 costs and attorney's fees; that on March 6, 1882, the mortgaged property was sold at sheriff's sale for $2,600, for the purpose of satisfying said judgment; that said last-mentioned sum was not sufficient, by $125.53, to satisfy that judgment, and a judgment for the deficiency was docketed; that, at said sheriff's sale, Sidney Dean, the present defendant, then plaintiff, became the purchaser of the mortgaged premises; that thereafter, on the fourth day of September, 1882, the plaintiff in this action, then defendant, for the purpose of redeeming said property from the said Sidney Dean, paid to the sheriff for him, at the county of Merced, the sum of $2,600, with 2 per cent. per month thereon in addition, and paid the said Dean also the amount of the judgment docketed, as aforesaid; that all of said sums of money so paid were on that same day had and received by the said Dean; that on the twenty-third day of December, 1882, an appeal from said judgment was taken by the present plaintiff to this court, and that on the eighteenth day of July, 1884, this court modified the judgment so appealed from; that a *remittitur* was sent down to the superior court of Merced county, and on the second day of September, 1884, that tribunal, in obedience thereto, modified its former judgment, by substituting for the sum of $2,317.26, as the amount of the principal and interest due and owing thereon, the sum of $1,907.52, and by substi-

tuting for the sum of $253.52, the amount of costs and attorney's fees as aforesaid, the sum of $212.55; that before the commencement of this action, viz., on the fourth day of September, 1884, the plaintiff demanded of said Dean the sum of $450.71, as paid in excess of the amount due under the modified judgment, together with interest and percentage upon said sum, as paid by plaintiff as aforesaid, amounting in the aggregate to the sum of $504.75, which payment, so demanded, was by the defendant refused, and which he still refuses to pay.

The demurrer filed by the defendant set up the bar of the statute of limitations, under subdivision 1, § 339, Code Civil Proc., and that the complaint was ambiguous, unintelligible, and uncertain, in this: As to when the moneys therein alleged to have been paid to the sheriff of Merced county for defendant were so paid; as to when the same were received by defendant, and as to how and for what purpose they were so paid and received; as to what amount or portion of the moneys sued for is claimed to have been paid, in excess of the judgment as modified, by a sale of the premises, on March 6, 1882; what portion thereof was paid by a redemption of said premises from said sale, on September 4, 1882, and what portion thereof was paid to defendant for the deficiency of the judgment, docketed after said sale, on September 4, 1882; as to what portion of said sum of $504.75 sued for it is claimed was paid for interest, what portion for costs and penalties, or what portion for money paid in excess of judgment as modified. And "that several causes of action are united in said complaint, and not separately stated, in this: That a cause of action for money paid by the sheriff of Merced county to defendant on March 6, 1882, from the proceeds of the sales of plaintiff's lands, and a cause of action for money paid by plaintiff to the said sheriff on September 4, 1882, for a redemption of said land from said sale for defendant's use and benefit, and a cause of action for money paid by plaintiff to defendant on September 4, 1882, for deficiency of judgment docketed, are all united in said complaint, and none of them are separately stated."

The action was not barred by the statute of limitations. The modification of the judgment by the appellate tribunal, by which it was ascertained and judicially declared that Applegarth had paid more money than he justly owed, when he redeemed the mortgaged premises and paid the amount of the docketed judgment, gave him, as against Dean, who was the judgment creditor and purchaser at the sheriff's sale, a new cause of action, which did not accrue until the eighteenth day of July, 1884. *Reynolds* v. *Harris*, 14 Cal. 668–680; *Bank of the United States* v. *Bank of Washington*, 6 Pet. 19.

The docketed judgment was paid, but it is not alleged that it was paid in order to redeem the property. It was, until reversed upon appeal, conclusive evidence of indebtedness; execution might have been issued to enforce its payment; and hence, to prevent further costs, etc., it was the right of the defendant therein to pay it. *Raun* v. *Reynolds*, 18 Cal. 276–291.

The complaint was not ambiguous, uncertain, or unintelligible; it was sufficient to make "easy of comprehension, and free from reasonable doubt," what it intended to announce as the facts constituting the cause of action. *Salmon* v. *Wilson*, 41 Cal. 595. It is clear that no money was sought to be recovered in this action, except such as came to the hands of the defendant himself by virtue of the redemption of the mortgaged premises, and the payment of the docketed judgment, on the fourth day of September, 1882. Separate causes of action are not, therefore, united in the complaint.

It is perfectly plain that by that pleading the defendant was sufficiently informed, although not with the utmost perspicuity, that the plaintiff demanded of him a certain sum of money, viz., the sum of $504.75; that this sum was made up by an amount of money which he had received from the plaintiff in excesss of what was due on a certain judgment, afterwards modified by this court, and the interest and percentage on the same. The amount

of the excess was declared to be $450.71, which, with such interest and percentage added, amounted to the sum of $504.75.

We perceive no prejudicial error in the records, and the judgment should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

72 Cal. 232

DORE v. DOUGHERTY. (No. 9,683.)

(*Supreme Court of California.* April 21, 1887.)

1. JUDGMENT—JUSTICE OF THE PEACE—COLLATERAL ATTACK.
 Whether an *alias* summons was regularly issued or not is not a jurisdictional question, and a judgment of a justice of the peace, rendered on such summons, will be held sufficient, at least as against a collateral attack.
2. EXECUTION—LEVY ON JUDGMENT—SUFFICIENCY.
 In California a levy on a judgment of an execution issued by a justice of the peace, by delivering to the judgment debtor a copy of the writ, with notice in writing that the levy was upon all the right, title, and interest of plaintiff in a certain judgment, (describing it,) and upon all moneys, goods, credits, effects, debts due or owing, or in his possession, or under his control, and requesting him not to pay or transfer the same except to the officer making the levy, is a sufficient levy on the debt itself, and not on the mere judgment, which is not subject to execution under Code Civil Proc. § 542, subd. 5, providing that the debt itself, and not the mere evidence thereof, shall be liable to execution.
3. APPEAL—MOTION TO DISMISS.
 Where some of the defendants are not interested in an appeal, a motion to dismiss, on the ground that it does not appear that the statement was served on all the adverse parties, will be denied.

Department 7. Appeal from superior court, San Francisco.

J. M. Nongues and *Chas. E. Nongues*, for appellant. *J. C. Bates*, for respondent.

TEMPLE, J. August 3, 1880, George Dougherty, one of the defendants, recovered judgment against the present plaintiff for $2,186, and costs. On the same day Dougherty assigned the judgment to his son, John Dougherty. September 3d, Dore appealed to the supreme court from the judgment. The judgment was affirmed here February 16, 1883. 63 Cal. 170. September 4, 1880, while the appeal was pending, defendant Miller caused a levy to be made on the judgment by virtue of an execution from the justice's court of San Francisco, upon a judgment against George Dougherty in favor of Miller. The attempted levy was by the sheriff, who delivered to and left with Maurice Dore a copy of the writ, with a notice in writing that such property, to-wit, "all the right, title, and interest in and to a certain judgment obtained in the superior court, department 5, of the city and county of San Francisco, in which George Dougherty is plaintiff, and Maurice Dore defendant, judgment having been rendered on the ninth day of August, 1880, against said Maurice Dore for the sum of $2,186, and costs." Also notifying Dore that he levied upon all moneys, goods, credits, effects, debts due or owing, or in his possession, or under his control; and requesting him not to pay or transfer the same to any one save said officer. September 27, 1880, the sheriff proceeded to sell all the right, title, and interest of George Dougherty in the judgment to the defendant Miller for the sum of $20, which was credited upon the execution and judgment in favor of Miller against said Dougherty. This action was brought by Dore under section 386, Code Civil Proc., to have the court deter-

mine who was entitled to receive the money; the amount of the judgment and costs, $2,850, being deposited in court. The court awarded the money to John Dougherty, the assignee of George Dougherty, and Miller appeals from the judgment, or a portion of it.

The superior court refused to allow Miller to introduce proof for the purpose of showing that the assignment to John Dougherty was fraudulent, on the ground that Miller had acquired no title to the judgment against Dore, and had no such standing as would enable him to attack the assignment. This position is sought to be maintained on the ground, first, the judgment rendered in justice's court is void; but in this we do not agree with respondent's counsel. The summons was sufficient, at least as against a collateral attack, under the rule laid down in *Keybers* v. *McComber*, 67 Cal. 395, 7 Pac. Rep. 838. Whether the *alias* summons was regularly issued or not is not a jurisdictional question.

In the next place, it is claimed that the judgment was not subject to levy and sale under execution. We think this point well taken. It was expressly so held in *McBride* v. *Fallon*, 65 Cal. 301, 4 Pac. Rep. 17. Much may be said on both sides of this question, and it has been differently decided in different states. As it has been decided in the above case, we see no reason for reopening the discussion. It is claimed that the case of *McBride* v. *Fallon* only holds that the sale could not be made as it was attempted in that case, and that the mode of levy there was different from the mode pursued here. But that ruling is expressly placed upon the ground that the judgment is but the evidence of a debt, and the statute has made no provision for attaching or levying upon evidences of debt; but that it is the debt itself, and not the evidence of it, which may be levied upon by the writ of attachment, or on execution in like manner as upon writs of attachment. And to confirm this view the court alludes to the case of *Davis* v. *Mitchell*, 34 Cal. 81, where it was held that a promissory note was the subject of levy and sale, when the sheriff could get possession of it, and could deliver it to the purchaser, and say they could not assent to the doctrine of that case. Of course it is not denied that a judgment is property, or that it can be the subject of assignment. The ruling is based entirely upon the statute. And it seems to us that it necessarily follows that the debt was by the proceeding duly levied upon. Service of the writ and notice constituted what is usually called the process of garnishment.

It is claimed that the garnishment is not sufficiently pleaded by defendant Miller. It is true, Miller claims to have bought the judgment; but in showing his title to the judgment he adopts by express reference the allegations in the complaint which show the garnishment, and adds the other facts which show the debt itself was duly levied upon. This put Miller in the attitude of a creditor, and gave him the right to attack the assignment for fraud, and the ruling denying him that right was error. The other defendants were not interested in this appeal, and the motion to dismiss, on the ground that it does not appear that the statement was served on all the adverse parties, must be denied.

Judgment reversed, so far as the same affects defendant Miller, and a new trial ordered as to the claim of said defendant.

We concur: PATERSON, J.; MCKINSTRY, J.

72 Cal. 236

MANLEY *v.* CUNNINGHAM. (No. 9,785.)

(*Supreme Court of California.* April 21, 1887

1. PUBLIC LANDS—OF STATE—"SUITABLE FOR CULTIVATION."

Lands several miles from the ocean, and not readily accessible by reason of the absence of roads, the surface of which is rolling and uneven, but not steep, the soil

of which is rich, and the greater portion of which is covered with brush and redwood timber, which must be removed before the land can be cultivated, and which will then be more valuable than as timber land, is "suitable for cultivation," as that term is used in Const. Cal. art. 17, § 3, providing how land suitable for cultivation may be disposed of by the state.

2. SAME—APPLICATIONS FOR—ACTUAL SETTLERS.

Section 3 of article 17 of the California constitution of 1879, which provides that "lands belonging to the state which are suitable for cultivation shall be granted only to actual settlers," applies to applications for state lands, pending at the time when the constitution was adopted, and requires such an applicant for lands suitable for cultivation to be an actual settler; following *Dillon* v. *Saloude*, 68 Cal. 267, 9 Pac. Rep. 162.

Department 1. Appeal from superior court, Santa Cruz county.

Garber, Thornton & Bishop, for appellant. *J. M. Lesser* and *J. H. Logan*, for respondent.

PATERSON, J. This is an appeal from a judgment of the superior court of Santa Cruz county in favor of the defendant. The case arises out of a contested claim to purchase certain state lands, referred to that court, as the successor of the district court, for determination, upon the application of the plaintiff, under section 3414 of the Political Code. The case was tried by the court below without the intervention of a jury, and the facts fully appear from the findings, which are not excepted to; the appeal being simply from the judgment. The lands in controversy are contiguous subdivisions of section 1, township 9 S., range 4 W., Mount Diablo base and meridian, aggregating 320 acres, and being lands granted to the state in lieu of N. ½ of section 36, township 9, N. range 18 W., San Bernardino meridian, lost to the state by a prior grant. These lands were duly surveyed, accepted, and listed, and were certified to the state by the honorable secretary of the interior on August 30, 1869. The plaintiff's application to purchase said lands was filed in the office of the surveyor general of the state August 14, 1878, and was in due form, and was accompanied by an affidavit setting forth all the facts required by the statute then in force. The application contained, among other things, a clause whereby the plaintiff expressly agreed to pay for the land $1.25 in gold or silver coin, in the manner and at the time prescribed by statute, and that, in case of non-payment of the first installment within the statutory period, the lands should "revert" to the state without suit. The legal fee was duly paid by the plaintiff on the filing of the said application. The court finds, also, that the facts stated by the plaintiff in his application and affidavit, as to his qualifications to purchase, are all true, and that there is no other valid claim to the land, except it be that of the defendant. The defendant's application and affidavit were filed December 31, 1872, setting forth that he was a citizen of the United States, a resident of the state, and over 21 years; that he desired to purchase the land "under the provisions of an act of the legislature of said state entitled 'An act to provide for the management and sale of land belonging to the state,' approved March 28, 1868, and the various acts amendatory thereof, and supplementary thereto;" that there was no adverse occupancy of the land, and that he agreed to pay for the same in the manner provided by law, etc. The defendant also paid the legal fee to the surveyor general, and his application was received and filed, and afterwards approved, by said surveyor general. Thereafter, on February 25, 1876, after the determination in his favor of a contest with one Crowley, hereinafter mentioned, a certificate of purchase was issued to defendant by the register of the state land-office, December 4, 1875, and the defendant was the holder of said certificate when the plaintiff's application was filed, as before stated. After the plaintiff's application was filed, he demanded of the surveyor general that the contest between himself and the defendant be referred to the courts for adjudication. Thereupon, on said day, the surveyor general and *ex officio* register of the state land-office made and entered in the record books

of his office an order referring said contest to the superior court of Santa Cruz county for trial, and a certified copy of said order was filed in the clerk's office of said superior court on September 8, 1881. The plaintiff filed his complaint in this action in said court on October 24, 1881.

The complaint sets out the above recited facts; alleges that the land is not suitable for cultivation; that the defendant's application and certificate of purchase are without authority and void, and prays the court so to adjudge; and also to adjudge that the defendant is not entitled to purchase the said land, but that the plaintiff is; that his application be approved; and that, upon his making payment, a certificate be issued to him. The answer denies all the allegations of the complaint, and sets out a separate defense to the effect that, on September 10, 1868, one Crowley had filed in the office of the state locating agent an application to purchase the land in controversy; that the land was afterwards, in 1870, duly listed, certified, and conveyed to the state; that on December 31, 1872, the defendant filed his application to purchase, as above stated; that a contest thereupon arose between himself and the said Crowley before the register of the state land-office, which, upon his demand, was referred to the district court in and for Santa Cruz county for determination; that thereafter, upon a complaint filed by him in said district court, such proceedings were had that the said contest was decided in his favor, and, on August 1, 1874, a judgment was duly entered, whereby it was ordered, adjudged, and decreed that the said defendant, Cunningham, was entitled to purchase the said lands, and his application should be approved, and the surveyor general approve the same, and issue to him a certificate of purchase; and that, on February 25, 1875, the state sold him the said land, and the surveyor general, as *ex officio* register, issued to him a certificate of purchase. The defendant also filed a cross-complaint setting out the facts as to his own application, etc., and that of the plaintiff, and the reference of the contest between them, and praying a determination of said contest in his favor. There is also a supplemental answer alleging the issuance of a patent to the defendant, pursuant to his certificate of purchase, on April 7, 1882. The defendant appealed from the decision of the district court in said cause of *Cunningham* v. *Crowley*, and on the appeal the judgment was affirmed. The opinion of this court is reported in 51 Cal. 128.

The following is the finding of the court below as to character of the land: "That said lands are situated in the Santa Cruz mountains, about six miles from the coast, difficult of access, for the reason that there are not any roads leading thereto. The surface is rolling and uneven, but not steep. Soil of a rich nature. A greater portion of the surface is covered with brush and redwood timber, which must be removed before the land can be plowed. This would involve very considerable outlay. There are spaces and openings, aggregating somewhat less than one-half, ready to be plowed. The land now has a distinct value for its timber, but, when the timber shall have been removed, will be more valuable for agricultural puposes. For these reasons, and none other, the court finds that at the time of filing plaintiff's application said lands were and still are suitable for cultivation; that there never has been any actual settlement by plaintiff, or any person; and neither plaintiff, nor any person, ever was an actual settler or resident on said lands, or any part thereof."

Article 17, § 3, of the constitution, reads as follows: "Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law."

In support of his proposition that the lands are not fit for cultivation, appellant claims "(1) that, as appears from the findings, the lands are in reality timber lands in the Santa Cruz mountains, without any roads leading thereto, and therefore 'difficult of access;' and that the conclusion of the court that,

because the soil is of a rich nature, the lands are 'suitable for cultivation,' although it is declared that the greater part of it cannot be plowed until the timber is removed, is wholly unwarranted; (2) that the terms 'suitable for cultivation,' logically and etymologically, mean presently or immediately fit for tillage, without other preparation than appertains to the ordinary operations of husbandry, and cannot apply to timber lands incapable of cultivation until the timber is removed."

We are unable to agree with appellant in his interpretation of the phrase "suitable for cultivation," as used in section 3, or his conclusion as to the effect of the seventh finding of the court. On the contrary, we think that the elements and conditions stated in the finding bring the land in controversy within the classes intended by the framers of the constitution to be reserved for actual settlers. It was intended by this section to provide that the public lands should be held and disposed of, so far as possible, to those who will live upon and cultivate them; that they should be used to encourage the immigration of industrious people who will utilize and improve the lands, and, by building up homes and engaging in husbandry, add permanently to the wealth and prosperity of the state.

The phrase, "lands belonging to this state suitable for cultivation," includes all lands ready for occupation, and which by ordinary farming processes are fit for agricultural purposes. The language of the section is used in the sense that it has always been employed in reference to the public domain. Some of the richest agricultural lands of the country have been acquired under the pre-emption laws, and yet they were covered with timber, brush, or prairie sod, which rendered them incapable of immediate cultivation.

In a recent letter to commissioner McFarland, the secretary of the interior says: "All timber lands are unfit for cultivation in their natural condition, but, if they may be redeemed and made susceptible of cultivation by ordinary farming process, they are not, in my opinion, within the purposes of this act, which was intended to embrace within its provisions timbered tracts only, in broken, rugged, or mountainous districts, with soil unfit for ordinary agricultural purposes when cleared of timber." 10 Copp, Land-owner, 73; *Hughes* v. *Tipton*, 11 Copp, Land-owner, 8.

It is said that this construction of the section will include swamp and overflowed lands which are rich in soil, and that it will require actual settlement thereon before purchase. But no lands can be included that are unfit for actual occupancy. It was not intended that the purchaser should live upon the water, or make his home in a swamp. It would be singular, indeed, if the state should require such lands to be reclaimed, so as to make them fit for residence for the actual settler, before it could entertain an application by the purchaser. Such a condition would, of course, place a complete embargo on all sales of those lands, and the state would thereby defeat the very purposes of the grant by which it took them.

Now, if we are correct as to the object, meaning, and intent of the section referred to, the reasons or facts given by the court for its ultimate finding that the lands are suitable for cultivation must be good and sufficient. The soil is of a rich nature. The surface is not steep. Nearly one-half is now ready for the plow. When the timber is removed, the land will be more valuable for agricultural purposes. The lands are within six miles of the ocean, and in the Santa Cruz mountains. They are difficult of access—not impossible—only because there are no roads, and the disadvantages arising from the fact that there is some brush on the place are more than offset by the redwood timber from which can be secured material for fencing, building, and fuel.

The second point made by appellant, viz., that this section cannot be given a retrospective operation, has been fully considered in former decisions of this court. We have stated the facts of this case, and deem it unnecessary to

review the decisions. *Johnson* v. *Squires*, 55 Cal. 103; *Urton* v. *Wilson*, 65 Cal. 13, 2 Pac. Rep. 411; *Dillon* v. *Saloude*, 68 Cal. 267, 9 Pac. Rep. 162. The plaintiff has not paid any part of the purchase price; therefore *Laugenour* v. *Shanklin*, 57 Cal. 76, and *Bludworth* v. *Lake*, 33 Cal. 262, do not apply.

It is said that the finding as to settlement is outside of the issues; that plaintiff did not allege he was an actual settler, and defendant should have alleged that plaintiff was *not* an actual settler, if he desired to rely on the fact. It must be remembered, however, that the plaintiff alleged and proceeded upon the theory that the land was not suitable for cultivation. If he had succeeded in proving this allegation, the question of settlement would have been immaterial. It devolved upon the plaintiff to allege and prove, either that the land was not suitable for cultivation, or that, being suitable for cultivation, he was an actual settler or resident. The plaintiff cannot recover because of the insufficiency of the allegations, or proof of the defendant.

In this case the court below did not award to defendant the right to purchase, and the defendant is not here complaining of the judgment. Judgment affirmed.

We concur: McKINSTRY, J.; TEMPLE, J.

(72 Cal. 243)

PAULSON *v.* NUNAN. (No. 9,585.)

(*Supreme Court of California.* April 23, 1887.)

1. APPEAL—EVIDENCE—HARMLESS ERROR.
 In an action of claim and delivery for two horses which plaintiff claimed as exempt from execution because used in his business of peddling, evidence of an entry in a city directory of plaintiff's business as compiler of hand-books was admitted. *Held*, that the admission of this evidence, if error, was harmless, since plaintiff admitted that a portion of his time was occupied as compiler of books, and the entry did not negative the fact that a portion of his time was occupied in peddling.
2. REPLEVIN—EXECUTION—LIMITATION OF ACTIONS.
 Where the issue in an action of claim and delivery against a sheriff is whether the seizure was lawful when made, it is immaterial whether after that, and before the suit was brought, the judgment was barred by the statute of limitations. It is therefore not error to refuse plaintiff leave to amend by pleading the statute.

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco.

Wm. & Geo. Leviston, for appellant. *Clitus Barbour* and *Carl T. Graef*, for respondent.

FOOTE, C. This is an action of claim and delivery by Paulson against Nunan, as sheriff of the city and county of San Francisco, for two horses, or their value, alleged to be exempt property under subdivision 6, § 690, Code Civil Proc., and wrongfully taken by the sheriff under writs of attachment. Judgment was rendered for the defendant, a new trial was moved for by the plaintiff and refused, and from the order made therein and from the judgment this appeal is prosecuted. The plaintiff alleges, as an error committed by the court, that it admitted in evidence, over his objection, an entry in a certain directory, as follows: "Paulson, Luther L. Publisher of hand-books and county directories. Office, 517 Clay; dwl., 914 Clay." Conceding without deciding, that such evidence was incompetent to prove Paulson's employment, nevertheless he testified that a portion of his time at least was employed in getting up and publishing directories or hand-books, so that the admission of the entry in question before the court could not and did not prejudice him in any appreciable degree, as the entry in the book did not negative the fact that a portion of his time was occupied in the business of a huckster or peddler. The great preponderance of the evidence was, we think, to the effect that the horses were not used habitually by the plaintiff, as he claimed,

as a huckster or peddler in earning his living, and for such conflict as did exist there should not be a reversal of the judgment or order.

The question before the court, under the original pleadings was, did not the sheriff rightfully seize the property under attachment at the time he took it? The plaintiff asked leave of the court, which was refused, to file a supplemental complaint, setting up that the judgment obtained in the action in which the attachments were issued was barred by the statute of limitations, not at the the time of the taking by the sheriff, but at the time of the proposed filing of the amended pleading many years after the taking, and after the sheriff had gone out of office. This refusal was a proper one. The sheriff's justification depended upon his lawful taking of the property at the time of its seizure; and whether after that time, and before this suit was brought, the statute of limitations had barred the judgments, was no concern of his.

There is no merit whatever in this appeal, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(72 Cal. 224)

WOOD v. BRUSH. (No. 9,515.)

(*Supreme Court of California.* April 20, 1887.)

1. PLEADING—ANSWER—STRIKING OUT—PRACTICE.
 Where, pending a decision of a motion by plaintiff to strike out defendant's answer, and for judgment as demanded in the complaint, defendant obtains an order on plaintiff to show cause why he should not be permitted to file a supplemental answer, but fails to appear at the time set for hearing such order, the answer may, if insufficient, be properly stricken out, and judgment entered for plaintiff.
2. NEGOTIABLE INSTRUMENTS—ASSIGNMENT AFTER MATURITY—COUNTER-CLAIM.
 Where an action is brought on a note assigned to plaintiff after maturity, defendant cannot set up a counter-claim or defense that has arisen since the commencement of the suit, as he is only entitled to set up such defense as he could have set up against the assignor before the transfer of the note.
3. SET-OFF AND COUNTER-CLAIM—PARTNERSHIP—ACCOUNTING.
 Where a counter-claim set up is due, if at all, as a partnership account against sundry persons beside plaintiff, and until an accounting, would not be the subject of an action at law, it is not a counter-claim "existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action," within the purview of Code Civil Proc. Cal. § 438, and is not valid.
4. SAME—SEPARATE CONTRACTS.
 Under Code Civil Proc. Cal. § 438, sub. 2, in an action upon a contract, another cause of action arising upon a separate contract can only be set up as a counter-claim when it existed at the commencement of the action.

Commissioners' decision. Department 2.

Appeal from superior court, San Francisco.

C. H. Moore, for defendant and appellant. *W. S. Goodfellow*, for plaintiff and respondent.

SEARLS, C. This is an action upon a promissory note for $875 and interest, made by defendant, payable to the order of W. W. Potter, and indorsed by the latter to the plaintiff. The sworn complaint contained a copy of the note, and is in the usual form. The answer is as follows: "Now comes the defendant above-named, and, answering the plaintiff's complaint herein, avers that, as consideration for the promissory note declared on in plaintiff's complaint herein, he received the sum of six hundred and nine and seventy-nine one hundredths ($609.79) dollars, and no more; wherefore he prays judgment, and for costs." Plaintiff moved to strike out the answer, and for judgment

as prayed for in the complaint. Pending this motion, defendant obtained an order on plaintiff to show cause why defendant should not be permitted to file a supplemental answer. At the hearing of the motion and order to show cause, defendant failed to appear, and an order was entered granting the motion for judgment, and denying the application to file a supplemental answer. Thereupon judgment was entered in favor of plaintiff as prayed for in his complaint, from which judgment defendant appeals.

The original answer contained no defense to the action, and was properly stricken out. There is no statement or bill of exceptions in the record. The supplemental answer, although presented to the clerk for filing, and marked as filed, did not become a pleading in the cause, so as to constitute a part of the judgment roll, until defendant's motion, permitting it to be filed as such pleading, was granted; and as leave was refused by the court it never became a pleading, and is not entitled to consideration as a portion of the judgment roll. Waiving all objections, however, to the record, and to its lack of authentication, and the leave to file a supplemental answer was properly refused, for the reasons: *First.* That defendant, after procuring an order on plaintiff to show cause, and having it set for hearing, failed to appear at such hearing, and the court might well have concluded he had abandoned the application to file a supplemental answer. *Second.* The complaint shows that the promissory note upon which the action is brought was indorsed to plaintiff after maturity. This entitled defendant to set up as against it any defense which he could have interposed against the assignor, and which existed at the time of, or before, notice of the assignment. The institution of the action was notice of the assignment of the note, and yet defendant seeks to set up, as against plaintiff, a defense or counter-claim which, according to his sworn statement, "has arisen since the commencement of this action, and since the former answer of defendant was filed." This he cannot be permitted to do. *Third.* The counter-claim set out in the supplemental pleading is clearly due, if at all, as a partnership account against sundry persons besides plaintiff, and, until an accounting is had and a balance struck, is not the subject-matter for an action at law. It is not, therefore, a counter-claim "existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action," within the purview of section 438 of the Code of Civil Procedure. *Fourth.* In an action upon a contract, another cause of action arising upon a separate contract can only be set up as a counter-claim when it existed at the commencement of the action. Code Civil Proc. § 438, sub. 2; *Gannon* v. *Dougherty*, 41 Cal. 661.

The judgment should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

72 Cal. 227

HEARST *v.* DENNISON. (No. 9,647.)

(*Supreme Court of California.* April 20, 1887.)

1. APPEAL—SETTLEMENT OF STATEMENT—FRAUD.
 When a trial judge, after examination, refuses to settle a statement of the case on motion for a new trial, on the ground that it is incorrect and fraudulent, on appeal, when there is nothing to show that the statement was not a fraud, the order of the trial judge, even if it is an appealable order, will not be reviewed by the California supreme court.
2. SAME—RECORD.
 On appeal from an order denying a motion for a new trial, where there is no statement, there can be no review in the supreme court of California.

Department 2. Appeal from superior court, San Francisco.

L. Owint, for defendant and appellant. *Edward Lynch*, for plaintiff and respondent.

McFARLAND, J. This is an action for unlawful detainer of land after nonpayment of rent. Plaintiff had judgment in the court below; and defendant appeals (1) from the judgment; (2) from an order of the judge of the lower court refusing to settle a proposed statement on motion for new trial; and (3) from an order denying a motion for new trial.

1. The judgment roll shows no error, and the appeal from the judgment has no merits.

2. The transcript contains a bill of exceptions, which shows that, after appellant had served and filed a notice of motion for a new trial, he served and presented to the judge, within the proper time, a document which commenced with the words, "Defendant's draft of his proposed statement on motion for a new trial." To this document, and to its settlement by the judge, respondent objected, and moved that the judge refuse to settle the same upon the ground that it was not "a draft of nor a statement of the case in the above-entitled action." The bill of exceptions shows that appellant's attorney admitted that said proposed statement "was incorrect and erroneous," but does not show that appellant was "in any way prevented from making a fair or substantially truthful statement of the case." After a full hearing of the matter, the court made an order refusing to settle the statement, "on the grounds that said proposed statement on motion for a new trial is not a statement of the case, or of any case herein, and is grossly incorrect; and that no draft of the statement of the case, or of any case herein, or a copy of said draft, has been made or prepared or served herein at any time." From this order defendant appeals.

If this document, named "draft of *his* proposed statement," is a mere pretense and fraud; if it is so grossly untrue, or so foreign to the real history of the case, as to come within no reasonable meaning of "a statement of the case," as used in the Code,—then the judge of the court below was right in disregarding it. It is the duty of a judge to "settle" a statement, not to make one. And there is nothing in the record to show that the proposed draft was not a sheer fraud. There is nothing before us upon which we can review the order. Indeed, it is doubtful if an appeal lies at all from such an order. If a judge refuses to settle a *bona fide* statement, he may be compelled to settle it upon *mandamus*, or by the proceeding provided in section 652, Code Civil Proc. In such a proceeding the reporter's notes or other evidence of the real facts of the case can be brought before this court. But, whether or not an appeal would lie, there is nothing in the record in the case at bar from which we can determine that the court erred in making the order appealed from.

3. There being no statement, there is nothing to review on the appeal from the order denying the motion for a new trial.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

LUX *v.* HAGGIN. (No. 11,966.)

(*Supreme Court of California.* April 28, 1887.)

VENUE—IN CIVIL ACTIONS—CHANGE OF—DISQUALIFICATION OF JUDGE.

It is competent for a judge to order a transfer of the place of trial upon the ground that he has been under a general retainer from one of the parties in the case; following *Lux* v. *Stine Canal Co.*, 11 Pac. Rep. 798.

Department 1. Appeal from superior court, Kern county.

The facts in this case are the same as are set forth in the opinion in *Lux* v. *Stine Canal Co.* and *Miller* v. *McCord*, 11 Pac. Rep. 798.

Luis T. Haggin, for appellant. *Stetson & Houghton*, for respondent.

BY THE COURT. On the authority of *Kern Valley Water Co.* v. *McCord*, *Lux* v. *Stine Canal Co.*, and *Miller* v. *McCord*, 11 Pac. Rep. 798, order affirmed.

2 Cal. Unrep. 753

KERR *v.* KERR. (No. 9,521.)

(*Supreme Court of California.* April 26, 1887.)

NEW TRIAL—SUFFICIENCY OF EVIDENCE—DISCRETION.

A motion for a new trial, made on the ground of the insufficieny of the evidence to sustain the decision and judgment, is addressed to the sound discretion of the court, and an order on such a motion granting a new trial will not be reversed unless there has been a manifest abuse of that discretion.

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco.

Davis Louderback and *R. Thompson*, for appellant. *Scrivner & Boone*, for respondent.

BELCHER, C. C. This is an appeal by the defendant from an order granting the plaintiff a new trial. The motion was made and granted upon the ground that the evidence did not justify the decision and judgment. It is settled law in this state that a motion for new trial, made upon the ground of the insufficiency of the evidence to justify the verdict, or other decision, is addressed to the sound legal discretion of the court, and an order granting a new trial on such ground will not be reversed unless it appear that there has been a manifest abuse of that discretion. *Phelps* v. *Union C. M. Co.*, 39 Cal. 407; *Pierce* v. *Schaden*, 55 Cal. 406; *Bronner* v. *Wetzlar*, Id. 419. In this case we see no such abuse of discretion as would warrant a reversal of the order, and it should therefore be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

72 Cal. 248

SULLIVAN *v.* ROYER. (No. 9,651.)

(*Supreme Court of California.* April 25, 1887.)

1. NUISANCE—SOOT FROM SMOKE-STACK—ABATEMENT.
 It appeared that the issuance of soot from defendant's smoke-stack was a nuisance of a most disagreeable character to plaintiff and his family. It was not shown but what the smoke-stack might have been easily used in such a way that soot would not have issued therefrom. *Held*, that this was not one of the inconveniences necessarily flowing from a concentration of population, which one impliedly consents to by living in a city, and that it was properly enjoined.
2. SAME—JUSTIFICATION—LICENSE.
 The board of supervisors licensed defendant to erect and maintain a steam-engine. *Held*, that this license did not justify the creation of a nuisance by the issuance of soot from the smoke-stack of such engine.[1]
3. SAME—ABATEMENT—EQUITY—PLEADING—INJUNCTION.
 The complaint in an action in equity for the abatement of a nuisance asked "that said nuisance be abated." *Held* that, the action being in equity, an injunction suitable to the facts of the case was the proper mode of granting the relief, although it was not expressly prayed for.
4. EQUITY—DECREE—ADVISORY VERDICT—INSTRUCTION.
 The judge charged the jury that damages could be recovered against defendant after the commencement of the action. The plaintiff, however, disclaimed all damages after the filing of the complaint. *Held* no error, since, the case being one in equity, the verdict was advisory.
5. TRIAL—ARGUMENTS OF COUNSEL.
 In a trial before a jury, counsel should not be permitted to read law books, or to make an argument on the law of the case, or to state what he claimed to be law, to the jury; and it is not error for the court to refuse to permit it.

Commissioners' decision. Department 1.

[1] Grants of privileges or powers confer no license to use them, in disregard of the rights of others, with immunity. Baltimore & P. R. Co. v. Fifth Baptist Church, 2 Sup. Ct. Rep. 719; Woodruff v. North Bloomfield G. M. Co., 18 Fed. Rep. 753, and 16 Fed. Rep. 25; Cogswell v. New York, N. H. & H. R. Co., (N. Y.) 8 N. E. Rep. 543; Morse v. City of Worcester, (Mass.) 2 N. E. Rep. 694; Tuebner v. California St. Ry. Co., (Cal.) 4 Pac. Rep. 1162. Legislative authorization exempts only from liability to the state. It does not affect the rights of private citizens for relief from private nuisances and special damages, Baltimore & P. R. Co. v. Fifth Baptist Church, 2 Sup. Ct. Rep. 719; Woodruff v. North Bloomfield G. M. Co., 18 Fed. Rep. 753, and 16 Fed. Rep. 25; Morse v. City of Worcester, (Mass.) 2 N. E. Rep. 694; but municipal authorities may authorize obstructions of the public streets, and such obstructions will not be nuisances, Marini v. Graham, (Cal.) 7 Pac. Rep. 442.

Appeal from superior court, San Francisco.
M. A. Wheaton, for appellant. *J. M. Allen*, for respondent.

FOOTE, C. This is an action in equity instituted for the purpose of enjoining and abating certain nuisances, and for the recovery of damages resulting therefrom. The cause was tried before a jury who heard all the evidence given therein. A verdict was by them rendered for $100 damages against the defendant, "and that he be ordered by the court to abate the nuisances complained of by the plaintiff." Thereupon the court made and filed written findings of fact, upon all the material issues raised by the pleadings, and rendered its judgment enjoining the defendant from continuing the nuisances complained of, ordering that the same be abated, and that the plaintiff recover the sum of $100 damages, and costs. A new trial was moved for by the defendant and denied, and from the judgment and order made therein this appeal is prosecuted.

Counsel for the defendant contends most earnestly, upon several grounds, that the judgment and order should be reversed, but none of them appear to us to be tenable.

There was no error in the refusal of the court to allow the defendant's counsel to read law books, or to make an argument on the law of the case, or to state what he claimed to be law to the jury. *People* v. *Anderson*, 44 Cal. 70; Proff. Jury, § 253.

As we have seen, this was an action in equity. *People* v. *Moore*, 29 Cal. 427; *Courtwright* v. *Bear R. & A. W. & M. Co.*, 30 Cal. 576, 577. An abatement of a nuisance is accomplished by a court of equity by means of an injunction, proper and suitable to the facts of each case. Wood, Nuis. §§ 777–794.

The complaint alleged, and the court found, that a nuisance existed, and was continuous. The answer denied all the material allegations of the complaint. While it is true that the prayer of the pleading above referred to did not expressly ask for the issuance of an injunction, yet it did ask "that said nuisance be abated." The relief granted was consistent with the case made by the complaint, and embraced within the issues made by the pleadings, and was therefore entirely proper. Section 580, Code Civil Proc.

There is a substantial conflict in the evidence as to whether the plaintiff was, at the time of the institution of the action, employed by the defendant to remove the "pile of hair and flesh" that constituted a part of the nuisance complained of.

The defendant complains that the court instructed the jury that damages could be recovered against him after the commencement of the action. It appears, however, that the plaintiff waived all damages for anything that had occurred after the filing of the complaint; and, the case being one in equity, the verdict of the jury was merely advisory to the court. *Sweetser* v. *Dobbins*, 65 Cal. 529, 4 Pac. Rep. 540.

The defendant's counsel makes a very strenuous argument that, in effect, the verdict, judgment, and findings, as he claims, most improperly pronounced the smoke-stack of the defendant to be a nuisance. The language of the decree or judgment upon that subject is as follows: "It is adjudged and decreed that said defendant is perpetually enjoined from allowing soot to issue from the smoke-stack on the premises," etc. The findings show that the issuance of this soot from the smoke-stack above mentioned was a nuisance of a most disagreeable character to the plaintiff and his family. We are not informed from the record but what this smoke-stack might have been used in such a way, both readily and easily, as that soot would not have issued therefrom. But, be that as it may, it is said by this court in the case of *Tuebner* v. *California St. R. Co.*, 66 Cal. 174, 4 Pac. Rep. 1162: "The keeping of a hotel or a restaurant is a lawful and very necessary business; * * * yet it

could not be held that a person carrying on such business, or any requiring a large consumption of fuel, could erect his chimney to a height that would discharge the smoke and soot into his neighbor's windows. It is true, as argued by appellant, that persons preferring to live in the city rather than the country must accept many inconveniences,—probably all that flow naturally and necessarily from the concentration of populations; but that doctrine should not be carried too far. The law looks to a medium course to be pursued by each for the mutual benefit of all." Tested by this rule, we do not see why the plaintiff should not be restrained from so using his smoke-stack as that the soot issuing therefrom shall be prevented from being a disturbance, annoyance, and source of positive injury to the defendant and his property.

Nor could the board of supervisors of the city and county of San Francisco grant a license to the defendant which would permit him materially to impair the plaintiff's property rights. They could and did grant the defendant a license to erect and maintain his steam-engine, but they neither could nor did license him thereby to create a nuisance. *Tuebner* v. *California St. R. Co.*, *supra*.

Upon the whole case, the record of which, as well as briefs of counsel and authorities there cited, we have carefully examined, we are of opinion that the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 254

BARRY v. FERKILDSEN. (No. 9,664.)

(*Supreme Court of California.* April 25, 1887.)

1. NEGLIGENCE—CONTRIBUTORY—SIDEWALKS.
 Plaintiff was injured by falling into a hole in the sidewalk in front of defendant's premises. The hole was used for defendant's convenience, was covered with a trap-door, but at the time of the accident was open and unguarded. The door of plaintiff's house was a few feet from the hole, but plaintiff never knew of its existence. At the time of the accident she was hurrying to school, and her attention being diverted for a moment, she did not notice the hole, and, after taking a couple of steps, fell in. *Held*, that the fact that her attention was momentarily distracted did not constitute contributory negligence. She had the right to assume that the sidewalk was safe.
2. SAME—BURDEN OF PROOF—NUISANCE.
 The plaintiff offered no evidence to show that defendant opened the trap, or caused it to be opened, or to negative the theory that a stranger might have opened it. *Held*, that the act being in the nature of a nuisance, on account of the occasion for accident and injury which it continuously presented to innocent persons, the plaintiff was not under the burden of showing affirmatively that there was no intervention of a third party which contributed to the result.
3. SAME—INDEPENDENT CONTRACTOR.
 In such a case the fact that, a few days before the accident, defendant had a carpenter repair a plank in the wooden cover, would not enable him to shift the liability on the carpenter as an independent contractor.
4. SAME—CITY ORDINANCE—VIOLATION OF.
 Under a city ordinance forbidding vaults under a sidewalk unless covered with an iron cover, this excavation and hole, being covered with a wooden cover, violated the ordinance, and were unlawful.

Department 2. Appeal from superior court, San Francisco.

F. M. Husted, for appellant. *J. D. Sullivan* and *Horace G. Platt*, for respondent.

MCFARLAND, J. Plaintiff, a girl about 19 years old, started somewhat in a hurry from her father's house about 9 o'clock in the morning of October 11, 1880, to go to school. Appellant owned the adjoining premises, and in the sidewalk in front of said premises there was a hole covered by a wooden trap-

door, which appellant used for his private convenience. This hole was only a few feet from the entrance to the residence of plaintiff's father. On the morning above referred to this hole was opened, and entirely unguarded and unprotected. As plaintiff went out of the house her attention was attracted for a moment by some children playing on the street, and, not noticing the hole, after taking a couple of steps, she fell headlong into it. The hole was quite deep, and plaintiff was very seriously injured by the fall. She had been accustomed to travel over this sidewalk daily on her way to and from school, and never knew before that the hole was there. The premises are on Post street, a populous street of the city of San Francisco. The evidence did not show who had removed the trap-door from the top of the hole. The jury found a verdict in favor of plaintiff for $3,000, and defendant appeals from the judgment, and from an order denying a new trial. Appellant makes many of the points which are usually raised in actions for damages of the class to which the case at bar belongs.

In our opinion, there is nothing in the point that respondent was guilty of contributory negligence. A sidewalk of a street in a city not near a crossing may be taken by one passing over it to be a safe and not a dangerous place. In this case the respondent had a right to presume that the sidewalk was in the same condition in which she had always found it; and the fact that her attention was momentarily attracted in another direction—a thing of the most common occurrence to travelers along a street—falls far short of that contributory negligence which in law defeats an action for damages.

Most of the other points made by appellant in various forms, when grouped together, present this proposition or theory: That as respondent failed to show that appellant, or any one of his employes or servants, removed the trap-door from the hole, and did not negative the theory that a stranger might have removed it, therefore there is a want of proof of that negligence which is the gist of an action for personal damages. To this proposition there is a multitude of authorities, more or less applicable; and they are widely divergent. We think, however, that through the numerous cases upon the subject may be seen a distinction which is determinative of the case at bar. When a person pursues a business or does an act perfectly lawful in itself, and not in its nature so hazardous or so conducive to injury as to be of the character of a nuisance, then he can be held liable for injuries to others arising therefrom only when he has been guilty of negligence in his manner of carrying on the business or doing the act. But when the act is unlawful, or is in its character so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continuously presents to innocent persons, then the party is liable, although the agency of a stranger may have contributed to some extent to the final catastrophe. At least, in such a case the injured party ought not to be compelled to show affirmatively that there was no intervention of a third person which contributed to the result.

Whether or not appellant had any lawful authority to maintain the excavation and trap-door at all is a somewhat doubtful question; but the weight of authority seems to be to the point that he had not. There is no evidence in the case of any custom, nor does it appear whether or not appellant had the fee to any part of the street. Judge Dillon, in his work on Municipal Corporations, states what seems to be a fair summing up of the authorities on the subject. At section 699, speaking of the right to make "openings in sidewalks," he says: "If the fee of the street is in the municipality in trust for the public uses, as it frequently is, it extends to the whole street, including the sidewalk; and the adjoining lot-owner would, *it seems clear*, have no right, as against the public, or the municipality charged with the control of the streets, to appropriate them to this use. * * * If the fee of the street is in the adjoining owner, as it frequently is, the question as to the rightfulness of such a use of the sidewalk may not be so plain; and yet even in this

case the public right must be paramount to individual interests, and the rights of the public are not limited to a mere right of way, but extend, as we have shown, to all beneficial uses as the public good or convenience may from time to time require. * * * The correct view would seem to be that all rights of this character must come from legislative declaration, or municipal license, express or implied, from general usage." Appellant showed no right from legislative declaration, municipal license, or general usage.

But if there be any principle upon which there could be based a right of appellant to maintain the excavation and trap, in the absence of any municipal action upon the subject, that right would disappear before an ordinance of the city which was introduced in evidence by respondent. The ordinance was passed in July, 1880, and was a re-enactment of a similar ordinance passed in May, 1866. The first part of section 6 of said ordinance is as follows: "No person shall construct, or cause or suffer to be constructed, under the sidewalk adjoining any premises belonging to him, or in his possession, or under his control, any area or vault except in conformity with the following specifications." Then follows a large number of specifications which provide with particularity how such vaults and their coverings shall be constructed; no one of which does appellant show a compliance with. They provide for the use of stone, brick, and iron, and against the use of wood. In the latter part of the section it is provided as follows: "No aperture through the sidewalk into a vault shall exceed a superficial area of twenty-four square feet. Every such aperture shall be covered with an *iron cover*, and shall be securely closed when not in actual use." It affirmatively appears that the covering or trap-door of the vault of appellant was wooden, and that a few days before the accident he had employed a man to repair it with wooden planks. It appears, therefore—*First*, that appellant had no authority of law to maintain the structure; and, *second*, that its maintenance was in direct violation of law.

Moreover, an excavation in the sidewalk of a populous street of a city, with a movable cover, liable to be removed by any careless or mischievous passer-by, is so dangerous a pitfall as to be, in its character, of the nature of a nuisance; and, when not authorized by law, it would be a hard rule to require an innocent party injured thereby to prove that the injury was not caused in part by the act of a third person. No such rule is applicable to the facts of this case.

It appears that, a few days before the accident, appellant employed a Mr. Krone to make a few repairs to the house situated on appellant's premises, and also to repair one of the planks on the trap-door in the sidewalk,—all to cost six dollars. There is no evidence that any act or negligence of Krone contributed to the accident; but appellant, assuming, we suppose, that Krone's negligence might have so contributed, invokes the principle that the owner of premises is not responsible for the negligence of an independent contractor. But, if such a trivial contract could bring that principle into action in any case, it would not, under the views herein expressed, be a defense in the case at bar.

Appellant's specific objections to the refusal of the court to grant a nonsuit, and to the giving and refusing of certain instructions to the jury, simply raise in various forms the questions above discussed. We think that the nonsuit was properly denied, and that the case was correctly and fairly given to the jury.

There was no error in the instruction that "plaintiff, if entitled to a verdict, is entitled to damages for her pain and suffering, both bodily and mental."

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

72 Cal. 245

LINDALL *v.* BODE. (No. 6,676.)

(Supreme Court of California. April 25, 1887.)

NEGLIGENCE—BURDEN OF PROOF—INSTRUCTION.

In an action by an employe to recover damages for an injury caused by the falling upon him of a bag of coffee from a pile near a pile from which he was removing bags, an instruction that "when, in the due exercise of his duties, the employe is injured through any appliances or surroundings of the business, and it does not appear that the employe was in fault, the burden is on the employer to show that he himself was free from fault," is erroneous, as it takes from the jury the consideration of the question as to whether or not the injury was caused by unavoidable accident; and in cases of this class plaintiff is bound to prove, as against the defendant, enough to show a fair presumption of negligence and of resulting injury to himself.

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco.

Pringle & Hayne and *E. F. Preston*, for appellant. *H. Dorsey Gough* and *L. Quint*, for respondent.

FOOTE, C. The plaintiff was employed as a truckman in and about the warehouse of the defendant, Bode, in which, among other goods, were stored bags of coffee heaped up in large piles. While engaged, under the orders of the defendant, in removing on a truck certain bags of coffee from a pile which was of considerable height, one or more of those lying upon another pile near by fell upon the plaintiff, and drove the handle of the truck through one of his hands, lacerating the flesh and shattering some of the bones thereof. To recover damages for the injury thus sustained the plaintiff brought this action, alleging, among other things, that the negligence of the defendant in not causing the bags of coffee to be properly piled had been the proximate cause of the injury. The action was tried before a jury, who returned a verdict against the defendant, and from the judgment thereupon rendered he has appealed.

There are several grounds urged by the latter for the reversal of the judgment, but there is only one of them which we deem material, and that is the granting by the court, over the objection of the defendant, of a certain instruction to the jury on the law of the case. It is as follows: "Where, in the due exercise of his duties, the employe is injured through any appliances or surroundings of the business, and it does not appear that the employe was in fault, the burden is on the employer to show that he himself was free from fault." That instruction takes away from the jury the consideration of the question as to whether or not the injury was caused by unavoidable accident. The jury would, under it, have been justified in finding against the defendant, even if the bags of coffee had been thrown down by an earthquake, if the employe was without fault, unless the defendant had affirmatively shown in rebuttal that he was free from all blame. As well might it be said that if a brick should fall from a wall, and injure the innocent passer-by, that the owner of the building would be responsible in damages on proving that the brick fell from his building without any apparent or ascertainable cause, unless the owner could affirmatively show himself free from blame.

In cases of that class, as it seems to us, the plaintiff is bound to prove, as against the defendant, enough to show a fair presumption of negligence, and of resulting injury to himself. Shear. & R. Neg. (3d Ed.) §§ 12, 13, and cases cited. The cases cited to us by the respondent do not, as we understand them, sustain the proposition for which he contends.

The judgment should therefore be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment reversed, and cause remanded for a new trial.

72 Cal. 264

STEWART v. SPAULDING. (No. 9,684.)

(*Supreme Court of California.* May 1, 1887.)

1. PLEADING—AMENDMENT—NEW CAUSE OF ACTION.
A. and B., describing themselves as "late partners," brought an action in California against C. alone, on a judgment obtained against C. and three others in Nevada. C.'s demurrer to the complaint for non-joinder of defendants being sustained, the court allowed the filing of an amended complaint, making all the judgment defendants parties, and omitting the words "late partners;" thus bringing the suit by A. and B. individually. *Held*, that the amendment did not introduce a new cause of action, and its allowance was not error.

2. LIMITATION OF ACTIONS—FOREIGN JUDGMENT—WHEN BARRED.
Although an action on a judgment obtained in another state would be barred by the statute of limitations of that state, an action may be brought thereon in California by plaintiffs, who, ever since the rendition of the judgment, have been residents of California, against defendants, who have been out of that state, except for two or three weeks in each year, until the commencement of the action, as such a case is within the exception of Code Civil Proc. Cal. § 361.[1]

3. PARTIES—SUBSTITUTION—ASSIGNEE IN INSOLVENCY.
Where, pending an action in California by several plaintiffs, one of them becomes insolvent, his assignee need not be substituted in his stead as a party to the action.

4. JUDGMENT—EFFECT—VALIDITY.
Where a judgment in Nevada is rendered against A. and the other defendants, and directs that it may be enforced against the joint property of all of the defendants, and against the separate property of A., in an action thereon in California, it cannot be considered void as to A.

5. SAME—SUIT UPON—EVIDENCE—VARIANCE.
Where an action is brought by a partnership in Nevada, and, pending suit, the firm is dissolved, and an individual judgment rendered against the defendants in plaintiffs' favor, in an action in California on such judgment the judgment roll in the Nevada case may be introduced in evidence, and there will be no variance between the evidence and the pleadings.

6. INTEREST—JUDGMENT—AMOUNT STIPULATED IN.
Where a judgment rendered in Nevada provides that a part of the amount shall bear interest at 7 per cent., but is silent as to the balance, and without such restriction the whole amount would have borne 10 per cent., in an action in California on such judgment it is not harmful error to allow interest at 7 per cent. on the whole amount of the judgment.

Department 1. Appeal from superior court, San Francisco.

Wm. R. Davis and *Wm. Lair Hill*, for appellant. *T. M. Osment*, for respondent.

TEMPLE, J. Suit was brought by the plaintiffs, describing themselves as late partners, against A. L. Sherman alone, upon a judgment recovered in the state of Nevada against Sherman and three others. This complaint was demurred to on various grounds, one of which was, non-joinder of the other defendants in the Nevada judgment. The demurrer was sustained, and the plaintiff amended, making all the judgment debtors parties, and omitting the designation of plaintiffs as "late partners." In other words, they sued simply as individuals, setting up, however, the same judgment as before. No other defendant was served. Sherman moved to have the amended complaint stricken from the files on the ground that it was not an amendment, but an entirely different cause of action. The court denied the motion, and we think correctly. In one sense it was a different cause of action, but plainly the same judgment was attempted to be set up in each complaint, and the same relief demanded upon the same facts, which were only stated in a different legal aspect.

[1] As to the running of the statute of limitations in favor of a non-resident, or one absent from the state, see Wood v. Bissell, (Ind.) 9 N. E. Rep. 425, and note.

As to its effect upon a cause of action accruing in another state, see First Nat. Bank v. Thomas, (Ky.) 3 S. W. Rep. 12, and note.

The action is not barred by the statute of limitations. True, no action can be maintained upon the judgment in Nevada; but the plaintiffs have resided in this state ever since the rendition of that judgment; and as they have been citizens of this state, and have held the cause of action from the time it accrued, they come within the exception of section 361, Code Civil Proc. The defendant had been out of the state, except for two or three weeks in each year, until the commencement of the action.

After the commencement of this suit, one of the plaintiffs went into insolvency, and an assignee was appointed. It is claimed that the assignee should have been substituted. This objection is answered by section 385, Code Civil Proc. Section 18 of the insolvency law (St. 1880, p. 87) does not conflict with this provision.

The judgment roll in the Nevada judgment shows that the complaint in that action described the plaintiffs as partners. The findings and judgment are merely in favor of plaintiff individually. It is claimed that this was a partnership judgment, its character in that respect being determined by the pleadings; that the judgment pleaded in this case is an individual judgment, and therefore it was not admissible because of the variance. It appears that during the pendency of the suit in Nevada the partnership was dissolved. This is probably why the individual judgment was entered. But, whether that judgment was regular or not, it was not void for that reason, and there is no variance. If there were a variance, however, in that respect, it is difficult to see how the defendant has suffered injury by it. That judgment was against all the defendants, and directs that it may be enforced against the joint property of all the defendants, and against the separate property of Sherman. This judgment was not void as to Sherman. *Tay* v. *Hawley*, 39 Cal. 94.

We do not think there was harmful error in the computation of interest on the judgment. The judgment directed that a portion of the amount recovered should bear interest at the rate of 7 per cent. The judgment is silent as to whether the balance of the judgment shall bear interest. If the judgment had been entirely silent as to interest, still interest by the law of Nevada would have accrued upon the whole amount. Here was a special provision in the judgment that a portion should bear a specified interest. The remainder would bear the interest under the statute. The interest, as actually computed, is less than the statute rate.

Judgment and order affirmed.

We concur: McFARLAND, J.; PATERSON, J.

72 Cal. 229

PHELAN *v.* DUNNE. (No. 9,532.)

(*Supreme Court of California.* April 21, 1887.)

PARTIES—MUNICIPAL ASSESSMENTS—ACTION FOR—DECEASED OWNER—EXECUTORS.

Under act of April 1, 1872, of California, providing that actions to enforce street assessments shall be brought against the owners, or parties in possession claiming to be the owners, of the lots fronting on the street improved, such an action may be brought against a devisee of the fee of such a lot to enforce an assessment made after his testator's death for work contracted for before his death, without joining his executors as parties, although his estate has not been finally settled, where it is shown there is sufficient personalty to pay all debts and claims, without resorting to the land.

Department 1.

Action to enforce a street assessment in San Francisco, brought against a devisee of a lot, without making the executors parties, pending the settlement of testator's estate.

Wm. Matthews, for defendant and appellant. *J. C. Bates*, for plaintiff and respondent.

PATERSON, J. The executors of the last will and testament of James Dunne, deceased, are not necessary parties in this action. It is true, the resolution of intention to improve the street in front of the property described in the complaint was passed by the board of supervisors, and the contract for the work let to plaintiff prior to the death of said James Dunne, but the assessment was not made until after his death, and it is admitted in the answer that defendant is the owner of the property; the same having been devised to him by his father, said James Dunne. A. J. and E. T. Donnelly were named in the will as executors, and duly qualified as such, and ever since have been and are now in the possession of the lands affected by the street-assessment lien.

It is claimed by appellant that the administration of the estate of James Dunne, deceased, being still open, and no decree of distribution having been made, the executors should be made parties defendant, and the amount due by virtue of the assessment lien collected of them in due course of administration. There is nothing to show, however, that the debts have not all been paid, the family allowances provided for, or that there is not an abundant amount of personal property out of which all debts and expenses of administration can be paid, if there be any such debts or expenses remaining. It was said by Mr. Justice TEMPLE, in *Brenham* v. *Story*, 39 Cal. 188, that "upon the death of the ancestor the heir becomes vested at once with the full property, subject to the liens we have mentioned;" *i. e.*, debts, expenses of administration, and family allowance.

In support of his proposition that the executors are necessary parties defendant, appellant cites *Hancock* v. *Bowman*, 49 Cal. 413, and *People* v. *Doe*, 48 Cal. 561. The decisions in those cases were based upon the provisions of section 13 of the act of April 4, 1870, which required the action to be brought "against the owners *and* all persons having an interest therein." St. 1869–70, p. 898. But by an act approved April 1, 1872, and apparently to avoid the necessity of making all parties having an interest in the property defendants in the action, it was provided (section 13) that the action might be brought against the *owner* of the land; and section 17 of the act provides that "the person owning the fee, or the person in the possession of lands, lots, or portions of lots or buildings under the claim of ownership, or exercising acts of ownership over the same for himself, or as the administrator or guardian of the owner or the person in whom on the day the action commenced appears the legal title to the lands by deeds recorded in the recorder's office in the city and county of San Francisco, shall be regarded, treated, and deemed to be the owner (for the purpose of this law) according to the meaning and intent of that word as used in this act."

It may be that, under these provisions, persons other than the heirs and devisees are *proper* parties to the action, and that their rights cannot be foreclosed unless they are made defendants; but as to that we express no opinion. It is sufficient to say that the defendant is the owner in fee; that he is the only necessary party; and that plaintiff is entitled, under this act, to a decree of foreclosure, whatever may be the rights of other parties interested who are not joined as defendants. *Parker* v. *Bernal*, 66 Cal. 113, 4 Pac. Rep. 1090.

Judgment affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

74 Cal. 448

PHELAN and others *v.* POYORENO and others. (No. 11,373.)

(*Supreme Court of California.* April 25, 1887.)

1. PUBLIC LANDS—MEXICAN GRANT—VALIDITY—PATENT.

Where, before the treaty of Guadaloupe Hidalgo, whereby the public domain of California was ceded to the United States, a perfect conveyance was made of land by the Mexican government, it cannot be defeated by the subsequent action of the board of commissioners organized under the act of congress of March 3, 1851, for the purpose of determining the validity of claims to land in California, or by the subsequent patent from the United States.

2. SAME—CHAIN OF TITLE.

A record containing the petition, with a *diseno*, an order of reference, an *informe* by the proper officer, a decree of concession, a *titulo*, the approval of the depart-

mental assembly, the order for survey and juridical possession, with the report of the proper officer that such survey was made and possession given, presents every link essential to a chain of title under the Mexican law.

3. SAME—NAME OF GRANTEE.
In the petition for the land the petitioner, Juan Crispin Perez, is twice called "Juan Perez," but in the decree of the governor, in the *título* or patent, and subsequent proceedings, he is called "Juan Crispin Perez," with such reference to the petition and preceding document that there can be no doubt as to his identity. *Held* that, as the identity of the petitioner sufficiently appears, the variance is immaterial.

4. SAME—DESCRIPTION.
A grant in which the property is described as "the lands known as 'Paso de Bartolo Viejo'" is sufficient, if the land is known and can be identified by the name given.

THORNTON, J., dissenting.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

Gardiner & Stephenson, for appellants. *Bicknell & White*, for respondents.

SEARLS, C. This is an action to quiet title to a tract of land, parcel of the Rancho Paso de Bartolo Viejo, in the county of Los Angeles. Plaintiffs had judgment, from which, and from an order denying a new trial, defendants appeal.

Defendants claim (1) title to an undivided one-tenth part of the premises; and (2) an easement or right of way over the land for a water ditch, designated as the Banta ditch, and the right to conduct water through the same for irrigation and other purposes.

The plaintiffs claim the land in controversy through sundry mesne conveyances, from Pio Pico and Juan Perez, to whom it was granted by patent, on the fifth day of August, 1881, by the government of the United States. The recitals in the patent show that the claim of the patentees is "founded on a Mexican grant to Juan Crispin Perez, made on the twelfth day of June, A. D. 1835, by Jose Figueroa, then governor of Upper California, and approved by the departmental assembly the twenty-ninth day of August, A. D. 1839." The patent was issued upon petition to the board of land commissioners, made after the death of Juan Crispin Perez. Defendants' predecessor, one of the heirs of the said Perez, did not join in said petition, was not before said board, and did not submit herself to its jurisdiction, but relies upon the *Mexican grant* as giving a *complete, indefeasible, definitive title in fee* to the Mexican grantee, who was her father. In other words, the contention of defendants is that Juan Crispin Perez, their predecessor, had a perfect title in fee, derived from the Mexican government, to the property in controversy, and that as his heir, Maria Antonio Romero, under whom they claim, was owner of one-tenth thereof.

For the purpose of sustaining this contention on their part, defendants, after the plaintiffs had introduced the patent hereinbefore referred to in evidence, and deduced title thereunder in themselves, offered in evidence the Mexican *expediente*, showing a grant from Gov. Figueroa, approval of departmental assembly, also the juridical possession of Juan Crispin Perez; to each of which plaintiffs objected on the following grounds: "That the *expediente* purported to show the proceedings anterior to said patent which conveyed the legal title; that such offer is incompetent, irrelevant, and immaterial; and that said patent is conclusive in this case." To the offer in evidence of a certified copy of the evidence of juridical possession of said *rancho* by Perez, the further objection was made that there is no allegation in the answer setting up a trust in the plaintiffs. The objections were sustained by the court, and the proffered evidence excluded. Like rulings were made upon the offers of defendants to show title in themselves to one-tenth of the *rancho* under Juan Crispin Perez, and these rulings are severally assigned as error.

The proposition of appellants is that the land in question was originally the property of and subject to disposition of the Mexican government; that prior to the treaty of Guadaloupe Hidalgo, whereby the public domain of California was ceded to the United States, the land in question was conveyed to, and the title vested in, Juan Crispin Perez, under whom they claim title; and that, a perfect title having thus vested in their grantor, it was not defeated by the subsequent action of the board of commissioners, organized under the act of congress of March 3, 1851, for the purpose of determining the validity of claims to land in California, or by the subsequent patent from the United States to plaintiffs' grantors.

Upon the main proposition, as presented, we are relieved from discussion by the previous rulings of this court.

In *Minturn* v. *Brower*, 24 Cal. 644, Justice CURREY, in an able and exhaustive opinion, concurred in by the court, held, in substance: (1) That Mexicans who, previous to the acquisition of California by the United States, had acquired from the governments of either Spain or Mexico, a perfect title to lands in California, and who chose to remain in the acquired territory, were by the treaty of Guadaloupe Hidalgo protected in the ownership and enjoyment of their lands the same as though no change of sovereignty had occurred; (2) that persons whose titles to lands were *perfect* at the time of the acquisition of California by the United States were not compelled to submit them for confirmation to the board of commissioners appointed under the act of congress of March 3, 1851, nor did they forfeit their lands by a failure to present them to such board for confirmation, and that the titles thus vested may be asserted and maintained like other perfect titles in the courts of the country; (3) that holders of titles to lands in the ceded territory, which were perfect at the date of the treaty, could, if they so elected, present them to the commission for confirmation, but were not bound to do so. See, also, *De Arguello* v. *Greer*, 26 Cal. 627; *Miller* v. *Dale*, 44 Cal. 577; *Seale* v. *Ford*, 29 Cal. 107; *Steinbach* v. *Moore*, 30 Cal. 507; *Stevenson* v. *Bennett*, 35 Cal. 431; *Hale* v. *Akers*, 10 Pac. Rep. 385; *Teschemacher* v. *Thompson*, 18 Cal. 27; *Estrada* v. *Murphy*, 19 Cal. 248; *Beard* v. *Federy*, 3 Wall. 478.

Assuming then, as we do, that, upon both principle and authority, the position of appellants is tenable, it only remains to determine whether the proffered evidence was of such a character as to vest in Juan Crispin Perez the legal title to the Rancho Paso de Bartolo Viejo, by grant from the Mexican government.

Turning to the several documents offered as establishing a grant from the Mexican government, we find a petition indorsed "*Expediente* concerning the place Paso de Bartolo Viejo, asked for his occupation and benefit by Juan Crispin Perez." The petition is addressed to the superior political chief; is dated pueblo of Los Angeles, September 21, 1833. It then proceeds to say that Juan Perez, of Los Angeles, is the owner of stock, and, having no land, solicits a tract extending from "the pass of Bartolo Viejo to La Canada Verde, and from thence to that of the Puenta that enters into the principal road of San Gabriel, and from thence to the dam of said mission."

He recites that a portion of the land is within the boundaries of the mission, but that that community has conceded it to him, in order that he may ask a grant, except a portion which belongs to the Senores Nieto, etc., and says he will present a map of the land as soon as possible, and is signed by Andreas Pico, "at the request of Juan Perez, who cannot write."

On the margin of the petition is a decree signed by Figueroa, the superior political chief, and Augustin V. Zamorano, secretary, referring the petition to the *ayuntamiento* of the pueblo of Los Angeles for an examination as to the qualifications of the applicant, the character and location of the land, etc., and requiring also that the *expediente* be sent to the priest of the mission of San Gabriel for his report. The reports were received in due time, and there-

after the matter was referred to the constitutional alcalde of Los Angeles, for a further and more specific report as to the citizenship of the applicant, his conduct, family, etc., and as to the ownership of the land, etc. Upon the coming in of this and some other reports, favorable to the applicant, a decree was made by the governor, reciting the several steps taken, and declaring Juan Crispin Perez the owner in fee-simple (under the conditions mentioned) of the lands known by the name of Paso de Bartolo Viejo, and describing them as in the petition. Then follows the grant of the same date, (June 12, 1835,) attested by the governor and secretary, by which the land is conveyed to Juan Crispin Perez, subject to the approval of the territorial assembly, on condition that he shall, within one year, build a house thereon, and inhabit it, etc. It also provides that, when the ownership is confirmed to him, he shall petition the respective judge to give him juridical possession, whereby the boundaries shall be marked off and land-marks placed; and further provides that, if the grantee shall violate the conditions of the grant, he shall lose his right to the land, and the same may be denounced by another.

On the twenty-ninth day of August, 1839, the departmental assembly approved the concession, and ordered the *expediente* to be transmitted to the political chief for his determination. Juridical possession of the land was given to the grantee by order of the governor, by Manuel Dominguez, first justice of the peace and judge first instance of Los Angeles, on the thirtieth day of April, 1842. According to the return made by the justice, a measurement of the land was made, the boundaries marked, land-marks placed, etc. The record presents every link essential in a chain of title under the Mexican law,—the petition, with a *diseno*, an order of reference, an *informe* by the proper officer, a decree of concession, a *titulo*, the approval of the departmental assembly, the order for survey and juridical possession, with the report of the proper officer that such survey was made and possession given.

It is objected by respondents:

1. That the petition is by Juan Perez, (not Juan Crispin Perez.) Referring to the *expediente*, and we find, as before quoted, that the application is by Juan Crispin Perez, for the "place Paso de Bartolo Viejo." In the petition following, and in some of the subsequent proceedings, he is described as Juan Perez, but in the decree of the governor, the *titulo* or patent, and subsequent proceedings, he is named as Juan Crispin Perez, with such reference to the petition and former documents that no doubt can be entertained as to his identity. As his middle name is not essential to the validity of the proceedings, and can only be of importance in identifying him, and as that end is reached, we are of opinion the objection is not well taken.

2. It is further objected that the description is defective. In the decree by the governor of June 12, 1835, "Juan Crispin Perez is declared, under the conditions herein mentioned, the owner in fee-simple of the lands *known by the name of Paso de Bartolo Viejo*, joining on the old road of Santa Gertrudes, a *rancho* of that name, the river and Mission of San Gabriel, by the hills on the north-east and the hills of Canada Verde," and the same description is carried into the patent, where the tract is described as "the lands known as 'Paso Bartolo Viejo,'" etc. A description of a tract of land by name is sufficient, if it is known and can be identified by such name. *U. S.* v. *Moreno*, 1 Wall. 400; *People* v. *Leet*, 23 Cal. 162. In *Castro* v. *Gill*, 5 Cal. 42, it was said: "The declaration describes the land by a certain name, and this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by the evidence." A conveyance of land by known designation, without specifying boundaries, is good. *U. S.* v. *Sutherland*, 19 How. 363; 1 Greenl. Ev. § 286.

It follows that if we discard from the *expediente* all that is contained therein of description, except the *name*, "the lands known as 'Paso Bartolo Viejo,'" or, as it appears in the decree, "the lands known by the name of 'Paso de

Bartolo Viejo,'" the grant is yet not void for uncertainty. It was therefore properly admissible in evidence, as against the objection made. Had it been objected to for want of proofs showing that the name of the *rancho* was so well known that from it the boundaries could be defined, quite a different question would arise; but the objection to the evidence was based upon the ground that the *expediente* purported to show proceedings anterior to the patent under which plaintiffs held, and was therefore immaterial, etc. Had the objection been made that the *expediente* was not sufficient without further evidence to establish the fact that from it the extent and boundaries of the land could be determined, *non constat* but that such evidence would have been furnished.

The other technical objections to the *expediente* were not made in the court below, and need not be considered. We are of opinion that the refusal of the court to admit the documentary evidence offered by defendants was error.

Upon the points made by appellants, in reference to the findings and rulings of the court upon the questions of the right of way, easement, and license of defendants for a water ditch, we need only say that the evidence was conflicting, and the findings should not be disturbed.

For the error indicated, the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

THORNTON, J., dissenting.

BOTTILLER *v.* DOMINGUEZ. (No. 11,336.)

(*Supreme Court of California.* April 26, 1887.)

In bank. Appeal from superior court, Los Angeles county.

H. K. S. O'Melveney, for appellant. *Howard & Robarts* and *A. L. Rhodes*, for respondent.

BY THE COURT. This is an appeal from a judgment on a verdict rendered in the superior court of Los Angeles county, in an action of ejectment. The plaintiff claims title to the lands in controversy as daughter and heir at law of Apolonio Dominguez, deceased, who acquired title to the premises by mesne conveyances from Nemesio Dominguez, one of the grantees of the Mexican grant of "Las Virgenes," situate in Los Angeles county. The grant was not presented to the board of United States land commissioners, and the questions presented are not materially different from those which were passed upon in *Phelan* v. *Poyoreno*, *ante*, 681, and for the reasons given in the opinion filed in that case the judgment and order appealed from in this case are affirmed.

72 Cal. 267

GREEN and others *v.* CAROTTO and others. (No. 9,570.)

(*Supreme Court of California.* April 27, 1887.)

1. RIPARIAN RIGHTS—ARTIFICIAL CHANNEL.

The owner of lands upon which there was a lagoon, from which there was no natural outlet, cut a ditch for irrigating purposes. Thereafter he conveyed part of the land upon which the lagoon was situated to the defendants. He conveyed the remainder of his lands to the plaintiffs. The irrigating ditch ran between the different tracts conveyed. By parol permission of their grantor, (the defendants,) the plaintiffs had used the waste waters of the ditch. *Held*, that the water never having flowed in any natural channel, the plaintiffs never acquired any riparian rights in the flow of water in the ditch.

2. APPEAL—REVIEW ON—QUESTIONS NOT RAISED BELOW.

The supreme court of California will not consider a claim made in argument on appeal which the appellant has not made in his pleadings.

Commissioners' decision. In bank.

Appeal from superior court, San Benito county.

Swope, the witness referred to in the opinion, was grantor of plaintiffs, and was permitted to testify that he sold plaintiffs only the waste water, over plaintiffs' objection that his testimony was inadmissible, as being parol evidence offered to vary the terms of their deed.

B. McCroskey and *T. H. Laine*, for appellants. *Briggs & Hawkins* and *S. F. Leib*, for respondents.

FOOTE, C. This action was brought by Green and wife for the purpose of perpetually enjoining Carrotto and others from disturbing what the former alleged to be the natural flow of a stream of water, and for damages for such disturbance. The defendants denied all the material allegations in the complaint, and asserted, among other things, that there was no stream flowing in a natural channel to and through plaintiffs' land; and, even granting there had been such a stream, that they were entitled to its waters by a prior appropriation thereof; and that such appropriation had been adverse and continuous for more than 10 years prior to the filing of the complaint in the action; and that the plaintiffs were estopped by standing by, without remonstrance, and permitting the defendants for more than five years to use all the water in dispute, and to expend large sums of money in improving their land for irrigation by means of said waters, and by other acts of estoppel *in pais*.

From the findings which were made on all the material issues contained in the pleadings, and are supported, by the evidence, (although conflicting,) it appears, *inter alia*, that there never was in fact any stream of water flowing in a natural channel where the plaintiffs claimed; that originally the water in dispute was contained in a lagoon or lake fed by springs located on the land of the defendants, from which no natural stream or outlet flowed or existed; that, for purposes of drainage and irrigation, a former owner of both the plaintiffs' and defendants' lands had cut a ditch over that part of his then premises now owned by the defendants more than ten years before this action was brought, and that he and the defendants, as his successors, had continuously used all the water which flowed from said lagoon through said ditch, except such as they wasted as their own, and adversely to the whole world, and without any adverse claim set up against them for more than 10 years prior to the bringing of this action; that said ditch ran down the border of the plaintiffs' lands, and that by leave of the defendants and their predecessors in interest, not in writing, the plaintiffs had used the "waste water" of said ditch, but had no further right or claim therein; that the plaintiffs' right to maintain their action, and each cause thereof, as by them stated, was barred by the provisions of sections 318, 319, Code Civil Proc.

To us it seems that the defendants and their predecessors owned the water in dispute as absolutely as if it had been drawn from a well located on their land, and overflowing the same or not at their election, and that the plaintiffs never acquired any riparian right to the water, because it never flowed to or over their land in any natural channel whatsoever; that the only water which came to them was "waste water," which they got through the revocable license of the defendants and their predecessors in interest. Such being the case, it is not material whether the admission of a part of the evidence of the witness Swope was in the nature of parol evidence to vary a written instrument or not, for the reason that, since the evidence showed that no natural stream of water ever flowed to or through the plaintiffs' land, it could make no difference what were the terms of their deed, whether they would have carried the title to the waters of such a stream had it existed, or the contrary. The plaintiffs in argument claim some right in what they term the "artificial channel" of the stream, but they made no such claim in their pleading, and cannot now be heard to do so.

Upon the whole case, it appears to us that the record discloses no prejudicial error, and that the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order affirmed.

72 Cal. 259

HOPKINS v. WIARD. (No. 11,850.

(*Supreme Court of California.* April 25, 1887.)

1. MORTGAGE—FORECLOSURE—DECREE—PARCELS.
Where a mortgage is given over adjoining tracts of land, it is within the jurisdiction of the court, in a proper case, to direct the lands to be sold as a whole, and in one parcel.

2. SAME—ESTOPPEL—APPROVAL OF COUNSEL.
Where a decree of foreclosure, which directs the several tracts mortgaged to be sold as a whole, has been submitted to the defendant's counsel before signing, and he has indorsed his approval thereon, the defendant cannot afterwards complain of the sale of the lands in one parcel.

In bank. Appeal from superior court, Alameda county.

Action to foreclose a mortgage of several adjoining tracts of land in the county of Alameda. The court ordered "that the said lands and premises be sold as a whole, and in one parcel," and the sheriff executed the decree as directed. On motion of the defendant, Laura E. French, the sale was set aside. The plaintiff and the purchaser at the sale appeal.

Jarboe, Harrison & Goodfellow and *James Mee*, for appellants. *C. M. Jennings*, for respondents.

SHARPSTEIN, J. This is an appeal from an order setting aside a sale, made by virtue of a judgment and order of sale in an action to foreclose a mortgage executed by the defendant to the plaintiff. There is nothing in the record which tends in any degree to impeach the fairness of the sale; and it appears that the purchaser paid to the sheriff the sum bid for the premises, and that the sheriff paid it to the plaintiff. Respondents' counsel say that the "decree is satisfied of record; its authority is dead; it is not now a lien upon said premises." This is claimed to result from the sale which has been set aside. The plaintiff was entitled to have the incumbered property sold. The court was authorized to direct a sale of it. Code Civil Proc. 726. The judgment contains a direction "that the said lands and premises be sold as a whole, and in one parcel." The premises were so offered for sale and sold as a whole, and in one parcel, although the sheriff was requested by respondents to sell in separate parcels.

The principal contention of the respondents is that "the order inadvertently made by the court in the decree, directing that the premises be sold in one parcel, was erroneous and void, and no act of the sheriff in selling them or otherwise could legalize the same; and, although the sheriff may have followed such (supposed) directions, the same, nevertheless, being illegal, because founded on an illegal decree, will be set aside, and in this case was properly set aside upon motion."

There is nothing in the record to indicate that the court inadvertently decreed "that the premises be sold in one parcel." It does appear that the decree was shown to the defendant's attorney before it was signed by the judge, and that said attorney wrote upon the margin of it, "This decree is satisfactory," and signed the same as the attorney of E. Wiard, defendant. It further appears that the decree was so submitted to defendant's counsel by direction of the judge. If the defendant's attorney did not carefully examine the sev-

eral clauses of the decree before indorsing on it his satisfaction, the fault was his own, as it appears from his own affidavit that he was given an opportunity to examine it, and was told that the judge desired he should.

The main contention of respondents is that the court exceeded its jurisdiction in ordering that the premises be sold as a whole, and in one parcel. The Code provides that "in such action the court may, by its judgment, direct a sale of the incumbered property," but is silent as to the mode of sale. The provisions of the Code in this respect are not materially different from those of the late practice act. And in *Heyman* v. *Babcock*, 30 Cal. 367, the court said: "No express provision is found in the practice act providing the mode of making sale of the mortgaged premises under a decree of foreclosure." In the absence of any provision prescribing the mode, we think the court might, under its power to direct the sale, direct how it should be made. Such appears to have been the opinion of Justice SANDERSON, who, in a concurring opinion in *Heyman* v. *Babcock*, *supra*, said: "If the judgment contains specific directions, they must be followed by the officer." In *Babcock* v. *Perry*, 8 Wis. 277, the court reversed an order similar to that now before us. One of the grounds upon which it was contended that the order setting aside the sale was not erroneous was that "the premises were sold together, and not in parcels." In answer to that the court said: "It is to be observed that the sheriff, as well as the party, was bound to pursue the order of the court in making the sale, and that order was that the premises should be sold together." In *Langsdale* v. *Mills*, 32 Ind. 380, the court said: "The question is not what the decree ought to have been, but what it is. While it remains in its present form, any sale made under it, not authorized by its terms, cannot stand."

It was within the jurisdiction of the court to direct by its judgment that the property should be sold in one or several parcels, and the officer making the sale was bound to follow the directions contained in the judgment. The judgment was not void, and if erroneous its terms could not be disregarded by the officer charged with the execution of it. But it has not been shown to be even erroneous. Whether it was or not depends upon the facts before the court when the decree was made. Before signing the decree, the court directed that it be submitted to defendant's attorney, and it was so submitted to him, and he indorsed on it that it was satisfactory. The decree was what both parties agreed it should be, and, as was said in *Smith* v. *Randall*, 6 Cal. 47: "To set aside the sale on this ground, under the circumstances, would be to allow a party to take advantage of his own deceit or negligence." The sale of the premises in gross was occasioned by the direction in the decree that it should be so sold. And the court had evidence before it that the decree was satisfactory to both the mortgagor and the mortgagee. As was said in *Cord* v. *Southwell*, 15 Wis. 211: "There is no error apparent on the face of the judgment. It was not necessary, in order to justify the directions as to the manner of selling the mortgaged premises, that a foundation should be laid in the pleadings. The court might make them upon facts shown at the hearing or by consent of parties."

We fail to discover any sufficient ground for setting aside the sale. In *Morice* v. *Bishop of Durham*, 11 Ves. 57, Lord ELDON said: "The only case in which biddings should be reopened was when there was some fraud or misconduct in the purchaser, or fraudulent negligence in another person of which it would be against conscience that the purchaser should take advantage." The rule undoubtedly is to consider every fair sale as final. "Upon an application for a resale, the rights of the purchaser will be taken into account, and will prevail when the sale has been fair and free from fraud, or other circumstances which give an undoubted right to have it set aside." 2 Jones, Mortg. § 1673.

Order appealed from reversed.

We concur: McFARLAND, J.; PATERSON, J.

THORNTON, J. I concur in the judgment. The portion of the judgment of the court below directing the property mortgaged to be sold as one tract is not void. The court had power to render such judgment. The sheriff made the sale in one tract in conformity with the judgment, which, or the material parts thereof, the writ must have recited. Code Civil Proc. § 684. The court, in setting aside the sale, made no change in the judgment. The motion to set aside the sale was made on the ground that the property was sold as one tract. As the judgment remains unchanged, the process which issues to the sheriff compelling him to sell must follow the judgment, and the sale must be made of the property as one tract, as it was before. The sale must be in conformity with the judgment, under a writ reciting the judgment, or the material parts thereof. Code Civil Proc. § 684. As long as the judgment remains as it is, I am of the opinion the sale must stand, and therefore concur in the reversal of the order.

HOPKINS v. WIARD. (Nos. 11,851, 11,852, 11,853.)
(*Supreme Court of California.* April 25, 1887.)

In bank.

BY THE COURT. On the authority of *Hopkins* v. *Wiard*, *ante*, 687, this day decided, orders appealed from reversed.

72 Cal. 251

MOORE v. CAMPBELL. (No. 9,668.)

(*Supreme Court of California.* April 25, 1887.)

1. EVIDENCE—DOCUMENTARY—RELEVANCY.
In an action for damages for breach of contract, letters written by plaintiff between the time of the alleged breach and the commencement of the action, tending to show that nothing was then claimed by him as due from defendant, are relevant and admissible.

2. APPEAL—REVIEW ON—QUESTION NOT RAISED BELOW.
Where the court holds that the plaintiff's claim has been satisfied, the plaintiff cannot, on appeal from an order denying his motion for a new trial, object that such finding was not within the issues raised by defendant's pleadings, without raising that point in the court below.

3. SAME—WAIVER OF OBJECTION.
Where the case has been tried on the answer without objection to its sufficiency, and the findings and decision are justified by the evidence, a new trial will not be granted on the ground that the judgment decides issues not raised by the answer.

Commissioners' decision. Department 2.
Appeal from superior court, San Francisco.
Geo. B. Merrill, for appellant. *Clunie & Young,* for respondent.

BELCHER, C. C. This is an action to recover damages in the sum of $3,000 for breach of contract. It is alleged in the complaint that in the month of May, 1879, the plaintiff and defendant entered into an agreement by which plaintiff was to render services to defendant, as his agent and business manager, for the period of one year, from and after the ninth day of June, 1879, for the sum of $3,000, and all his personal living expenses to be paid and met by defendant; that on the ninth day of June, 1879, in pursuance of the agreement, plaintiff sailed with defendant for the city of Honolulu, and that, having arrived there, he held himself subject to the orders of defendant, under his said agreement, and demanded of defendant to designate what services he should render, but defendant refused to designate any labor or services to be performed by plaintiff, and on the sixth day of July following informed him that he would not fulfill the contract, and directed him to take the first steamer for San Francisco, with which request he then and there

complied; that defendant paid him on account for his services the sum of $800, and that his personal living expenses after the sixth day of July amounted to $800. The answer denies all the material allegations of the complaint, and denies that defendant "is indebted to plaintiff in the sum of $3,000, or in any other sum whatever, upon an agreement, or for anything." It then alleges that defendant took plaintiff to Honolulu as an act of kindness, and there gave him some employment, and "paid him in full for said work after his services were rendered; and that in no other way has plaintiff ever served defendant, and all work or services ever done for defendant by plaintiff have been paid for in full by defendant."

The court found that the agreement was made and broken as set forth in the complaint, and also that defendant paid plaintiff $800 and two passenger tickets from Honolulu to San Francisco, "which said sum of money and tickets the plaintiff received in full satisfaction of all demands against defendant by reason of the breach of said contract by defendant as aforesaid." Judgment was then entered in favor of defendant. The plaintiff moved for a new trial, and the appeal is from the order denying his motion.

Two letters written by the plaintiff were offered in evidence by the defendant, and were objected to as irrelevant and immaterial. The objections, we think, were properly overruled. The letters were written between the time of the alleged breach and the commencement of the action, and tended strongly to show that nothing was then claimed by plaintiff to be due him from defendant, and they were therefore relevant and material to the matter in hand.

It is further objected that the finding that plaintiff's claim was fully paid and satisfied was not within the issue tendered by the defendant's answer. The point does not appear to have been made in the court below, and we think it should not be sustained here.

The answer might have been, and perhaps should have been, amended at the trial, but as the case was tried upon it without objection as to its sufficiency, and the findings and decision were justified by the evidence, the order refusing a new trial should now, we think, be affirmed.

I concur: FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, order affirmed.

72 Cal. 270

HEFFLON *v.* BOWERS. (No. 12,070.)

(*Supreme Court of California.* April 27, 1887.)

1. INJUNCTION—VACATING—NOTICE OF MOTION.

In California, when a defendant moves to dissolve an injunction granted on the *ex parte* application of plaintiff, and offers evidence to overcome plaintiff's *prima facie* case, especially when he relies upon the fact that since the issuance of the injunction the principal thing complained of has been abated, plaintiff is entitled to notice, and should be permitted to support with evidence the *prima facie* case, which was all he was required to make in the first place; as the manner of procuring a revocation of such an order is not governed by Code Civil Proc. § 937, providing that *ex parte* orders may be vacated without notice, but by section 532, prescribing the manner in which an order granting an injunction may be vacated. TEMPLE, J., dissenting.

2. APPEAL—RECORD—CLERK'S CERTIFICATE.

An appeal in California from an order vacating an *ex parte* injunction to abate a nuisance, on motion of defendant, without notice to plaintiff, will not be dismissed because the clerk's certificate fails to show what papers were used at the hearing, when the application for a revocation of the order states that the motion is made on the petition and affidavit on which the injunction was issued, and upon the appended affidavits on the part of defendant showing that no nuisance exists, and the security is insufficient, and the order of the court granting a dissolution states that upon the hearing defendant read in evidence, in addition to the papers upon which the injunction was issued, the affidavits of parties named.

In bank. Appeal from superior court, San Diego county.
Deakin & Wadham, for appellant. *Luce & Henderson*, for respondent.

PATERSON, J. The injunction in this case was granted on the *ex parte* application of plaintiff, and was based upon the verified complaint and an affidavit. Thereafter the defendant presented several affidavits to the court, showing that the injurious effects complained of by plaintiff were not due, as alleged, to defects in the sewer, and that the break in the sewer which was alleged to be the principal source of the nuisance had been repaired since the issuance of the injunction. Upon these affidavits, and the complaint and affidavit of plaintiff, the court, on motion of defendant, without notice to plaintiff, and without giving him an opportunity to reply, dissolved the injunction. Respondent claims that plaintiff was not entitled to be heard on the motion to dissolve, because the injunction was issued without notice. Section 937, Code Civil Proc., upon which he relies, provides that "an order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made." The manner of procuring a revocation of the order granting an injunction, however, is prescribed in section 532, Code Civil Proc., which reads as follows: "If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the injunction was granted."

The contention of respondent that the last clause of this section applies only in cases where the injunction has been granted after notice to the defendant cannot, we think, be maintained. There is no such limitation in the language of the section, and there is no reason for the application of the rule prescribed by section 937, where the facts are like those in the case at bar. So long as the defendant rests his right to have the order vacated or modified upon the same matters which were considered by the court in granting it, there can be no good reason for allowing the plaintiff to be heard; but when the defendant goes further, and offers evidence to overcome the plaintiff's *prima facie* case, and especially in cases like this, where he relies upon the fact that since the issuance of the injunction the principal thing complained of has been abated, it becomes necessary, by virtue of both the reason and the letter of the rule, that the plaintiff should be permitted to support with additional evidence the *prima facie* case, which is all he was required to make in the first instance. *Falkinburg* v. *Lucy*, 35 Cal. 52; *Delger* v. *Johnson*, 44 Cal. 182; *Hiller* v. *Collins*, 63 Cal. 235. Any other construction of the two sections quoted above must result in annoying repetitions of the application, upon additional affidavits in support thereof, and a trial thereof, by piece-meal, of most important matters.

The authorities cited by respondent state the general rule applicable to *ex parte* orders, and speak of it as applicable to orders for the dissolution of injunctions; but each one is a case in which the application for revocation of the order was based upon the showing made by the plaintiff.

In *Borland* v. *Thornton*, 12 Cal. 440, it is true the court said, in effect, that the provision especially applicable to injunctions is not inconsistent with or a limitation upon the more general language of section 937, (§ 334, Prac. Act;) but the decision in that case was made upon the ground that the injunction had been improvidently issued, on a complaint barren of all equity to sup-

port it. The defendant moved to vacate on the complaint and affidavit of plaintiff, yet the court said that, while it was competent for the judge to vacate or modify the injunction without notice, it was not the better practice, and should never be done, except when, from the urgency of the case, it was necessary to guard against serious loss, which sometimes might be occasioned by the delay incident to serving notice, "and except where the injunction has been improvidently granted upon a complaint disclosing no ground whatever for equitable relief, as in the present case."

The point made by respondent that the appeal should be dismissed because the clerk's certificate, showing what papers were used at the hearing, is not sufficient, in the absence of a certificate of the judge, or a bill of exceptions, is without merit. In his application for a revocation of the order, the defendant, by his attorneys, Messrs. Luce & Henderson, states that "the motion is made on the petition and affidavit on which the injunction was issued, *and upon the appended affidavits on the part of the defendant*, showing that no nuisance exists, and the security is insufficient. The order of the court granting the motion to dissolve states that, upon the hearing, the defendant read in evidence—in addition to the papers upon which the injunction was issued—the affidavits of T. L. Magee, W. W. Bowers, P. C. Remondino, and T. C. Stockton. It becomes unnecessary to say, therefore, whether the affidavits set forth in the transcript are the same that were used at the hearing. It clearly appears from the written application of defendant, and from the order of the court, that defendant did in fact use affidavits on his own behalf, "showing that no nuisance exists," and the order must have been granted upon the affidavits of the defendant, inasmuch as the papers on which the plaintiff procured the injunction establish a *prima facie* case for the issuance thereof. The question as to who made the affidavits is not material. They contained matters that were material, and considered by the court, and plaintiff should have been permitted to reply thereto.

The order is reversed.

We concur: McFarland, J.; McKinstry, J.; Sharpstein, J.

Temple, J., (*dissenting.*) This is an appeal from an order dissolving an injunction. The injunction was granted *ex parte*, and out of court, and was dissolved by the judge who made the order for the injunction, without notice, on motion of the defendant, and, on such motions, affidavits on the part of the defendant were read. The new affidavits tended to show that the sewer no longer constituted a nuisance, and there was urgent necessity for the immediate dissolution of the injunction to prevent great and irreparable loss to defendant. It was also shown that the security was insufficient.

The transcript contains no certificate of the judge's clerk identifying the affidavits as those which were used on the hearing of the motion to dissolve. The first order granting the injunction recites that it was made on the complaint and an affidavit. The motion to dissolve was based upon these papers, as well as the new affidavits. Unless we are prepared to overrule *Nash* v. *Harris*, 57 Cal. 243, and *Baker* v. *Snyder*, 58 Cal. 617, we cannot look at these affidavits, and cannot know that the dissolution was not granted for insufficiency of the papers upon which it was originally granted.

But if the affidavits were properly authenticated, I still think the order should be affirmed. It is said that section 937, Code Civil Proc., cannot apply to injunctions, because section 532 is a special provision covering that subject; and that, even if section 937 does include injunction orders, still they are *in pari materia*, and no new affidavits can be read on such *ex parte* application, because in section 532 it is provided that, if affidavits are used by the defendant on such application, the plaintiff may read additional affidavits in support of his original showing.

It is not necessary to give the statute this construction. Section 532 merely prescribes the practice when the dissolution is asked on notice, and a contest is inaugurated, and, of course, *ex vi termini*, cannot apply to a motion which is *ex parte*. There is no inconsistency in the two modes of procedure, and the effect of dissolving, or refusing to dissolve, with notice or without, are quite different. Where notice is given, the matter is no longer in the discretion of the court, but is final until the trial of the cause.

The only question really is whether section 937 applies to orders for injunctions at all, for, if it does, this court cannot, under pretense of construing the statute, restrict its operation. If an *ex parte* application may be made to dissolve, and the grounds upon which such application may be made are not limited by the statute, it would follow, as a matter of course, that such application may be based upon any matters which would justify its dissolution. But this is not an open question in this state. In *Fremont* v. *Merced Min. Co.*, 9 Cal. 18, it was expressly held that a motion to dissolve an injunction, granted *ex parte*, could be made by the defendant without notice. The court refers to section 334 of the practice act, and which corresponds to section 937 of the Code of Civil Procedure, and held that it justified the action of the court below. The report of that case is not very full, but evidently the application to dissolve was based on affidavits.

The same ruling was made in *Borland* v. *Thornton*, 12 Cal. 440. The learned judge in that case justifies the practice only when, from the urgency of the case, it was necessary to guard against serious loss, which sometimes might be occasioned by the delay incident to giving notice. Of course, urgency which would render notice impracticable could only be made to appear by an affirmative showing.

This practice has, I believe, always prevailed in this state, as also in the state of New York, from which we have taken these two sections of the practice act. The court in the last case very properly suggests that the judge should require notice where it is practicable, and the same discretion should be exercised upon making the order for injunction in the first instance. I have never heard this practice called in question until now, and there can be no question whatever that the rule which has heretofore prevailed is much the most beneficial and reasonable. I cannot even imagine a plausible objection to it on the score of expediency. The facts in the case at bar well illustrate its usefulness and necessity. The defendant keeps a hotel, having about 150 boarders, and discharging 3,000 gallons of sewage per day. The alleged nuisance was caused by a leak in the sewer near the residence of plaintiff, and from the fact that the sewer does not extend quite far enough into tide water. From the moving papers themselves, it appears that the sewer could, by a little alteration, be used without creating a nuisance. It appears that the stoppage of the sewer for a very short time would create at the hotel an intolerable nuisance. It was shown on the motion to dissolve that the leak no longer existed, and that the sewer was extended into the sea. Of course, we must suppose that the judge was completely satisfied on these points, and that this claim that the nuisance no longer existed is absolutely true, beyond doubt.

The injunction ought not, in the first instance, to have prohibited the use of the sewer absolutely, but only while such use would create a nuisance. But it did prohibit its use altogether.

An attorney may practice law in every county in the state. How long it would have been required to give notice in this case does not appear. The attorney probably resided at San Diego. This the judge could best determine. Had he been a resident of a distant county, as we may suppose he was, to test the rule, notice could not have been given under several days, even if the time had been shortened by the judge. Under such circumstances, must the court permit the defendant's business and property to be entirely ruined by the delay in the face of the conclusive proof that the dissolution of the in-

junction could not possibly injure any one? The rule which has heretofore prevailed in this state, and which still obtains in other states, is, no doubt, to some extent, an innovation upon the rule formerly enforced by courts of chancery. But it should be remembered that the use of the writ of injunction as a preventive writ has been greatly extended. Formerly, chancellors were reluctant to grant the writ, except in very few cases. Rules which were sufficient for the purposes of justice under such practice would be plainly inadequate now, when any business may be unjustly interrupted by a false *ex parte* showing of some adversary.

I think the judge properly exercised his discretion in dissolving the injunction, and that the order ought to be affirmed.

72 Cal. 280

BOON and others *v.* DE HAVEN. (No. 12,098.)

(*Supreme Court of California.* April 29, 1887.)

WITNESS—SUBPŒNA—LAND-OFFICE—MANDAMUS.

The supreme court of California will not issue a writ of *mandamus* to compel a judge of the superior court to issue a subpœna to a witness to appear, and testify before a register and receiver of the United States land-office, as Code Civil Proc. § 1986, subd. 3, regulating the issuing of subpœnas to a witness to appear before a commissioner appointed by a court of a foreign country or another state, does not apply to a United States land-office, located and doing business in California.

In bank.

John T. Carey, for petitioners. *H. S. Smith*, for respondent.

MCFARLAND, J. This is an application for a writ of mandate to compel the respondent to issue a subpœna to certain persons, commanding them to appear and testify before the register and receiver of the United States land-office at Eureka, Humboldt county, California, in a proceeding before said register and receiver involving the right of certain parties to purchase certain public lands of the United States government. And the matter to be determined is whether or not the issuance of such subpœna is an act which the law especially enjoins upon respondent as a duty resulting from his office. The public land system of the government of the United States, in substantially its present form, has been in existence since about the commencement of the present century. Registers and receivers have always been the principal agents of the government for the sale and disposition of its lands. Many millions of acres have passed through their hands. Numerous contests have been heard before them about the right, or rather the privilege, of purchasing, and they have taken the testimony of innumerable witnesses. But the government has never, during all this time, provided any compulsory process by which witnesses might be compelled to attend before such agents. Registers and receivers may administer oaths, and that is about the only one of the usual powers of a court given them. They have no power to issue a subpœna. They cannot bring a witness before them, or keep him there. A person present before them cannot be compelled to testify; or, having given his evidence in chief, he may refuse to be cross-examined. They have no marshal, bailiff, or other officer to keep order or enforce any mandate; nor has the government provided any other means by which those things may be done. No fees are provided for witnesses, and there can be no judgment for costs. Each party pays his own expenses, and procures the attendance of his own witnesses the best he may. (It is true that in certain cases, where the government is itself a party,—as where it endeavors to set aside an entry,—the interior department may provide for the expenses of its own witnesses; but that is upon the theory that each party must get his own witnesses before the land-office by persuasive means.) And this system cannot be deemed to be the result of accident or oversight. Ignorance of the compulsory methods of courts cannot be attrib-

uted to the United States government. It has its own courts in which those methods are followed. After all these years of experience, the voluntary system in its land-department must be taken as its well-considered and settled policy. And it seems to have worked reasonably well, and to the satisfaction of the government, for nearly a century. Under these circumstances, the state of California should not be held as intending to take the federal government under its guardianship, and to undertake to do for it what it has steadily declined to do for itself, unless the intention so to do has been declared in language too plain to be misunderstood.

It is contended that there is such language in subdivision 3 of section 1986 of the Code of Civil Procedure. It is to be observed, in the first place, that the language of that section is not, in terms, mandatory. It merely provides that, when a subpœna is issued, it must be in a certain form, and by certain officers,—as, for instance, when the witness is required to appear before a commissioner appointed by a court of a foreign country, or of another state, etc.,—it may be issued by a judge or justice. It is, no doubt, true, however, that it is the duty of a judge to issue a subpœna under that section, in a proper case. But subdivision 3 of that section is founded clearly upon the doctrine of comity. A court of England, or of the state of New York, or a federal court in an eastern state, which compels the attendance of witnesses by compulsory process within its own jurisdiction, and would do so here if it could, finds itself powerless in California to enforce the attendance of a witness before a commissioner or other officer in this state. In such a case, California, upon the principle of comity, offers the aid of the processes of its courts to enable the foreign court to do what it would itself do if it had the power. But this principle does not apply to a United States land-office located and doing business in California. This state is not beyond the jurisdiction of the United States government. If it desires to compel the attendance of witnesses before the register and receiver here, it has ample power to do so. But it does not desire to do so. It does not require the attendance of witnesses before such officers anywhere else. The compulsory attendance of witnesses in such cases is against its settled policy. It does not ask this state for any assistance in the matter, and the use of our processes would be a mere gratuitous intrusion,—an attempt to thrust our system on a government that does not want it.

The application is denied.

We concur: SEARLES, C. J.; TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.

72 Cal. 278

MYERS *v.* TIBBALS and others. (No. 9,516.)

(*Supreme Court of California.* April 28, 1887.)

1. EVIDENCE—PAROL TO EXPLAIN WRITING—USAGE OF TRADE.
 In an action to recover the value of marble sold and delivered to defendant to be used in the erection of a building under a contract providing that the marble should be delivered, "finished, and ready for setting," the meaning of these words, as used by marble cutters, may be proved by testimony of competent witnesses.[1]
2. APPEAL—REVIEW ON—PRESUMPTION.
 Where a case is tried by the court without a jury, and the testimony as to material issues is conflicting, and findings by the trial court have been waived, on appeal the supreme court will presume that the trial court found all the facts in favor of respondent, and its decision will not be reversed.

Commissioners' decision. Department 2.

[1] As to the admissibility of parol evidence to explain an ambiguity in a written instrument, see Seavey v. Shurick, (Ind.) 11 N. E. Rep. —; Manchester Paper Co. v. Moore, (N. Y.) 10 N. E. Rep. 861; Beason v. Kurz, (Wis.) 29 N. W. Rep. 230, and note.

Appeal from superior court, San Francisco.

H. A. Powell, for appellants. *W. C. Burnett* and *Isaac G. Burnett*, for respondent.

BELCHER, C. This action was brought to recover $836.08, the alleged value of certain marble sold and delivered by plaintiff to defendants under a contract in writing. The defendants answered, and claimed in the court below that the plaintiff did not comply with the contract, and that, by reason of such non-compliance, they were damaged in the sum of $189. They also alleged and proved that, prior to the commencement of the action, they duly tendered to the plaintiff, in satisfaction of his claim, the sum of $720, and, when it was commenced, deposited in court for him the amount so tendered. The case was tried before the court, without a jury, and, findings being waived, judgment was entered in favor of plaintiff for the full amount claimed, with interest thereon, and costs. The defendants moved for a new trial, and, their motion being denied, appealed from the judgment and order.

By the contract, entered into by the parties, the plaintiff agreed "to furnish all the border and base of Belgium black marble required in the contract for the Larkin-street wing of the new city hall, number one hundred and fifty-six, according to the plans and specifications accompanying said contract," and to pay to the defendants "any damages that they may suffer by reason of any failure on his part to deliver to said parties the said border and base at his mill, in the aforesaid city, within thirty days after the date of this agreement, said work to be finished and ready for setting."

It appeared at the trial that some of the marble contracted for was not delivered within thirty days after the date of the contract, and the defendants claimed that, by reason of this failure, they suffered damage in the sum of $50. It also appeared that some of the pieces were not of the exact length required, and the ends were not squared and polished, so that they could be put in place without further labor upon them, and the defendants claimed that they were therefore not "finished and ready for setting," and that, in consequence of this failure, they suffered damage in the sum of $139. It was not definitely shown what damage, if any, was sustained by defendants by reason of the failure to deliver to them all the marble within 30 days, and the plaintiff claimed and offered some testimony to prove that the failure resulted from their fault, and not his. Whether all the pieces of marble, when delivered, were "finished and ready for setting," within the true meaning of those words, as used by marble cutters, was a question upon which testimony was introduced on both sides without objection. For the plaintiff the affirmative of the proposition was proved, and for the defendants the negative, there being a substantial conflict in the evidence.

The words were evidently used in a technical sense, and testimony was admissible as to their meaning; and, as findings were waived, the court must be presumed to have found all the facts in favor of the plaintiff. We cannot, therefore, say that the decision was not justified by the evidence.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; SEARLES, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order affirmed.

GALLOWAY *v.* JONES. (No. 9,488.)

(*Supreme Court of California.* 1887.)

COURTS—JURISDICTION—CALIFORNIA SUPERIOR COURT.

Under Code Civil Proc. Cal. § 76, giving the superior courts original jurisdiction in cases in which the demand, exclusive of interest, or the value of property in controversy, amounts to $300, the *ad damnum* clause in the complaint is the test of jurisdiction; and where the demand, according to that clause, exceeds $300, exclusive of interest, the superior court has jurisdiction of the action, though each of the separate claims united in the action is less than $300; following *Bailey* v. *Sloan*, 65 Cal. 388, 4 Pac. Rep. 349.

Commissioners' decision, department 2.

Appeal from superior court, city and county of San Francisco.

Action by Galloway, respondent, in his own right and as assignee of 16 others, against Jones, appellant, for breach of the following contract:

"Whereas, Witcher Jones purposes and intends engaging in the manufact-

[1]Section 3 of the Washington Territory appeal act of 1883 (Laws Wash. T. 1883, p. 59) provides: "Sec. 3. That in all causes removed to the supreme court as in the preceding sections provided, the party so removing the same may have the facts, or any portion thereof, transmitted thereto, with the transcript of the cause; and such facts shall be certified to by the district judge before whom the cause was tried, to be all the material facts in the cause. Such facts shall be settled and agreed upon in the following manner: The party desiring to settle a statement of facts shall give notice to the opposite party, or his attorney of record, within thirty days after the rendition of the judgment or order desired to be reviewed, upon a day therein named, which day shall be at least ten days after the day of service; and upon such day the parties or their attorneys shall appear before the court or judge before whom the cause was tried, for the purpose of settling the statement of facts, and such judge shall sign any statement agreed upon by the parties, or their attorneys. If a disagreement occurs, the court or judge shall settle, as between the parties, what is the proper statement, in so far as the disagreement exists, and, when such statement is so settled, it shall be signed by such judge, and certified in the manner hereinbefore provided."

ure of tobacco in the city and county of San Francisco, in the state of California, and intends hiring and transporting hands and laborers from the state of Virginia, to be employed in the different capacities of 'twisters,' 'job hands,' and 'prizers,' to his said place of business, the names of said hands and laborers yet unknown, it is agreed between Witcher Jones, of the first part, and such persons as shall subscribe their names to this agreement, to work in the capacity and manner aforesaid, of the second part, this ——— day of ———, 1881, in manner following, to-wit: The said parties of the second part, for the consideration hereinafter mentioned, do hereby covenant and agree to and with the said Jones, by these presents, that they shall and will, during the space of two years, to commence from the first day of January, 1882, diligently and faithfully serve the said Jones, as laborers and employes in his tobacco factory, and there perform and do all the duties and requirements of whichever of the aforesaid three departments of labor they agree to perform, and therein shall, from time to time, and at all times during the said term, observe, fulfill, and keep the lawful and reasonable commands and directions of the said Witcher Jones. In consideration of which service so to be performed by the said parties of the second part, the said Jones covenants and agrees to pay and allow to said parties of the second part the following wages: To the 'twisters,' each the price per 100 pounds for work as paid by the Danville, Va., manufacturers; to the 'prizers' the sum of (9) nine dollars per week each; and to the 'job hands,' each the sum of (7) seven dollars per week. It is also agreed between the parties hereto that the said Jones shall deduct from the wages of each one of the parties of the second part the sum of one dollar ($1) per week, which amount, if the parties of the second part, or any of them, shall fail to perform this contract, and quit the employment of the said Jones before the expiration of said two years, shall be forfeited by the party or parties so doing to the said Jones, and remain in his hands; but if the said parties, or any of them, shall well and truly perform and fulfill this agreement, and remain with the said Jones the entire two years, as aforesaid, to each of those so doing said Jones shall, and hereby covenants and agrees to, refund the said amount deducted, as aforesaid, at the expiration of said two years. Said Jones further agrees to pay the proper and necessary traveling expenses of the said parties of the second part from their present place of abode to San Francisco, California, his place of business, as aforesaid."

The contract was signed and sealed by Galloway and nine other "twisters," by six "prizers," and five "job hands."

The complaint, as amended, contained 17 counts. The first, omitting the formal parts and the parts struck out on motion, is as follows: "That defendant is indebted to plaintiff in the sum of seventy-one ($71) dollars; that said indebtedness is based upon and grows out of a contract entered into between plaintiff and defendant in the town of Danville, Virginia, on the tenth day of December, 1881; that the terms and conditions of said contract are expressed in the contract, a copy of which is hereunto annexed; that, by the terms of said contract, said defendant employed said plaintiff to come from his place of abode, viz., Danville, Va., to the city and county of San Francisco, California, and to there engage in the manufacture of tobacco in the capacity of twister, viz., to twist tobacco; that, by the terms of said contract, said defendant agreed to keep said plaintiff constantly employed in the manufacture of tobacco in the capacity of twister for the period of two (2) years, viz., from the first day of January, 1882, up to and including the first day of January, 1884; that defendant, by said contract, also agreed to furnish this plaintiff with all proper and necessary traveling expenses in coming from his then place of abode, viz., from Danville, Va., to the city and county of San Francisco; that all of said traveling expenses were paid by said defendant, according to said contract, with the exception of fifteen ($15) dollars, which

amount said plaintiff was forced to and did expend for necessary traveling expenses in coming from said Danville, Va., to the said city and county of San Francisco, which amount is still due and not paid from said defendant to said plaintiff; that, by the terms of said contract, the defendant agreed to pay said plaintiff the same price per hundred (100) pounds as was then paid by the manufacturers at Danville, Va., to their twisters; that the price then paid by the said manufacturers at Danville, Va., to their twisters was $2 per hundred (100) pounds, which said sum the defendant agreed, as aforesaid, to pay this plaintiff; that pursuant to said contract this plaintiff came from the town of Danville, Va., to the city and county of San Francisco; that on the first day of January, 1882, he entered the tobacco manufacturing establishment of said defendant in the capacity of twister; that he continued to work for said defendant, under said contract, and in said capacity of twister, from the first day of January, 1882, up to and including the fifteenth day of January, 1883, and twisted one hundred (100) pounds of tobacco every working day during said period of time; that on the sixteenth day of January, 1883, the said defendant, without just cause and without fault on the part of this plaintiff, discharged plaintiff from his said employment for a period of 28 working days, up to and including February 12, 1883; that this plaintiff has often, since said last-mentioned date, applied to this defendant for employment under said contract, and in the capacity of twister, but said defendant has refused, and still refuses, to give said plaintiff said employment; that said plaintiff has from the first day of January, 1882, and still is willing to observe, fulfill, and obey all lawful and reasonable commands and directions of said defendant; that said plaintiff always has been and still is willing, and has offered to said defendant, to well and truly perform and fulfill on his part all of the covenants of said contract as herein set forth; that, by the failure of said defendant to observe and keep the said covenants of said contract, plaintiff has been damaged in the sum of $71."

The remaining 16 counts are based upon claims assigned the plaintiff by his fellow-workmen, who came with him from Virginia, and are similar to the first, except as to the work done, and the respective amounts alleged to be due. The complaint concludes in these words: "Wherefore plaintiff prays judgment against said defendant for the sum of $894.70, United States gold coin; also for legal interest on said amount from the twelfth day of February, 1883, and costs of suit."

The case was tried to a jury, and there was a verdict and judgment thereon for the plaintiff for $330.

Manuel Eyre, for appellant. *Marion Todd* and *Geo. E. Filkins*, for respondent.

FOOTE, C. This appeal is from a judgment rendered by the superior court of the city and county of San Francisco. The appellant claims that it should be reversed—*First*, because, as he alleges, the complaint did not state facts sufficient to constitute a cause of action; *second*, for the reason, as he asserts, that the trial court did not have jurisdiction to hear and determine the cause.

Upon an examination of the complaint we are clearly of opinion that it stated a sufficient cause of action.

The precise question involved in the appellant's second contention has been heretofore determined by this court in *Bailey* v. *Sloan*, 65 Cal. 388, 4 Pac. Rep. 349, when it was said: "The demand, according to the *ad damnum* clause of the complaint, exclusive of interest, exceeds $300. The *ad damnum* clause of the complaint is the test of jurisdiction."

The judgment appealed from should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion judgment affirmed.

Ex parte ROBINSON. (No. 20,289.)

(*Supreme Court of California.* May 25, 1887.)

CONTEMPT—PURGATION—HABEAS CORPUS—DIVORCE.

An order in a divorce suit that the defendant, who had moved for a new trial, pay costs and attorney's fees, is not complied with by paying the reporter and sheriff, but not the attorney; and the defendant is not entitled, upon such payment, to a discharge on *habeas corpus* from the imprisonment to which he had been sentenced for contempt in refusing to comply with the order.

In bank. Appeal from superior court, Del Norte county.

On *habeas corpus*. For the facts, see 12 Pac. Rep. 794.

R. W. Miller, *W. H. Hart*, and *Aylett P. Cotton*, for petitioner.

SHARPSTEIN, J. The order under which the petitioner is now imprisoned is the one which was held to be valid in an opinion filed January 28, 1887, (12 Pac. Rep. 794.) Since then petitioner has paid the sums which he was ordered to pay to the reporter and sheriff, but not that which he was ordered to pay to the attorney named in the order. As the order has not been changed, the case is not materially different from what it was on the former hearing, and, for the reasons given in the opinion then filed, this proceeding is dismissed, and the petitioner remanded.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.

(72 Cal. 283)

HART *v.* KIMBALL and another. (No. 11,787.)

(*Supreme Court of California.* May 18, 1887.)

1. LACHES—RESCISSION—FRAUD.

A boarding-house keeper falsely represented to a prospective lessee from her of the premises, and purchaser of the furniture, that she had been and was still doing

a fine business in the house, and that the furniture, all of which he did not examine, had cost her much more than the price she asked for it. The purchaser closed the contract, and it was six months after entering into possession before he found out that the representations were false. He then rescinded the contract of purchase, and offered to put her *in statu quo*, and upon her refusal brought suit. *Held*, that he was not guilty of laches.

2. EQUITY—RESCISSION—ESTOPPEL—STATUTE OF FRAUDS.
It does not lie in the mouth of K., one party to a trade, when H., the other party, seeking to rescind the contract of exchange, has placed him *in statu quo*, to say that the trade had to do with a lease of real estate for more than five years, and that the rescission of the contract was required by law to be in writing.

3. NEW TRIAL—NOTICE OF MOTION.
A notice of a motion for a new trial is not objectionable because it specifies that the motion will be made not only upon the minutes of the court, but also upon a bill of exceptions and a statement of the case.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

H. K. S. O'Melveny, for appellants. *Wells, Van Dyke & Lee.* for respondent.

FOOTE, C. Mr. Hart sought by this action to rescind a contract, which included the purchase by him of a lot of furniture and a lease from the defendant Mrs. Kimball of a boarding and lodging house, and to enforce the reconveyance to him of a lot or parcel of land which he had previously conveyed to M. H. Kimball, her husband and co-defendant. He based his claim to the relief prayed for upon the alleged fraudulent acts and representations of Mrs. Kimball, made anterior to the making of the contract, and which alone induced him to enter into it. Judgment was rendered as demanded in the complaint, and from that and an order refusing a new trial this appeal is prosecuted.

The respondent contends that the appeal from the order first mentioned should not be considered, for the reason, as he alleges, that the notice of motion for a new trial specified that such motion would be made, not only upon the minutes of the court, but also upon a bill of exceptions and a statement of the case, and that, therefore, the statement upon which the motion was heard by the trial court should have been disregarded, since the moving party relied upon that method of procedure, and did not file any affidavits or use the minutes of the court. We do not concur in this view of the law, for the respondent had full notice that all the statutory methods of procedure to obtain a new trial would be adopted by the appellants, and when they elected which of such methods they would pursue, such election was their privilege, and did not prejudice in any way the rights of the respondent, the other methods being thereby abandoned.

The specifications wherein it was alleged in what particulars the evidence did not warrant the findings were, we think, sufficient, and a hearing should be accorded both to the appeal from the order and to that from the judgment.

The appellants assert that the complaint did not state a sufficient cause of action, and that their demurrer thereto should have been sustained. The pleading first mentioned sets out at some length certain acts and representations of Mrs. Kimball, which are alleged to have been false and fraudulent, and that the plaintiff relied on them as being true in making the contract, and has suffered damage thereby. To us it seems that what Mrs. Kimball is alleged to have said and done, would have warranted any prudent man in entertaining the belief that the boarding-house was doing a good and profitable business, and that the furniture, piano, and other things bought from her by the plaintiff were of the kind and worth what she claimed. Such being the case, the plaintiff having relied upon them, and been deceived to his damage, would have a right to a rescission of the contract, if he made his offer to re-

scind in a proper manner, and within a reasonable time after his discovery of the fraud which had been practiced upon him.

It is claimed, in this connection, by the appellants, that, as the lease given was for five years, the only way in which an offer to rescind it would have been valid was to have made an offer of a release in writing to both parties defendant. The husband, M. H. Kimball, had nothing to do with the lease or the contract. He was simply, at his wife's request, a recipient of the legal title to the plaintiff's lot, with full notice of the latter's equities, without any consideration whatever. To offer to rescind so far as he was concerned would have been an idle ceremony. Mrs. Kimball had made to her not only the offer of the plaintiff to rescind the whole contract, and to place her *in statu quo*, but, according to the complaint, she had been put in possession of all the personal property which she had before that sold to the plaintiff, as well as the boarding and lodging house. In what better position she could have been placed, so far as the plaintiff could act, does not appear.

How can she equitably claim to defeat the plaintiff's right to a rescission of this contract, and to have returned to him his notes and lot when she is in actual possession as her own, with his consent of all that she ever sold him, and when he by his acts *in pais* is estopped from claiming possession of the boarding and lodging house by virtue of the lease? It would certainly be very unjust to say that the mere failure of the plaintiff to execute a written *release* to Mrs. Kimball of all his rights under the lease she made him should prevent him from having her return to him his property and obligations, when she has had returned to her all the property which she ever sold the plaintiff, and is in possession, with his consent, of the boarding and lodging house upon the title to which the plaintiff neither makes nor possesses any claim.

Under the circumstances of this case, six months was a reasonable time within which to ascertain the falsity of the defendant's representations, and to offer to rescind the contract. *Marston* v. *Simpson*, 54 Cal. 189. The demurrer was therefore properly overruled.

It was right to deny the motion for a nonsuit. There is a conflict in the evidence, and the findings should not be disturbed.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Cal. Unrep. 754)

HALL *v.* COUNTY OF LOS ANGELES. (No. 11,833.)*

(*Supreme Court of California.* May 18, 1887.)

CONTRACTS—CONDITION—MUNICIPAL CORPORATION.

An action was brought by an architect against a county to recover for the value of services rendered in making certain plans for a jail building, which plans had been accepted conditionally by the county board of supervisors, provided that a bid should be accepted from some reliable party for the building of the jail. The board of supervisors refused to open any of the bids received, and rejected plaintiff's plans, on the ground that he had been guilty of improper acts in getting his plans provisionally accepted. *Held*, that it was within the discretion of the board to refuse to open or accept any of the bids based upon plaintiff's plans, and that, the condition upon which plaintiff was entitled to compensation never having happened, he could not recover.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

Action for the value of certain services alleged to have been rendered by plaintiff in making certain plans for defendant.

*Reversed in banc. See 16 Pac. 313, 74 Cal. 602.

The complaint shows that the board of supervisors of Los Angeles county made an order to the effect that the board would receive plans and specifications for a jail and appurtenant buildings, the board reserving the right to reject any and all plans and specifications. The board adopted the plan of the plaintiff for a county jail, with certain provisos, among which was that the plans should not be considered adopted unless the board accepted a bid from a reliable party to the effect that such party would construct the buildings proposed for a sum not exceeding $50,000. After this order was entered, the defendant submitted certain drawings, and the clerk was directed to give notice to all persons who desired to bid upon a jail building to be erected in accordance with plaintiff's plans and specifications. In this notice the board reserved the right to reject any and all bids. The notice was published, and the plaintiff claims that bids were made by reliable parties within the required figures. Before any plans or specifications were finally adopted, the board made an order rejecting the plaintiff's plans, on the ground that he had been party to certain improper acts in getting his plans conditionally accepted, and refused to open any of the bids received, based upon said plans.

Williams & McKinley, for appellant. *Geo. M. Holton* and *Bicknell & White*, for respondent.

FOOTE, C. The demurrer to the complaint was properly sustained. The plaintiff had no claim against the defendant, the county of Los Angeles, according to his own pleading, save and except one based upon the condition that the board of supervisors of that county should accept the bid of some "reliable party" for the building of a jail. They refused, in the exercise of a proper discretion, as the complaint shows, to open or accept any of the bids tendered, on the ground that the plaintiff had been a party to certain improper acts in getting his plans conditionally accepted. Thus the condition upon which alone he had, or could have had, any claim for compensation for his alleged services never happened, not because of any fault of the board of supervisors, but for the reason that they, in the exercise of a rightful discretion, refused to entertain or accept bids which they believed were based upon plans tainted with fraud, with which the plaintiff appeared to them to be in collusion. As guardians of the best interests of their county, they could not have properly acted otherwise, and the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion judgment is affirmed.

72 Cal. 287

MOORE *v.* CITY OF LOS ANGELES. (No. 11,786.)

(*Supreme Court of California.* May 18, 1887

MUNICIPAL CORPORATION—LIABILITY—OVERFLOW OF STREAM.

The city of Los Angeles, California, is not liable for damage to property within its corporate limits caused by the sudden overflow of a river, the bed of which, and the right to sell water from which, belong to the city; there being no provision in its charter requiring it to protect private property from such overflow.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

S. Haley, W. H. H Russell, and *David Lyon*, for plaintiff and appellant. *J. W. McKinley, F. P. Kelly*, and *W. T. Williams*, for respondent.

FOOTE, C. The plaintiff sued the city of Los Angeles for damages to his property lying within its corporate limits, alleging that the same was caused by the defendant in failing to use proper care in preventing an overflow of

the waters of the Los Angeles river. The bed of the river, and the right to divert its waters and sell them to its citizens, as stated in the complaint, belonged to the city. The pleading was demurred to, the demurrer sustained, and from the judgment then rendered this appeal is prosecuted.

We do not agree with the plaintiff in his contention that the city, incorporated as it is, should be held responsible for the damages he declares his property to have sustained from the overflow of the river, caused by a sudden flood of water. The incorporated city was not responsible as a private corporation from the fact that it owned the bed of the river, and the right to sell the water therefrom to its citizens, and there is nothing contained in its charter which could impose such an obligation upon it as the duty of protecting private property from sudden and unlooked-for floods, which might at any time fill the stream to overflowing.

The judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

2 Cal. Unrep. 756

PARTRIDGE *v.* OWENS. (No. 9,571.)

(*Supreme Court of California.* May 18, 1887.)

APPEAL—REVIEW—FINDINGS.

Where the evidence is conflicting, the findings of the trial court will be upheld on appeal.

Commissioners' decision. Department 2.

Appeal from superior court, San Francisco.

Fisher Ames and *J. M. Kinley*, for appellant. *George E. Lawrence*, for respondent.

FOOTE, C. This is an action in ejectment for a lot of ground in the city and county of San Francisco. The court below gave judgment for the plaintiff, and the defendant moved for a new trial, which being denied, he appealed from the order made in the premises.

The only real ground of objection which the defendant makes against the correctness of the action of the trial court is that the findings are not supported by the evidence. We have given a very careful examination to the record, and to briefs of counsel, and the authorities cited, but we have not been able to perceive anything therein which militates against our opinion that, the evidence being conflicting, the findings should be upheld and the order affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

72 Cal. 290

TYLER *v.* SUPERIOR COURT OF SONOMA CO. (No. 100,000.)

(*Supreme Court of California.* May 18, 1887.)

COURTS—UNITED STATES SUPREME—ERROR TO—SUPERSEDEAS—ATTORNEY AT LAW.

An order of the supreme court of a state, suspending an attorney from practicing law, is not superseded by a writ of error to the supreme court of the United States, as a writ of error in the United States courts operates as a *supersedeas* only when the judgment requires the issuance of process for its enforcement.

In bank. Application for writ of mandate.

Geo. W. Tyler, for the application. No appearance for respondent.

THORNTON, J. Application for writ of mandate to the superior court of the county of Sonoma, commanding said court to allow Tyler to practice law in that court. Tyler was, by an order of this court, entered in December, 1886, suspended from practicing law in the courts of the state for two years, and until the payment of a certain sum of money. 12 Pac. Rep. 289. On application to the chief justice of this court, a writ of error to the supreme court of the United States was allowed, citation issued and served, and bond filed. It is argued that the writ of error supersedes the order of suspension, and that Tyler can still practice law until the cause is determined on error, or dismissed by the court in error; and this, by virtue of the act of congress.

There are cases where a writ of error operates as a *supersedeas*, and cases where it does not. This is plain from sections 1000–1007 of the Revised Statutes of the United States. See latter clauses of sections cited. What is a *supersedeas*? It is a writ issued to a ministerial officer, commanding him to supersede or desist from proceeding under another writ previously or subsequently issued to him. Abb. Law Dict. word, "*Supersedeas;*" Burrill, Law Dict. same word. No writ of *supersedeas* need be issued under the act of congress, for the writ of error operates as such. The service of a copy of the writ of error on the clerk would be sufficient to restrain him from issuing a writ of execution, or a like service on the sheriff would restrain him from executing it, or, perhaps, the court might order a writ of *supersedeas* in form to be issued. In Virginia the writ of *supersedeas* is directed to the sheriff. Section 4, Minor, Inst. pt. 1, pp. 854, 855, where the form of the writ is given.

Prof. Minor, in his able work above cited, which we consider high authority, says of the writ of error in the courts of the United States: "It operates as a *supersedeas* to prevent the successful party in the court below from proceeding to enforce his judgment," etc. 4 Minor, Inst. pt. 1, p. 296. This plainly signifies that when a party has recovered a judgment which he can enforce by the process of the court, that a writ of error, on the proper bond being given, will prevent the execution of such process. The writ is issued for the purpose of preventing the enforcement of the judgment by execution. This is clearly apparent from the mandate of the writ in the forms given in the work above cited. When the judgment is rendered, and no process is required to be issued for its enforcement, no *supersedeas* is allowed. In fact, there is no necessity for such a writ. There is nothing to stay or supersede; as, where an injunction is allowed by a decree, the *supersedeas* does not nullify or set aside the injunction. *Slaughter-House Cases*, 10 Wall. 273–297; *Whitney* v. *Mowry*, 3 Fish. Pat. Cas. 175. The injunction granted by the decree stands, and is not suspended or superseded. The order disbarring Tyler needs no process to execute it, and it stands unaffected by the writ of error.

But it is argued that this court has no power to pass on the question whether the writ of error operates as a *supersedeas;* that the power of this court to act in the case is suspended until, by some act of the supreme court of the United States, the power is restored to it. To sustain this contention the case of *Ex parte Dunn*, 6 S. C. 307, is cited. In that case process was required to enforce the judgment of the court. The question arose on an application to the court below to enforce its judgment. This was declined on the ground above stated. Here there is no application to enforce the judgment or order of this court, nor is any necessary. The judgment or order stands as it was rendered, and the effect is to suspend the applicant for the writ in this case from the practice of his profession. There is and can be no *supersedeas* under the act of congress.

Writ denied, and application dismissed.

We concur: SEARLES, C. J.; MCFARLAND, J.; TEMPLE, J.; SHARPSTEIN, J.

PATERSON, J., (*concurring.*) I concur on the ground that, in the absence of an express statutory provision applicable to cases of this kind, or an order of the court suspending the operation of the judgment until decision on the writ of error, the judgment of this court operates as an injunction against the exercise by the party disbarred of the right or franchise to practice law.

(72 Cal. 289)

PEOPLE *ex rel.* GARRISON and others *v.* CLARK. (No. 11,690.)

(*Supreme Court of California.* May 18, 1887.)

ATTORNEY GENERAL—ACTION—PARTIES—STATE.

In California, the attorney general, after having given his consent to the parties interested to use the name of the state, and his name in bringing an action, has no authority to withdraw such consent, to the prejudice of the parties in interest.

Commissioners' decision. Department 2.

Appeal from superior court, Tulare county.

F. S. Stratton, Wm. M. Pierson, and *Latimer & Morrow,* for appellants. *E. C. Marshall,* for respondent.

FOOTE, C. This was an action on behalf of the people of the state of California, upon the relation of the real parties in interest, instituted for the purpose of obtaining a decree to set aside a certain patent dated November 22, 1883, to swamp and overflowed lands lying in the county of Tulare. The attorney general of the state, upon a proper petition presented to him, authorized the relators to use his name, and to bring this suit in the name of the people as plaintiff. An undertaking in due form was afterwards filed in the proper court, conditioned to save the state harmless from all costs. The complaint, signed by the attorneys of the real parties in interest, the relators, was filed according to law on January 19, 1884. The attorney general, however, on the seventh of March, 1884, filed in the court where the action was pending a withdrawal of his authority for the further prosecution of the action in the name of the people, and requested that the action be dismissed. The court below granted his request, against the objection and subject to the exception of the plaintiffs, the relators. From the judgment made in the premises the latter have appealed.

The attorney general, as such, (the state having no direct interest in the event of the suit, and his permission having been given to the real parties in interest seeking relief,) had no right or authority to withdraw his consent, thus previously given, to the use of his name, to the prejudice of the relators. *People* v. *North San Francisco, H. & R. R. A.*, 38 Cal. 564; *People* v. *Jacob*, 12 Pac. Rep. 222.

The judgment of dismissal should be reversed, and the cause remanded for trial.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

(72 Cal. 293)

PALMER and another *v.* HOWARD. No. 11,653.)

(*Supreme Court of California.* May 20, 1887.)

SALE—CONDITIONAL—BONA FIDE MORTGAGE.

As against a *bona fide* mortgagee of the purchaser, provisions in a contract of sale that the property is borrowed, and that the title is to remain in the seller until the price is paid, are ineffectual to constitute the transaction an executory contract of sale, where the possession is delivered, and the promise to pay is absolute, and

where, under the contract, the seller is *bound* upon default, on repossessing himself of the property, to resell it, and to account to the purchaser for the proceeds in excess of the contract price and expenses.[1]

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

Claim and delivery by Palmer & Rey, respondents, against Howard, appellant, for possession of certain personal property consisting of printing materials, or for $2,295.43, the value thereof, in case a delivery cannot be had.

Levi Chase, for appellant. *W. J. Hunsaker,* for respondents.

HAYNE, C. The plaintiff delivered to one St. Clair and wife certain personal property under a writing, of which the following is a copy:

"SAN FRANCISCO, March 26, 1885.

"D. Parker St. Clair and wife, San Diego, Cal., borrowed and received of Palmer & Rey, 405–407 Sansome street, San Francisco, the following articles in good order. If the price set against them is paid, as per memorandum below, the property is then to belong to the said borrower; otherwise it remains the property of Palmer & Rey. Notes and drafts, or renewals of the same, if given, are not to be considered payments until they are paid. In the mean time the borrower is to keep the property in good order, and agrees to pay the price as per memorandum below, keep the property sufficiently insured for the benefit of the said Palmer & Rey, depositing the policy of insurance with them, and may use the property free from any other charge. Said property is not to be removed from lot L, in block thirty-six, (36,) in the city of San Diego, Cal., without the written consent of Palmer & Rey. Should said borrower fail to meet any of the payments at the time specified, or to keep the property satisfactorily insured, or in good order, then Palmer & Rey may take the said articles, and dispose of them to the best advantage, rendering to the said borrower all surplus, if any, after paying the price agreed upon, and the expenses of removal and sale."

Then follows a list of the articles and a specification of the installments of the price, amounting in all to $2,295.45. The St. Clairs paid but one installment of the price, and did not keep the property insured, but mortgaged the same to the defendant for $925, and subsequently left for parts unknown. The question is as to the effect of the agreement quoted.

It is settled in this state that even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to property. *Kohler* v. *Hayes*, 41 Cal. 455; *Hegler* v. *Eddy*, 53 Cal. 598. This is in accordance with the great preponderance of authority elsewhere. *Harkness* v. *Russell*, 7 Sup. Ct. Rep. 51. The reason is that in such cases the title to the property does not pass, and the maxim, *nemo plus juris*, etc., applies.

But in applying this rule it must be remembered, in general, that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or incumbrancers for value, and in particular that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to insure good faith, and to give notice to the world of the character of the transaction. These provisions as to the mortgages cannot be evaded by any mere shuffling of words. Where it is clear from the whole transaction that for all practical purposes the ownership of property was intended to be transferred, and that the seller only intended to reserve a security for the price, any characterization of the transaction by the parties, or any mere denial of its legal effect, will not be regarded. The question, it is true, is one of intention; but the

[1] Respecting the validity of conditional sales, see Simpson v. Shackelford, (Ark.) 4 S. W. Rep. 165, and note.

intention must be collected from the whole transaction, and not from any particular feature of it.

In the present case it seems to us that the intention must be taken to have been to transfer the ownership of the property, reserving a security for the price and nothing more. The possession was delivered. The promise to pay was absolute. *Hart* v. *Barney*, 7 Fed. Rep. 553. If Palmer & Rey, on reselling the property, had sued the St. Clairs for the difference between the agreed price and what the property brought on the resale, we see no defense the latter could have made. Moreover, Palmer & Rey were *bound* to resell the property if they repossessed themselves of it. They could not have kept it as an owner; and not only so, but they were bound to resell for the benefit of the St. Clairs. The provision is that, if they retake, they shall sell "to the best advantage, *rendering to said borrower all surplus, if any, after paying the price agreed upon, and the expenses of removal and sale.*" This is not a feature of an executory contract of sale. It is the chief characteristic of a mortgage, and it is the very sum and substance of proceedings for foreclosure. In a controversy between debtor and creditor as to whether a transaction was a mortgage or a sale, such a stipulation would be conclusive that it was a mortgage. Why should it have a different import in this case?

We think, therefore, that the intention was to vest the substantial ownership in the St. Clairs, and that the sole object of the seller was to secure payment of the price; and this intention appears from the provisions of the contract itself. Such being the case, the statement that the property "remains the property of Palmer & Rey," etc., is inconsistent with the nature of the transaction, as shown by the contract itself, and is a mere disguise for the purpose of evading the requirements of the law as to mortgages of personal property. To sustain the position of respondents would be, in effect, to add to the chapter on mortgages a provision that, in every case where personal property is sold, the seller may take a mortgage thereon for the price; and that, too, without the affidavit and recording which are required in the cases where such mortgages are allowed.

This conclusion is not in contravention of the cases cited by respondent, for in none of them, except, perhaps, a case from an inferior court of New York, (*Grant* v. *Skinner*, 21 Barb. 581,) did the provision above referred to exist. On the other hand, it is in accordance with the decision of the supreme court of the United States in *Heryford* v. *Davis*, 102 U. S. 235, which was not in reference to any local law. That court maintains to its fullest extent the rule as to conditional sales which prevails in this state. *Harkness* v. *Russell*, 7 Sup. Ct. Rep. 51. But it held that the features above adverted to took the case before it out of the general rule.

For these reasons we advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

2 Cal. Unrep. 757

TRIPP *v.* DUANE. (No. 9,490.)

(*Supreme Court of California.* May 20, 1887.)

1. TRUSTS—COUPLED WITH AN INTEREST—CONVEYANCE BY TRUSTEE.

A transfer of all his interest by one who had advanced money to pay the state's charges for a deed to salt marsh and tide lands, and who, as security for the loan, had taken a conveyance to himself of the land in trust to reconvey upon payment, and with power, upon default, to sell after notice by advertisement, is valid as a conveyance of his equitable interest, although made without such notice, and is not in

contravention of Civil Code Cal. § 870, providing that, "where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustee in contravention of the trust is absolutely void."

2. QUIETING TITLE—LIENS—TENDER.
A bill to quiet title to an undivided interest in land will not lie, as against the grantee of one who has advanced money to clear the property, and taken a deed in the nature of a mortgage as a security for the loan, without payment or tender of the proportionate part of the money loaned.

3. TRIAL—BY COURT—RECEPTION OF EVIDENCE—RULING ON.
It is error for the court, in making up its findings, to consider a deposition which was objected to when offered, and with respect to which objection the court did not decide at the time, but reserved its ruling.

4. SAME.
Where testimony is objected to when offered, the party objecting has a right to have a ruling upon the point; and where the ruling is reserved, and the court, when making up its finding, wrongly considers the testimony, the error is not cured by tendering the objecting party a ruling upon the matter, when the statement on motion for new trial is presented for settlement.

Commissioners' decision. Department 2.

Appeal from superior court, San Francisco.

Geo. W. Tyler and *E. D. Wheeler*, for Duane, appellant. *Philip G. Galpin*, for Tripp, respondent.

FOOTE, C. An action to quiet title to thirty-three ninety-sixths of certain land described in the complaint. Some time during the year A. D. 1853, one George W. Ellis filed in the recorder's office of the city and county of San Francisco a pre-emption claim to 160 acres of salt marsh and tide lands, the property of the state of California. In the interval between such time and October 21, A. D. 1875, Ellis executed to various persons bargain and sale deeds of undivided portions of his pre-emption claim, amounting to thirty-three ninety-sixths of the whole thereof, the grantees of such undivided interests conveyed them to the plaintiff prior to the twenty-first day of October, A. D. 1875, by deeds sufficient in form, and such deeds were recorded before said last-mentioned date. The state of California executed to Ellis a deed to the lands described in the complaint on the twenty-fourth day of November, A. D. 1875, they being but a portion of those described in the pre-emption claim heretofore mentioned. The plaintiff claims title to thirty-three ninety-sixths of the land, by reason of the pre-emption claim and the deed from the state of California to Ellis. It appears, however, that, when the deed from the state was ready for delivery, Ellis had no money, and $8,000 had to be paid the state before the deed would be delivered; and Ellis, Duane, and Haymond executed to one Patterson an instrument in writing, which is as follows: "We, George W. Ellis, Creed Haymond, and C. P. Duane, hereby grant, bargain, sell, and convey to Wm. H. Patterson all the estate, title, and interest which we, either and all of us, now have, or may hereafter acquire, of, in, and to the land described, and intended to be described, in a certain so-called pre-emption claim or pre-emption notice on record, whereof is contained in the land records of the city and county of San Francisco, in Liber B of Miscellaneous Deeds, page 665; and also all the lands described in two certain deeds made by the tide-land commissioners to G. W. Ellis, and bearing date November 24, 1875. This conveyance is in trust to secure the payment of $4,000 due to said Patterson from the said Ellis, $2,000 due from the said Haymond to said Patterson, and $2,000 from the said Duane to the said Patterson, and payable in United States gold coin, with interest at the rate of one and one-half per cent. per month, and payable on or before sixty days from the date thereof. The said Patterson to have full possession and control of the said land, and the absolute power of the disposition of the said land for the purposes of the trust. If such payments are not paid at or before sixty days from the date hereof, such disposition is to be made upon one week's notice in any daily paper pub-

lished in the city and county of San Francisco. Upon the payment of the whole of said sum of $8,000 and interest, the said Patterson is to reconvey said land; or, upon the payment by the said Ellis of the sum of $4,000 and interest, he will reconvey one-half of said property to said Ellis; or, upon the payment of $2,000 and interest by said Haymond he will reconvey to said Haymond one-fourth thereof; or, upon the payment of $2,000 and interest by the said Duane, to reconvey one-fourth of said property to said Duane. Witness our hands and seals this thirtieth day of November, 1875,"—the same being signed and sealed by all of said parties thereto.

The $8,000 was not paid within the 60 days, as agreed by the instrument above set out; and Patterson, without advertising the sale of the land as therein provided, transferred all his interest in it to one Morrissey by deed, and Morrissey to Duane.

At the time of the commencement of the present action, neither the plaintiff nor Ellis had paid Patterson or Duane any of the said $8,000, and the complaint sought to quiet the plaintiff's title to thirty-three ninety-sixths of said land without alleging payment, or making any offer to pay to Patterson, or Duane, his grantee, any portion of the same. After Duane had filed his amended answer, the plaintiff bought of Patterson his right to and interest in the land, and took from him a conveyance therefor, and *then* applied to the trial court for leave (which was refused, as far as Duane was concerned) to file a supplemental complaint setting up the facts above related. But upon the trial of the cause the plaintiff offered in evidence the deposition of Patterson to prove the facts set up in the supplemental complaint. The defendant, Duane, objected, upon the ground that all the matters thus sought to be proved had occurred after the joinder of issue in the case, and were incompetent, irrelevant, and immaterial, and that no supplemental complaint had been filed touching such matters, so far as concerned the defendant, Duane. The court did not at the time admit the testimony, but reserved its ruling. Before, however, the decision in the cause was made, the court did read and consider that deposition, and in fact based its findings and decree thereon; and decided that defendant, Duane, had no right, title, or interest in the land described in the complaint, and quieted the title of the land to the plaintiff, and as against Duane, as prayed for.

The appellant makes three points for the reversal of the judgment, and the order denying him a new trial: *First.* He claims that the court erred in quieting the plaintiff's title to the whole of the land described in the complaint. *Second.* That the court erred in deciding that plaintiff was entitled to prevail in the action, without paying or offering to pay thirty-three ninety-sixths of the purchase money which Patterson advanced to Ellis, Haymond, and Duane to pay to the state of California, and in ruling that Duane had no title or interest in the land. *Third.* That the court erred in considering and reading evidence not admitted at the trial, and basing its findings and decree thereon.

We do not think that the court quieted the title to the whole of the land, but only to thirty-three ninety-sixths thereof. But it seems to us that the transfer by Patterson to Morrissey was valid, so far as to carry all the beneficial interest which Patterson had in the trust instrument from Ellis, Duane, and Haymond, and, as a consequence, that Duane got the same interest from Morrissey. Patterson thereby made no conveyance in contravention of the trust, within the meaning of section 870, Civil Code. He transferred all his beneficial interests only, and the title was not affected. The advertisement for the sale was not affected. It was just as incumbent on Patterson's grantee to have carried out the trust, and to have advertised as the instrument required, as it was upon Patterson. The grantees under Patterson had a right to be repaid their share of the $8,000, vesting as a lien upon the thirty-three ninety-sixths of the claim, as fully as Patterson had, and therefore it was

wrong to divest Duane of the interest he had acquired under Patterson and Morrissey, without, at least, having him reimbursed, and no offer so to do was made in the complaint.

The court had no right to consider the deposition of Patterson, as against Duane, in deciding the cause. Duane never waived his exceptions, and the court, without any notice to him, or ruling upon it after it was taken, so that he might perchance have rebutted Patterson's evidence, founded its decree and findings upon it. The fact that he was tendered an opportunity to have a ruling on the matter, when the statement on motion for a new trial was presented to the court for settlement, gave Duane no opportunity, which was his right to have, to offer rebutting testimony.

The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial, *nunc pro tunc*, as of March 15, 1887.

72 Cal. 297

CARROLL *v.* GIRARD FIRE INS. CO. (No. 11,694.)

(*Supreme Court of California.* May 20, 1887.)

1. INSURANCE—FIRE—CONDITION—WAIVER.
 A provision in a fire insurance policy that in case of loss the insured shall forthwith give notice thereof, "and shall also produce" a magistrate's certificate that the loss was without fraud, *held* to have been waived by the company's joining with the insured in proceedings to determine the loss by arbitration, and setting up the award as a defense.[1]
2. SAME—CLAUSE AGAINST WAIVER.
 It is no objection to such waiver that another clause in the policy provides that "no condition, stipulation, covenant, or clause hereinbefore contained shall be * * * waived, * * * except by writing indorsed hereon." Such provision may be waived by conduct as well as the others.
3. SAME—ACTION—PLEADING.
 The policy provided that "no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable * * * until an award shall have been obtained fixing the amount of such claim in the manner hereinabove provided." *Held*, that a complaint which sets out the policy, but contains no allegation of an award, or of any facts excusing a failure to obtain one, is demurrable as not stating a cause of action.

Commissioners' decision. Department 1.

Appeal from superior court, Merced county.

T. C. Van Ness, for appellant. *Wigginton, Creed & Hawes*, for respondent.

HAYNE, C. Action upon a policy of insurance. Verdict and judgment for plaintiff. The grounds for reversal urged by counsel for appellant may be reduced to two.

1. The policy requires that in case of loss the assured shall "forthwith" give notice thereof, "and shall also produce" a certificate from a notary or magistrate to the effect that he has examined into the circumstances, and believes that the assured has sustained the loss without fraud on his part. These

[1] In Bowlin v. Hekla Fire Ins. Co. (Minn.) 31 N. W. Rep. 859, it was held that a local agent, simply authorized to fix rates of insurance, cannot waive a provision requiring proof of loss; and in Cleaver v. Traders' Ins. Co., (Mich.) 32 N. W. Rep. 660, that a provision in the policy that the agent had no authority to waive, modify, or strike from the policy any of its conditions, or revive the policy in case it becomes void by reason of a violation of its conditions, is a part of the contract, and prevents the company from being estopped to deny its liability, or declare the policy void for violation of its conditions, though the agent has waived them.

things were not done. But the evidence shows that, when the claim was brought to the attention of the company, it made no objection on account of the absence of the notice and preliminary proof, but went on and joined in proceedings for determining the amount of the loss by arbitration. These proceedings were required by the policy to be taken to determine the amount of the loss, "after proof thereof has been received in due form." They culminated in an award fixing the loss at a certain sum. The first we hear of an objection on ground of want of notice and preliminary proof is in the answer filed by the company in the action; and by this time the period for giving the notice and making the proof had certainly expired. We think that under these circumstances the formalities mentioned must be considered waived. By joining in the proceedings to fix the amount of the loss, the company manifested its intention to dispense with preliminary formalities. The assured had a right to rely upon this manifestation of intention. And to say that the company all along intended to require the notice and preliminary proof, and to take advantage of their absense after the time for giving them had expired, is to impute to it a want of good faith and fair-dealing which we will not assume.

The counsel for appellant urges several reasons against this conclusion, viz.:

(*a*) That those who acted for the company had no authority to waive any condition of the policy. But the company does not repudiate the acts of those who acted for it in this regard. On the contrary, it adopts them, and shelters itself behind the award, which was the result of such acts. It is plain that it cannot do this without accepting all the consequences of the acts.

(*b*) It is said that the submission to arbitration provides that "this appointment is without reference to any question or matters of difference within the terms and conditions of the insurance, and is not to be taken as any waiver upon the part of said companies of the said conditions in their policies in case they elect to avail themselves of them." If this means the right to object on account of the absence of preliminary steps was to be reserved until after the time for taking them had expired, it certainly is a very crafty document. But we do not think such is its meaning. The proceedings for fixing the loss were, as we have seen, not to be commenced until *after* the preliminary steps had been taken. And the language of the submission is that the appointment is to be without reference to "any *other* question within the terms and conditions" etc.; and the proviso is that it "is not to be taken as any waiver of *said* conditions." We think that, taking all the circumstances into consideration, it is a fair construction to hold that the proviso as to waiver refers to the conditions other than the ones relating to the appointment of the arbitrators, and those superseded or waived thereby. But, however this may be, the language of the proviso relates only to the effect of the "appointment" of the arbitrators, and does not extend to subsequent proceedings. And by going on, and completing the award, and setting it up as a defense, the company waived the preliminary steps under the principle first above laid down.

(*c*) It is urged that the policy provides that "no condition, stipulation, covenant, or clause hereinbefore contained shall be altered, annulled, or waived, * * * except by writing indorsed hereon, or annexed thereto, by the president or secretary, with their signatures affixed thereto." But this condition is of no more sanctity than any other conditions of the policy. Like any other provision for the benefit of the company, it could be waived; and we think that, so far as the notice and certificate are concerned, it was waived by the submission to arbitration, and the subsequent proceedings. We are of opinion, therefore, that the defense founded upon the want of notice and certificate is of no validity.

2. The defendant set up the award of the arbitrators determining the amount of the loss; and we think that its position in this regard must be sustained. The policy provides that "in case differences shall arise touching

any loss or damage, after proof thereof has been received in due form, the matter may, at the written request of either party, be submitted to competent and disinterested appraisers,—one to be appointed by the assured, and one by the company, and these two shall select a third, if necessary,—whose award, by them or any two of them, in writing, *shall determine the amount of such loss or damage*, but not decide the question of the liability of this company under this policy," and that "no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until an award shall have been obtained *fixing the amount of such claim* in manner hereinabove provided."

A similar provision was held to be valid, and to be a condition precedent to any right of action, in *Old Saucelito L. & D. D. Co.* v. *Commercial U. A. Co.*, 66 Cal. 253, 5 Pac. Rep. 232, and this case was approved and followed in *Adams* v. *South British Ins. Co.*, 11 Pac. Rep. 627. It is argued for the respondent that these cases are not in point, for the reason that the policies there considered contained express provisions that the determination of the arbitrators should be "binding on both parties." But we are unable to assent to this view. The provisions of the policy under consideration seem to us to be substantially the same as those in the cases mentioned, and to be to the effect that the amount of the loss shall be first determined in the manner specified, and that the action must be for the amount as fixed. And it is no more open to the respondent, after submitting to the arbitration, to say that, as a matter of fact, no "differences" existed, than it would be for the appellant, if it had been dissatisfied with the award, to say that no "written" request for arbitration had been made.

The logical result of this view is that the award is a necessary element of the plaintiff's cause of action. In contemplation of law the promise is not to pay such damage as the insured should suffer, but to pay such sum as the arbitrators should fix as the amount of damage sustained. It follows that the action should have been for the amount of the award, and that the award should have been set forth in the complaint. See Morse, Arb. 95. The allegation that "all the conditions of said policy of insurance were duly performed and kept by this plaintiff" is not equivalent to setting forth the award, because, as has been stated, the award is a necessary element of the cause of action, and it is not the action of plaintiff, but of third persons. If a fair award was prevented by the fraudulent conduct of defendant, the complaint should have set forth the acts constituting the fraud. But the complaint, although it set out the policy, thereby disclosing the provisions as to the award, made no mention of any award having been made, or of any reason why not. Hence it did not state a cause of action, and the demurrer should have been sustained. This not having been done, the defendant's objections to any evidence impeaching the award set up in the answer should have been allowed.

It would not help the plaintiff's case to show that, by reason of any irregularity of the arbitrators, such as want of hearing, or the like, the award was void; for, if the defendant could not be charged with participation therein, the result would simply be that the action was prematurely brought.

The document filed by plaintiff, styled "Answer to defendant's cross-complaint," must be ignored, because the defendant filed no cross-complaint. The attempted pleading was therefore wholly unauthorized; but, even if it could have any effect as an answer to a cross-complaint, it could not obviate the defects in the complaint,—it being thoroughly well settled that, in order to support a judgment, the complaint must state a cause of action.

For these reasons we advise that the judgment and order be reversed, with directions to sustain the demurrer to the complaint, with leave to plaintiff to amend.

We concur: BELCHER, C. C.; FOOTE, C.

By the Court. For the reasons given in the foregoing opinion the judgment and order are reversed, with direction to sustain the demurrer to the complaint, with leave to plaintiff to amend.

72 Cal. 307

Raynor *v.* Drew. (No. 11,837.)

(*Supreme Court of California.* May 20, 1887.)

1. Frauds, Statute of—Agreement not to be Performed in a Year—Lease.
 A verbal lease of land until such time as the lessor shall pay the lessee a certain sum of money, is neither an agreement that by its terms is not to be performed within a year from the making thereof, nor an agreement for leasing for a longer period than one year, within the meaning of the statute of frauds of California.[1]
2. Evidence—Extrinsic—Written Instrument.
 At the time of the execution of a mortgage, the mortgagor gave to the mortgagee a verbal lease of the land, wherein it was stipulated that the rent was to offset the interest on the note. *Held* that, the lease, being a separate and supplementary matter, was not in contradiction of the provisions of the note that, *if* the interest was not paid when due, it was to be compounded, and oral evidence of its provisions as to the payment of interest on the note was admissible.
3. Limitation of Actions—Mortgage—Adverse Possession.
 Under Code Civil Proc. Cal. § 346, which provides that an action to redeem from a mortgage may be brought against the mortgagee in possession, unless he has continuously maintained an adverse possession for five years after a breach of condition, an action to redeem, where the mortgagee is in possession, may be brought at any time, provided there shall not have been an adverse possession for five years.
4. Same—Landlord and Tenant.
 When a mortgagee is in possession of the premises under a verbal lease providing that the rent shall be applied to keep down the interest on the mortgage note, his possession cannot be held to be adverse until the expiration of five years from the last payment of rent, under Code Civil Proc. Cal. § 326, providing that when there is no written lease, the possession of the tenant is deemed to be the possession of the landlord, until the expiration of five years from the time of the last payment of rent.

Commissioners' decision. Department 1.

Appeal from superior court, San Bernardino county.

Byron Waters and *W. G. Webb*, for appellant. *Paris & Goodcell* and *H. M. Willis*, for respondent.

Hayne, C. On May 14, 1875, the plaintiff gave to the defendant an instrument in writing which in form was an absolute deed. It is admitted by the pleading that this instrument was to secure the payment of a promissory note; and therefore it was a mortgage, and, under the present doctrine, did not convey the title, (*Taylor* v. *McLain*, 64 Cal. 514, 2 Pac. Rep. 399; *Healy* v. *O'Brien*, 66 Cal. 519, 6 Pac. Rep. 386,) and did not give a right of possession, (Civil Code, § 2927.) But at the time the plaintiff gave to the defendant a verbal lease of the premises for one year. The lease is alleged in the complaint to have been "until such time as the plaintiff should pay him said sum." This was neither "an agreement that by its terms is not to be performed within a year from the making thereof," (*Dougherty* v. *Rosenberg*, 62 Cal. 32,) nor was it "an agreement for the leasing for a longer period than one year," (Browne, St. Frauds, 32.) Such a lease, therefore, would not be void. The defendant testifies that he "leased the premises for a year, during which the note was to run," and the court found that it was for a year. There was probably a variance, but, under the circumstances, we do not think it misled the defendant to his prejudice, and therefore it was not material.

[1] Respecting the application of the statute of frauds to contracts not to be performed within a year, see Treat v. Hiles, (Wis.) 32 N. W. Rep. 517. In Henry v. Wells, 3 S. W. Rep. 637, it was held that while a verbal contract for service, not to be performed within a year, might, in equity, be taken out of the statute by part performance, it could not at law.

As part of the agreement of lease, it was stipulated that the rent was to offset the interest on the note. The defendant objected to oral evidence of this, as contradictory of the provision of the note that, *if* the interest was not paid when due, it was to be compounded. But the lease, although made at the time, was a separate and supplementary matter, and provided what was to be taken as payment of the interest, and hence was not in contradiction of the note.

There is a dispute about the amount of the rent. The plaintiff swears that it was to offset the interest, which would make it $33 per month. The defendant swears in his answer that it was $15 per month, and in his evidence that it was $20 a month. The only other evidence was the testimony of experts that $33 was too high a rent. The finding was in accordance with plaintiff's evidence, and, under the well-settled rule as to conflict, it must be assumed here that such was the agreement. The defendant entered and remained in possession up to the commencement of the action, which was on December 18, 1884. He paid the taxes and insurance, and made a good many repairs and improvements, but took no steps to get the title, either by foreclosure or otherwise.

The positions of the defendant not involved in the foregoing may be reduced to three:

1. It is contended that he had a five years' adverse possession. But he admits that he accepted a lease, and we do not see how he can be permitted to say that he did not enter under it. Any tenant might say the same thing. Having accepted the lease, and agreed that the rent was to be applied to keep down the interest, and then entered, his possession is conclusively presumed to have been under the lease. Being a tenant, his possession could not, under any circumstances, be held to be adverse until the expiration of five years from the last payment of rent. Code Civil Proc. § 326. Under the contract, the rent was paid by the interest. It was the duty of the defendant to have credited such payments on the back of the note. It must be presumed that he did his duty. At least, he cannot gain any advantage by neglecting it. Therefore it must be held that the rent was credited against the interest as long as defendant remained in possession under the agreement; and, even if we say that there was no renewal of the lease by holding over, the possession could not commence to be adverse until five years from the expiration of the year, which would, at most, give the defendant an adverse possession of only three years and seven months.

2. It is urged that the plaintiff's claim to relief is barred by lapse of time. The argument is that the right of foreclosure is barred; and that, the rights of redemption and foreclosure being reciprocal, if one is barred, the other must be. Such was undoubtedly the rule before the Code. *Cunningham* v. *Hawkins*, 24 Cal. 406; *Arrington* v. *Liscom*, 34 Cal. 369; *Espinosa* v. *Gregory*, 40 Cal. 58. But perhaps it may be doubted whether the reason of the old equity rule applies under a system where no title passes to the mortgagee. If the title and right of possession remain in the mortgagor, and the lien of the mortgage is extinguished by lapse of time, (Civil Code, § 2911,) what is it that the mortgagee has which can be redeemed? The old phraseology has come down to us, and found a place in the statute. But it is manifest that an action to "redeem" under our system is, in effect, merely an action to remove a cloud; and, since a court of equity may require justice to be done as a condition of removing the cloud, why should there be any period of limitation for such an action?

Possibly the law-makers had this in view when they enacted the following section of the Civil Procedure:

"Sec. 346. An act to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming

under him, *unless* he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage."

Whatever view may be taken of this section, one thing is clear, viz., that, if the mortgagee be in possession, the action to "redeem" may be brought at any time, provided there shall not have been an adverse possession of five years.

In the case of *Taylor* v. *McClain*, 60 Cal. 651, the above section was not cited to the court, and it escaped attention. But, whether or not this circumstance takes away the authority of the case, the record shows that the mortgagee was not in possession of the mortgaged premises in that case, and therefore the case may be distinguished. It is therefore not necessary to decide whether section 346 changes the old rule, where the mortgagee is not in possession.

3. It is contended that the defendant should have been allowed a greater sum for repairs and improvements. He was allowed $158 for taxes, $202.50 for insurance, and $337.45 for repairs, making $697.95 in all. It does not clearly appear what repairs are included in the $337.45. The defendant, in his character of tenant, was not entitled to any sum for repairs, for the reason that he gave no notice of his intention to make them. Code Civil Proc. § 1942. If in his character of mortgagee he was entitled to do anything which he could not do as tenant, then the general rule would apply, viz., that the mortgagee may make such repairs as are reasonably necessary for the preservation of the property, but not permanent improvements, or things which conduced merely to his comfort or convenience. 2 Story, Eq. Jur. 1016*b*; 3 Pom. Eq. Jur. 1217; *Hidden* v. *Jordan*, 28 Cal. 309, and 32 Cal. 401; *Murdock* v. *Clarke*, 59 Cal. 695; *Moore* v. *Cable*, 1 Johns. Ch. 384. The cases which go beyond this, rest upon grounds of equitable estoppel. Applying this rule, we cannot say that there was error in the action of the court below with reference to the defendant's rights as mortgagee.

Then was there any ground of equitable estoppel? The finding is that "none of said improvements were made with the consent or acquiescence of the plaintiff." The evidence shows that nothing was said on the subject, but that the plaintiff, in passing and repassing the property, must have seen at least some of the work in progress or completed, and that he made no objection. When asked at the trial why he had kept silent, he answered: "Because I did not want him to foreclose till I was ready to take it up." It is essential, however, to any claim of this character on the part of the defendant, that he acted in ignorance of his real position. *Boggs* v. *Merced Min. Co.*, 14 Cal. 368; *Kelly* v. *Taylor*, 23 Cal. 15; *Carpentier* v. *Thirston*, 24 Cal. 281; *Maine Boys Co.* v. *Boston Co.*, 37 Cal. 50. The defendant's state of mind is shown by his own statement. He says: "I went on and made certain improvements on the place. I made up my mind that the place was mine, *from the fact that the place wasn't worth the money* even if Mr. Raynor agreed to redeem it, or had the money to redeem it. *I, of course, knew he could redeem within a short time if he saw fit to*, and, the property not being worth that, I was satisfied he wouldn't do it."

The other points do not require special mention. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 317

ESTUDILLO *v.* MEYERSTEIN and others. (No. 12,035.)

(*Supreme Court of California.* May 20, 1887.)

1. INSOLVENCY—DISCHARGE—FRAUD.
 The insolvent act of California, § 49, which provides that "no discharge shall be granted, or, if granted, shall be valid, if the debtor, or any other person on his account, has influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation," does not require that the pecuniary obligation shall be in writing, or one that can be enforced in the courts, and a mere verbal promise is sufficient.
2. SAME—ANNULLING DISCHARGE—PROCEDURE.
 The insolvency act of California, § 53, provides that any creditor having a provable debt against the insolvent, who shall see fit to contest the validity of the discharge of the insolvent on the ground that it was fraudulently obtained, may, within two years, apply to the court which granted it, to set aside and annul the same, but does not provide how the application shall be made. *Held*, that it is not necessary that the remedy be sought by motion in the insolvency proceeding, but an independent action may be maintained to set aside and annul the discharge, under Code Civil Proc. § 187, providing that, when the course of proceeding is not pointed out by the statute, any suitable mode of proceeding may be adopted.

Commissioners' decision. Department 2.

Appeal from superior court, San Bernardino county.

Byron Waters, *Henry M. Willis*, and *Naphtaly*, *Freidenrich & Ackerman*, for appellants. *Paris & Goodcell* and *H. C. Rolfe*, for respondent.

BELCHER, C. C. This is an action to set aside and annul the discharge from their debts, granted to the defendants in certain insolvency proceedings under the insolvent act of 1880. It is alleged in the complaint that on the seventeenth day of February, 1885, the defendants were doing business as partners, and the plaintiff had a claim against them which was provable against their estate in insolvency; that on that day a creditors' petition was filed against them, upon which they were, on the sixth of March, 1885, adjudged insolvents; that thereafter they applied for their discharge, and on the twenty-seventh of August, 1885, the court duly made an order discharging them from all their individual and partnership debts, in accordance with the provisions of the insolvent act. It is then alleged, as ground for setting aside and annulling the discharge, that while the proceedings in insolvency were pending, and prior to the granting of the discharge, the defendants, and each of them, promised and agreed to and with two of their creditors, C. Jansen and E. Sommer, that, if they would not oppose the application for discharge, then the defendants, in consideration thereof, would, after the granting of such discharge, pay to the said creditors the full amounts, respectively, due them; that these promises and agreements were made with the intent and for the purpose of influencing the action of Jansen and Sommer, and of inducing them, and each of them, not to oppose, delay, or obstruct the granting of a discharge to the defendants; that Jansen and Sommer, prior and up to the time of the making of said promise and agreement, intended, in good faith and upon what they deemed good and sufficient grounds, to oppose the granting of a discharge to either of the defendants, and that they would have opposed it but for the said promise and agreement; that they relied upon the said promise and agreement, and were thereby influenced and induced not to oppose the discharge of defendants; that the discharge was thus fraudulently obtained; and that plaintiff had no notice or information of the facts constituting the fraud until after the discharge was granted.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and thereupon defendants answered specifically, denying that they made any promise to Jansen or Sommer, or influenced them in any way, or to any extent, not to oppose their discharge. Upon the trial the court found

against the defendants, and adjudged that their discharge be set aside and annulled. The appeal is from the judgment and an order denying a new trial.

1. The insolvent act provides (section 49) that "no discharge shall be granted, or, if granted, shall be valid, if the debtor, * * * or any other person on his account or in his behalf, has influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation." It further provides (section 53) "that any creditor of said debtor, whose debt was proved or provable against the estate in insolvency, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, and who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it, to set aside and annul the same."

It is urged for the appellants that the promise to pay Jansen and Sommer was verbal and against the policy of the law and void, and therefore it did not constitute a "pecuniary consideration or obligation;" that the plaintiff should have alleged and shown that something besides a mere verbal promise was actually received by them. Whether the promise was verbal or in writing does not appear from the record; but, in whichever way made, it was equally against the policy of the insolvent law and void. The rule is that even a promissory note or bond given by an insolvent, or any one in his behalf, to prevent opposition to his discharge, is illegal and void, and its collections cannot be enforced. *Bell* v. *Leggett*, 7 N. Y. 176; *Rice* v. *Maxwell*, 13 Smedes & M. 289; *Tuxbury* v. *Miller*, 19 Johns. 311.

A pecuniary obligation is an obligation to pay money, and, in the absence of a statute requiring it to be in writing, may be verbal. The statute controlling this case, as has been seen, does not require that the obligation be in writing, or be one that can be enforced in the courts. It provides simply that, when the action of any creditor has been influenced at any stage of the proceedings by *any* pecuniary consideration or obligation, the discharge shall not be valid; and any other creditor who had no knowledge of the facts constituting the fraud when the discharge was granted, may, at any time within two years thereafter, apply to have it set aside and annulled. In our opinion, the complaint stated all the facts required by the statute to render the defendants' discharge invalid, and the demurrer was therefore properly overruled.

2. It is claimed that the mode of proceeding adopted by the plaintiff to have the discharge set aside is not the proper one; that the remedy should have been sought by motion in the insolvency proceeding, and not by an independent action. The statute says that any creditor having a provable debt may apply to the court which granted the discharge to set aside and annul the same, but does not say how the application shall be made. In such a case any suitable mode of proceeding may be adopted, (section 187, Code Civil Proc.,) and we fail to see why the mode adopted here is not suitable and proper.

3. It is further claimed that the findings are not justified by the evidence. In answer to this it is enough to say that the court found the facts to be as they are set out in the complaint, and there was testimony tending to support all of its averments. A new trial cannot, therefore, be granted upon this ground.

It follows that the judgment and order should be affirmed.

I concur: FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 334

GALE v. MCDANIEL. (No. 12,081.)

(*Supreme Court of California.* May 24, 1887.)

1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—MALICIOUS MISCHIEF.
A right of action for maliciously destroying by fire a stable and saloon, and the personal property contained therein, accrues immediately upon the destruction of the property, and not upon the discovery of the person who set the fire.
2. SAME—BAR OF THREE YEARS.
Such an action, whether considered as one for trespass upon real property or one for injuring personal property, is barred, under the California statute of limitations, (Code Civil Proc. § 338,) by three years.

Commissioners' decision. Department 1.

Appeal from superior court, Butte county.

Gray & Sexton, for Gale, appellant. *Hundley & Gale*, for McDaniel, respondent.

HAYNE, C. The action is for maliciously destroying by fire a stable and saloon, and the personal property contained therein. More than three years elapsed before the commencement of the action. Whether it be considered as an action for trespass upon real property, or for injuring personal property, it is barred by limitation. Code Civil Proc. § 338. The fact that plaintiff only recently discovered who did the wrong makes no difference. The demurrer was properly sustained, and the judgment should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

72 Cal. 305

BEAL v. OSBORNE and others. (No. 11,941.)

(*Supreme Court of California.* May 20, 1887.)

CORPORATIONS—OFFICERS—REPORTS—MINES.
In an action against the directors of a mining corporation, to recover for their failure to post reports and accounts current, as required by St. Cal. 1880, p. 134, a finding that the company worked the mines during a period named, *held*, upon appeal, to be supported by evidence showing that, during that period, the mines were worked under the superintendence of A., who, when elected superintendent, had refused to accept the office, although it appeared that he made some claim to own the mine himself; the record not containing the evidence in support of such claim.

Commissioners' decision. Department 1.

Appeal from superior court, San Bernardino county.

Harris & Allen, for appellants. *Hargrave & Gray*, for respondent.

BELCHER, C. C. This action is brought by a complaining stockholder in a mining corporation known as the Alvord Consolidated Mining Company, against the directors of the corporation, to recover the sum of $1,000 as liquidated damages for the failure of the directors to have certain reports and accounts current made and posted, as required by an act of the legislature of this state. St. Cal. 1880, p. 134. The case was tried and judgment rendered in favor of the plaintiff. The defendants moved for a new trial, and now appeal from the judgment and order denying their motion.

The principal point made for the appellants is that the finding "that during the month of August, 1885, said corporation worked its said mines and was engaged in carrying on and conducting the business of mining, and therein and thereabout received and disbursed money and incurred liabilities," is not justified by the evidence. It was clearly proved that the defendants were the directors of the corporation, and that at a meeting held by them in June, 1885,

the defendant Osborne was elected as superintendent. He was at that time also the largest stockholder in the corporation, holding more than one-half of all its capital stock. During the month of August, 1885, work was carried on at the mine and mill under the superintendence of Osborne, and money was received and disbursed and liabilities incurred.

It is claimed for the appellants that the work was done, the money received and disbursed, and the liabilities incurred by Osborne on his own account; that under a sheriff's sale he had acquired some title to the property, which he was asserting against the company until a settlement for moneys which he had advanced and paid out for the company should be made; and that in the mean time he was putting up his own money, and doing the whole business in his own name and for himself. All record evidence showing that Osborne had acquired any rights to the property, as against the company, is omitted from the transcript, and we cannot say what its effect would be if presented. We must conclude, therefore, in support of the judgment, that he had acquired no valid rights.

The case, then, is this: Osborne was a stockholder and director of the corporation, and was elected superintendent of its works. When elected superintendent, he told the other directors that he would not serve as such, but nevertheless did serve, and during the whole month of August superintended and managed the business of taking out ores from the company's mine, and working them in its mill. These facts were sufficient to justify the finding objected to; and, looking at the whole record, we fail to find anything which can be held to excuse the defendants for their failure to have reports and accounts current made and posted as required by the statute.

The other points do not require a special notice. There are two of them only, and they relate to alleged errors of the court in overruling objections to questions propounded to plaintiff's witnesses. We see no error in the rulings, but, assuming that they were improper, no harm was done to the defendants, as the answers to the questions were immaterial.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 321

BLAKEMAN *v.* PUGET SOUND IRON CO. (No. 9,640.)

(*Supreme Court of California.* May 20, 1887.)

EXECUTION—SALE—CORPORATE STOCK.

A purchaser of shares of corporate stock at execution sale is bound by notice of defects in the judgment debtor's title.

Commissioners' decision. Department 2.

Appeal from superior court, San Francisco city and county.

T. Z. Blakeman, appellant, *pro se*. *John C. Hall*, for respondent.

FOOTE, C. Blakeman instituted this action for the purpose of compelling the corporation defendant to transfer to him 2,500 shares of its capital stock, of which he claimed to have become the owner, by reason of his purchase thereof at sheriff's sale under execution against one C. H. Simpkins. The court found that the latter was the owner of five shares of the stock in controversy, and gave judgment that the same be transferred to the plaintiff as prayed for in the complaint. From that and the order denying him a new trial he has appealed. From the record it appears that the plaintiff purchased the whole of the stock he claims at sheriff's sale, under execution, as the property of C. H. Simpkins, and paid therefor the sum of three dollars; that Simp-

kins was not the owner of the stock then being offered for sale, except five shares thereof, and that the plaintiff had full notice of such facts. Blakeman was therefore a purchaser at such sale, with full notice of the defects in Simpkins' title to the property sold, and could not and did not acquire any better title thereto than was possessed by Simpkins, and, under such circumstances, can have no just ground of complaint against the judgment and order made and entered by the court below, which should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 303

HICKS *v.* RIVERSIDE FRUIT CO. (No. 11,857.)

(*Supreme Court of California.* May 20, 1887.)

1. WITNESS—EXAMINATION—QUESTION.
 A question put to a witness in the following form: "State only what you know about the matter,"—is not objectionable.
2. SALE—ACTION—EVIDENCE.
 In an action for failure to accept fruit contracted for, where the plaintiff's testimony was self-contradictory as to the merchantable condition of the fruit tendered, *held*, that a finding of the court to the effect that the fruit tendered was unmerchantable would be upheld.

Commissioners' decision. Department 1.
Appeal from superior court, San Bernardino county.
Harris & Allen, for appellant. *Curtis, Otis & Conner*, for respondent.

FOOTE, C. Plaintiff brought this action to recover from the defendant a sum of money alleged to be due on a contract to deliver certain peaches. The cause was tried by the court, and judgment rendered in favor of the defendant, and from that, and an order overruling her motion for a new trial, the plaintiff has appealed.

It is argued for plaintiff—*First*, that the court erred in overruling the objection, interposed by her counsel, to a question propounded to Mr. Burt, a witness for the defendant, as follows: "State only what you know about the matter." *Second*, that the evidence did not justify findings 1 and 2; she alleging that the evidence was uncontradicted that the fruit delivered "was in good and merchantable condition," according to the terms of the contract which had been made between the parties.

As to the first contention it was only necessary to say that the question was proper, and the plaintiff's counsel pointed his objection at the question, and not at the answer thereto, which last was not responsive to the question, and no motion was made to strike it out.

The second point is untenable, for the reason that Mrs. Hicks, the plaintiff, testified in effect that the fruit delivered was bruised more or less, which fact rendered it impossible that it could have been in good and merchantable condition, as in other portions of her testimony she claimed it to have been. Where such a conflict exists, the findings should be upheld.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

75 Cal. 452

DAVIS *v.* COUNTY OF YUBA. (No. 11,880.)

(Supreme Court of California. May 25, 1887.)

MUNICIPAL CORPORATIONS—BONDS—PAYMENT.

Bonds issued in pursuance of the California act of 1872, (St. 1871–72, p. 662,) entitled "An act to authorize the county of Yuba to issue $60,000 of bonds for the purpose of constructing, repairing, and improving wagon roads and bridges in said county," are not authorized to be paid prior to the expiration of 20 years from their issue, except out of a surplus remaining after payment of interest due, in the "wagon-road and bridge interest and sinking fund," provided for in the act; and an attempt by the county to pay such bonds prior to maturity, in any other manner than out of such surplus, is void, as against a non-assenting holder.

In bank. Appeal from superior court, Yuba county.

W. C. Belcher, for appellant. *A. L. Hart* and *E. A. Forbes*, for respondent.

SEARLS, C. J. This action was brought to recover $5,600 and interest, alleged to be due upon coupons attached to certain bonds issued by the county of Yuba, under an act of the legislature entitled "An act to authorize the county of Yuba to issue $60,000 of bonds for the purpose of constructing, repairing, and improving wagon roads and bridges in said county of Yuba," approved March 28, 1872. The cause was tried by the court, and written findings filed, upon which judgment was entered in favor of plaintiff for $400, being for the interest on bonds from the first day of January, 1882, to and including March 30, 1882. Plaintiff appeals from the judgment, and from an order denying a new trial.

If defendant, the county of Yuba, had a right, under the law, and by virtue of their contract with the bondholders, of whom the plaintiff was one, to pay off the bonds in question on the thirtieth day of March, 1882, the judgment of the court below is correct, and should be affirmed. If, on the other hand, the bonds could not, without the consent of the holders, be paid until the expiration of 20 years from the date of their issue, the court below erred in refusing to render judgment in accordance with the prayer of the complaint.

The act of March 28, 1872, (St. 1871–72, p. 662,) so far as is necessary to the consideration of this case, reads as follows:

"Section 1. The board of supervisors of the county of Yuba, in the name of said county, are hereby authorized, empowered, and directed to make, execute, and issue, from time to time, as it shall become necessary, not to exceed $60,000 of bonds of said county.

"Sec. 2. Such bonds shall be issued in denominations of $1,000 each, and be payable in twenty years from the first day of January, 1873, and shall bear interest at the rate of 8 per cent. per annum, payable semi-annually on the first day of July and January of each year. Said bonds and interest shall be payable at the office of the treasurer of said county in United States gold coin. Such bonds shall be signed by the chairman of the board of supervisors, countersigned by the county auditor, and indorsed by the treasurer of said county. Forty coupons shall be attached to each bond, and numbered consecutively, and shall express the amount of interest due at such payment, and shall be signed in the same manner as the bonds are required to be signed. * * * The said chairman of said board of supervisors, county auditor, and treasurer shall proceed to dispose of said bonds for the best sum or price in gold coin of the United States they can procure: provided, that they shall not sell or negotiate the said bonds at less than 80 cents gold coin on the dollar."

"Sec. 4. The said board of supervisors shall each year, previous to the making out the duplicate or general assessment list for said county in each year, levy a tax, to be styled the 'Yuba County Wagon-Road and Bridge Interest and Sinking Fund Tax,' and sufficient to raise the amount of interest

required to be paid; and *in ten years after the issuing of said bonds they shall levy a tax for each and every year, to liquidate and pay said bonds, in ten years, that shall then remain unpaid.* The said taxes shall be levied and collected in the same manner as the general taxes for county purposes, and, when collected, shall be paid to the county treasurer, to be kept in a separate fund, to be known as the 'Yuba County Wagon-Road and Bridge Interest and Sinking Fund,' to be by him applied to the payment of the interest, as herein provided, and for the redemption and payment of said bonds under the direction of the board of supervisors.

"Sec. 5. The said board of supervisors of said county shall make arrangements for the payment of the interest on said bonds when the same shall become due at least thirty days before the time of payment; and in the event said Yuba county wagon-road and bridge interest and sinking fund is insufficient, the said treasurer shall draw on the general fund of said county for said purpose; and, in the event these funds prove inadequate, the said board of supervisors are hereby authorized to make such contracts and arrangements or loans as may be necessary for the payment of said interest, and the protection of the faith of said county.

"Sec. 6. Whenever, at any time after the payment of the July interest of said bonds, there shall be *in the funds so raised for the payment of the principal and interest of said bonds* a sum of money amounting to *five thousand dollars over and above the amount required for the payment of the annual interest*, the said board of supervisors shall advertise, in one or more public newspapers, published in the counties of San Francisco and Yuba, for a period of four weeks, for sealed proposals for the redemption of said bonds; and, ten days from the time of the expiration of the time for such publication, the said board of supervisors shall open said sealed proposals, and the said treasurer shall pay and liquidate, so far as the funds then on hand shall extend, such bonds presented, under said proposals, as shall have the lowest value proposed, at which day they may be liquidated: provided, there shall be no proposals for less than par value, then the payment of said funds on hand shall be made on said bonds according to the number of their issue, of which the board of supervisors shall give four weeks' notice of the number of bonds to be so paid, after which time said bonds shall cease to bear or draw interest."

The county issued its bonds for the full amount authorized by the act and sold them. The bonds all bore date January 1, 1873, and were made payable 20 years after date, with interest at 8 per cent. per annum, payable semi-annually. Plaintiff was the owner of the coupons of 20 of these bonds, (for $1,000 each,) for the years 1882, 1883, 1884, and the first half of 1885, upon which he demanded payment July 2, 1885, all of which was refused.

The provisions of the statute are to be read in connection with the bonds. They constitute a part of the contract entered into between the county and the bondholders, and all persons acquiring possession or ownership of the bonds, or any of them, must be deemed to have done so with full knowledge of all the stipulations contained in the statute, precisely as though these provisions were embraced in the bonds themselves. Viewed in this light, it is apparent that the bonds were payable absolutely, and in any event, at the end of 20 years from the first day of January, 1873. The board of supervisors was required to levy a tax each year, to be styled the "Yuba County Wagon-Road and Bridge Interest and Sinking Fund Tax." This tax was required to be sufficient in amount to meet the interest, which was payable semi-annually. If, after the payment of the July interest in any year, there remained in this interest and sinking fund a sum of money equal to $5,000 over and above the amount required to pay the annual interest, it was to be paid upon the principal in the manner provided by the statute. To the extent of the means on hand thus raised, and in such fund, there can be no serious doubt but the county had a right to extinguish its bonds. It was so nominated in the law,

and, had the resources of that fund thus accumulated been sufficient to pay the bonds in full at the payment of the July interest, they could have been extinguished.

The further provision requiring an annual tax after 10 years to pay off the principal of the bonds remaining unpaid need not be considered, except as it may tend to throw light upon the questions presented; for the reason that the attempted payment occurred before the time for action, under that clause of the statute, had arrived.

The question still remains, had the board of supervisors a right to resort to other and independent means, such as issuing new bonds under sections 4048 to 4052, inclusive, of the Political Code, and, by placing the means thus raised in the sinking fund, to pay off the bonds of plaintiff against his consent. Respondent concedes that these bonds are contracts of which the act under which they were issued forms a part, and the obligations of which cannot be impaired by subsequent legislation. His contention is that it was the purpose of the legislature, by the act of March 28, 1872, to give to the county of Yuba 20 years, within which to make payment of said bonds, if it so desired, and, at the same time, to confer upon the county authority to make payment thereof at any time within that period, provided sufficient funds were in the hands of the officers of the county with which to make such payment. We cannot so construe the act of March 28, 1872.

As before stated, the bonds were dated January 1, 1873, and purported on their face to have 20 years to run. The holder could not enforce payment before the expiration of this last period. For 10 years the supervisors were required to levy a tax sufficient to pay the interest, and at the end of 10 years they were required to levy such tax for each and every year of the remaining 10 years as would be sufficient to pay principal and interest by the time the bonds fell due. The board of supervisors was authorized by section 6 of the act, "whenever, at any time, after the payment of the July interest of said bonds, there shall be in the funds *so raised for the payment of the principal and interest* of said bonds a sum of money amounting to $5,000, over and above the amount required for the payment of the annual interest," etc., to pay such sum on the principal of the bonds in the manner by the act provided. A sum of money thus raised, and in the fund, was the condition upon which any of the bonds could be paid before the expiration of 20 years. If the bonds were due, it could make no difference to the holder from what fund he was paid; but the very question here is, were they due? The 10 years had not expired, and there could not have been in the treasury any sum of money raised for the payment of principal, because no tax could be levied therefor until the end of 10 years. What the board of supervisors did in fact do, was to raise funds by the issue and sale of other bonds, for the payment of those we are considering.

We are of opinion the purchaser of these bonds had a right to hold and collect interest on them for 20 years, subject to the contingency provided in the statute under which they were issued of having them paid sooner, if the fund therein provided for should prove adequate to that end. This was a contingency which the purchaser could estimate, and which might well become an important factor in determining the value of the offered security. It was a part of his contract, and he had a right to rely upon such contingency as the only one under which the term of his investment could be curtailed.

It follows that plaintiff was entitled to recover according to the prayer of his complaint.

The judgment and order appealed from are reversed, and a new trial ordered.

We concur: SHARPSTEIN, J.; THORNTON, J.; TEMPLE, J.; MCKINSTRY, J.; MCFARLAND, J.

72 Cal. 351

BURTON v. TODD. (No. 11,777.)

(*Supreme Court of California.* May 24, 1887.)

EVIDENCE—COMPETENCY—JUDGMENT.

In an action of ejectment involving the ownership of a piece of land lying along the boundary line of two adjoining *ranchos*, it being stipulated that plaintiff and defendant are the respective owners of the two *ranchos*, and the only issue being as to the location of the boundary line, a judgment offered in evidence determining the title to the *ranchos* to be in plaintiff and defendant, respectively, *held* properly excluded.

Department 2. Appeal from superior court, Santa Barbara county.

Action of ejectment. Defendant had judgment below.

A. Packard and *R. B. Canfield*, for appellant. *Fernald, Cope & Boyd*, for respondent.

MCFARLAND, J. This is an action of ejectment involving the ownership of a piece of land lying along the boundary line of two adjoining *ranchos*,—the one called "The Rancho Jesus Maria," and the other "The Rancho Todos Santos y San Antonio." Appellant is the owner of the former *rancho*, and respondent is in possession of the land in contest as tenant of the Newhall Land & Farming Company, who own the other *rancho* as successor in interest of one H. M. Newhall. The question to be determined in the case was, in which of the *ranchos* does the land in contest lie? The case was tried without a jury, and the court found for defendant. From an order refusing a new trial the plaintiff appeals. The only point made by appellant is that the court erred in refusing to allow appellant to introduce in evidence the judgment roll of a former action brought by plaintiff against the said H. M. Newhall, defendant's predecessor in interest.

The Rancho Jesus Maria was patented to the predecessors of plaintiff by the United States government in September, 1871, and the Rancho Todos Santos was patented to the predecessors of defendant's lessor in 1876. In 1881, or thereabouts, plaintiff herein commenced an action to quiet his title to the Jesus Maria, describing it as patented, against said H. M. Newhall, who was then the owner of the Todos Santos. Newhall answered, disclaiming any interest in the Jesus Maria, and averring that he was the owner in fee-simple of the Rancho Todos Santos y San Antonio, as described in the patent of the United States government to his grantors. The court found and decreed March 26, 1881, that plaintiff was the owner in fee of the Jesus Maria as patented; that Newhall was the owner in fee of the Rancho Todos Santos as patented; and that "there is no conflict whatever between the two tracts as patented by the United States where the two *ranchos* aforesaid adjoin." That was the case the judgment roll of which was ruled out in the case at bar. (One Weil was also made a defendant, but his connection with the case is immaterial here.)

The judge before whom this present case was tried also presided at the trial of said case of *Burton* v. *Newhall;* and he ruled out the judgment roll in that case, not because the parties in the case at bar were not bound by it, but because it was immaterial, as not throwing any light upon the issue then before the court. The parties, by written stipulation, had admitted the titles to the two *ranchos* as established by the judgment in the case of *Burton* v. *Newhall;* and the only point at issue was the proper *location* on the *ground* of a part of the line between the tracts as patented.

From an examination of the record we are unable to see how the judgment in the former case would have aided in the determination of this point, and therefore unable to see that the ruling of the court complained of was either erroneous or harmful to appellant. Order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

72 Cal. 345

CRAVEN and another *v.* CENTRAL PAC. R. Co. (No. 9,044.)

(*Supreme Court of California.* May 24, 1887.)

1. NEGLIGENCE—CONTRIBUTORY—INSTRUCTION.
In an action to recover for injuries received in alighting from a train, where it was claimed that plaintiff heedlessly jumped from the train while it was in motion, an instruction that she could not recover if her negligence contributed to the accident is not erroneous for omitting the word "proximately," as in such case any negligence which contributed to the accident must have contributed proximately.

2. SAME—EVIDENCE—PREVIOUS NEGLIGENCE.
In an action to recover for injuries received in alighting from a train, where it was in dispute whether plaintiff carelessly jumped from the train while it was in motion, *held*, that defendant might show that, during the year preceding the accident, plaintiff had frequently traveled over the same route, had frequently jumped off the cars while in motion, and had been warned of the danger of doing so.

Department 2. Appeal from superior court, San Francisco.

Action to recover damages for personal injuries. Defendant had judgment below.

Alfred H. Cohen, for appellants. *Wilson & Wilson*, for respondent.

MCFARLAND, J. This is an appeal from an order of the court below denying appellants' motion for a new trial. The action was brought to recover damages for personal injuries received by the appellant Nettie R. Craven, who is the wife of the other appellant, in alighting from a train of cars of respondent. As she was about to get off the train at or near a place called "Willow-Street Station," in Alameda county, she was either thrown or fell violently to the ground, and was injured; and the main question in the case was one of fact, namely: After the train had stopped, did respondent's employes, without giving appellant a reasonable time to alight, carelessly and suddenly start it, and thus cause her to fall, or did she carelessly and needlessly jump from the train while it was in motion, and thus cause or contribute to her own injury? Upon this question the evidence was conflicting,—although, so far as the record shows, the weight of it was against appellant,—and the jury found a verdict for respondent. Under these circumstances the verdict should not be set aside, and a new trial ordered, unless there were clear errors of law occurring at the trial, which might reasonably have affected the jury to the prejudice of appellants.

The two grounds of error mainly relied on by appellants' counsel are—*First*, a certain omission in the charge of the court to the jury; and, *second*, the overruling of appellants' objection to certain evidence.

1. The court instructed the jury very fully as to the duty of railroad companies when stopping at stations for the discharge of passengers. They were told that "a railroad company carrying passengers for hire has not discharged its duty, or relieved itself from liability to them, until it has stopped at the end of their journey a reasonable time for them to get off the train in safety;" also, "if you believe the defendant did not afford the plaintiff Mrs. Craven a reasonable time for this purpose, but started the train suddenly while she was in the act of getting off the car, and before she had time to alight, it failed to perform its duty, was guilty of negligence, and is liable to her for damages she has suffered thereby not exceeding $20,000." Other instructions were given to the same effect. But the court instructed the jury that if the negligence of the plaintiff caused or contributed to the injury complained of, she was not entitled to recover; and appellants contend that a new trial should be granted because the court, in its charge on this point, omitted the qualification that, in order to defeat a recovery, the negligence of plaintiff must have contributed *proximately* to the injury.

A general definition of contributory negligence should, no doubt, include the word "proximate," although it is doubtful if juries attach any very defi-

nite meaning to that word. And if, in the case at bar, there were any room for doubt whether the alleged negligence of plaintiff contributed proximately or remotely to the injury, the point here made by appellants might be material. But the whole evidence revolved around this one question: Did the plaintiff, *at the very time of the accident*, negligently jump off the train while it was moving, and thus cause or contribute to the injury? If she did not, then the verdict should have been for plaintiffs. If she did, then there can be no doubt that her negligence contributed *proximately* to the injury. It was the very thing which then and there directly and immediately caused it. Under these circumstances, if the court had used the word "proximately" in its instructions, their effect upon the jury would not have been changed; and it would be a vain and unwarrantable thing to order an entire new trial of this action in order to allow the judge of the court below to insert in his charge a word which, when there, would be of no practical consequence.

2. The second point made by appellants is more difficult of solution. There being a conflict of evidence as to the averment that plaintiff carelessly jumped off the train while it was moving at the time of the injury, the court, against the objections of plaintiffs, allowed defendant to introduce evidence to show that within the year preceding the accident plaintiff had frequently traveled over that route, had frequently jumped off the cars while in motion, and had been warned against the danger of doing so. This ruling is assigned as an error for which a new trial should be granted. There is no doubt of the general rule applicable to criminal cases that, on the trial of a defendant for the particular crime charged, evidence of the commission by him of other crimes cannot be introduced. The same rule seems to apply in civil cases, when it is sought to show that some specific act was done maliciously, or that it was done intentionally with some definite purpose, and not carelessly, from mere force of habit. But when, in the absence of any question of evil intent, or of any intent at all, the point of fact to be determined is whether or not a person did a certain thing, or did it in a particular way, and the direct testimony as to the fact is conflicting, then evidence is admissible to show that he was in the habit of doing the thing in question, or accustomed to do it in a particular way. A sensible man called upon, out of court, to determine whether or not a certain person had, on a certain occasion, carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give *some* weight to the fact that the person was in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned *in* court. The evidence, at least, had some legal tendency to show that plaintiff's conduct at the time of the injury was such as defendant ascribed to her.

In *Fitzpatrick* v. *Railroad Co.*, 128 Mass. 13, which was an action for injuries to a minor while on defendant's track, evidence that plaintiff had frequently been on the track on previous occasions, and had been warned to keep off it, was held to be admissible.

In *Randall* v. *Telegraph Co.*, 54 Wis. 142, 11 N. W. Rep. 419, it was held that, in an action for injuries caused by defendant allowing its wires to lie across the road at a particular place, it was admissible to show that defendant's wires were down at other places, and at times previous to the date of the injury complained of.

In *State* v. *Boston & M. R. R.*, 58 N. H. 410, the question being as to the rate of speed at which defendant's train was going at a particular time and place, evidence was held admissible of the rate of speed at which the same engineer drove the train at that place on previous occasions.

In the case of *State* v. *Manchester & L. R.*, 52 N. H. 549, the court uses language peculiarly applicable to the case at bar. One of the questions in that case was whether or not the engineer and fireman of defendant's train ran it

over a certain crossing at the time when the accident complained of occurred, without ringing the bell or sounding the whistle. There was direct evidence on one side that neither of the signals was given, and just as direct evidence on the other side that they were both properly given. Under these circumstances the court below admitted evidence that the same engineer and fireman, during the preceding year, had a number of times passed the crossing without giving the signals. Upon appeal the appellate court held the evidence to have been properly admitted, and in their opinion say: "It would seem to be axiomatic that a man is more likely to do or not to do a thing, or to do or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done, or omitted to be done, without any particular intent or purpose to injure any one. It cannot apply to acts that are done intentionally, willfully, or maliciously, because such acts are done with a specific object in view, and they are performed, not by force of habit, but with a definite purpose. * * * If, in this case, it had been charged that these agents of the corporation had knowingly, intentionally, willfully, and maliciously done or omitted to do any act, for the purpose of injuring the deceased or anybody else, then the only questions would be, was the act done or omitted as charged? and did the knowledge, the intention, the will, or the malice exist when the act was done or omitted? But when the question is, did these servants of the road, without any intention whatever, and through mere negligence and carelessness, omit to give these signals on that occasion, we think the inquiry was properly made as to what they had done before in that regard, and whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible, not as evidence of character, not as evidence of fitness or unfitness, but simply as having some tendency to show that, on this particular occasion, these agents were more probably negligent and careless because they had before frequently neglected the same duty with impunity, and had thus become habitually negligent in that regard."

These views of the supreme judicial court of New Hampshire seem to us to be correct; and, applying them to the case at bar, they solve the point now under discussion in favor of the ruling of the court below. The two cases of *Largan* v. *Central R. Co.*, 40 Cal. 272, and *Martinez* v. *Planel*, 36 Cal. 578, cited by appellant, are not in point.

It may be remarked generally that, unless the case falls within some well-recognized class of exceptions, an evidentiary fact is relevant to the principal fact when the former tends to show that the latter probably did or did not occur; and mere remoteness usually goes to the weight, and not to the admissibility, of evidence.

Some other points are made in the record, but the two above noticed are the only ones discussed in the briefs. We see no error that would warrant a new trial.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

72 Cal. 335

In re Estate of MOORE, Deceased. (No. 9,767.)

(*Supreme Court of California.* May 24, 1887.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTS—JURY.

Code Civil Proc. Cal. §§ 1716, 1717, providing for trial by jury in probate proceedings, is not to be considered as granting an absolute right to a jury trial in cases of the settlement of accounts of executors and administrators, in view of the fact that the language of the Code in many places implies that the settlement is to be by the court.

2. SAME—SUBSTANTIAL ERROR.
The verdict being only advisory, if the court finds upon all the issues submitted, mere irregularity in the formation of the jury, or error in the instructions, cannot affect the substantial rights of the parties.

3. SAME—EVIDENCE—WIDOW.
Upon the settlement of an administrator's account, where it appeared that the administrator had paid to the widow only a small portion of the monthly allowance made by the probate court for the support of the family pending the administration, on the plea that she had abandoned the children, testimony offered on her part of her readiness and willingness to take care of the children, and that she was forcibly excluded from the family residence by the administrator, should be admitted.

4. SAME—DELAY IN SETTLEMENT.
In the settlement of an administrator's account, evidence is admissible to show that he unnecessarily prolonged the settlement of the estate.

5. SAME—INSANITY.
The administrator having been confined in an insane asylum for a time during the administration, a ruling admitting in evidence his certificate of discharge from the asylum, *held* not prejudicial error.

6. SAME—ITEMS ALLOWED.
An administrator should not be allowed in his accounts for expenditures made in building an addition to a hotel belonging to the estate, or in purchasing adjoining property. The allowance of traveling expenses of the administrator's attorney, or of the salary of a book-keeper, will not necessarily be considered as error.

7. SAME—WHAT CHARGEABLE—INTEREST.
An administrator is not chargeable with interest agreed to be paid on a loan improperly made by him, unless he has collected or could collect such interest.

8. EVIDENCE—TAXES—PAYMENT.
Oral evidence of the payment of taxes is competent, especially if the loss of the tax receipts is first shown.

Department 1. Appeal from superior court, Santa Cruz county.

Settlement of administrator's account.

The estate consisted, *inter alia*, of a dairy ranch of about 800 acres near Santa Cruz, and an undivided one-half of a hotel in Santa Cruz known as the Pacific Ocean House. The administrator, T. W. Moore, was committed to an insane asylum, April 28, 1881, and remained there until December 22, 1881. On April 20, 1882, he received a certificate of discharge, and July 25, 1882, his restoration to capacity was judicially determined. Objection was made to the admission in evidence of the discharge, but it was admitted, and the court ruled, in regard to the administrator's incapacity, that, after his restoration to capacity, he could ratify acts performed by him as administrator while insane. The other facts appear in the opinion.

Chas. B. Younger, for appellant. *Hall & Rodgers*, for respondent.

TEMPLE, J. The decedent died October 30, 1871, leaving a widow and five minor children, four of whom were the offspring of a previous marriage. Letters of administration were issued to the respondent March 4, 1872, and an inventory filed June 27, 1872. Respondent, as administratror, took possession of the property of the estate, but allowed the widow and the children to occupy the residence until May, 1877, when, as is claimed by respondent, she voluntarily left with her own child, but, as she contends, she was forciby excluded by the respondent. On the twenty-ninth of April, 1874, the court made an order allowing "for the support and maintenance of the family of deceased, consisting of a widow and five minor children, the sum of $250 per month, from the death of the deceased until the close of the administration."

September 16, 1882, the respondent filed an account of his administration. The appellant, William H. Moore, a minor child of the deceased, and a son of the widow, contested the account, filing 26 so-called exceptions to different items, each exception based upon many different grounds, and some of them

attacking many items of the account. Upon the trial of the issues thus made, the contestant demanded a jury, which was granted by the court, and special issues were found.

The account was very lengthy, extending through many years, and including a great many receipts and expenditures. The trial was long, tedious, and complicated, imposing upon court and counsel a vast amount of labor, which would not have been necessary had the trial been before the court without a jury.

Very many of the alleged errors complained of arose in the impaneling of the jury, and the allowance or refusal of instructions. The record in fact affords very convincing evidence of the unsuitableness of this mode of trial in such contests; and the question arises whether the contestant was entitled to a jury trial as a matter of right, or whether it was allowed only as a matter of discretion, as in equity cases, the verdict being only advisory to the court. The fact that a jury trial is so inappropriate and inconvenient upon such a settlement raises a strong presumption that it was never intended to allow it as a matter of right. It is utterly impracticable for a jury to wade through, comprehend, and disentangle a long account, or to express an intelligent judgment upon each item. Furthermore, it was evidently contemplated that the settlement should be made by the court. Many matters are left entirely to the discretion of the court to allow or disallow. In many places the Code speaks of claims allowed by the court, and provides for a referee to examine the account and report thereon. It has been held that the right of trial by jury is secured by the constitution only in cases in which it had previously existed in the administration of justice according to the course of the common law. Probate matters belonged to ecclesiastical jurisdiction, where a jury was not a right. Such a proceeding is not really an action at law, as defined in the Code. Section 22, Code Civil Proc. There may be cases in which it would be very desirable to submit an issue arising on the settlement of an account to a jury. In such cases, no doubt, the court may frame an issue for a jury, and the verdict will even then be only advisory to the court. The trial of the issues made required the examination of a long account. That, indeed, was the purpose of the entire proceeding. In such cases the court may of its own motion, and without the consent of the parties, refer such issue to a referee to hear and report. And we do not understand that at common law the right existed to have the examination of a long and complicated account made by a jury. If the verdict is only advisory to the court, and the court has found upon all the issues submitted, it would seem that a mere irregularity in the formation of the jury, or error in the instructions, could not affect the substantial rights of the appellant.

The difficulty with this construction is found in sections 1716 and 1717, Code Civil Proc. Section 1716 is: "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article 2, chapter 2, of this title; and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issues joined, as well as for costs, may be entered by the court, and enforced by execution or otherwise by the court, as in civil actions." Section 1717 reads: "If no jury is demanded, the court must try the issues joined. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. * * *"

This language is certainly very positive and comprehensive. Was it really intended that every possible disputed fact in any step in the administration of an estate might, as a matter of right, be made an issue to be tried by a jury? If such be the construction, any litigious heir, though entitled to but an in-

finitesimal share of the estate, might devote the entire amount to court costs, and indefinitely prolong the settlement; for the same chapter provides for motions for new trial, bills of exception, and appeals, as in civil actions.

We think the courts would have little difficulty in conforming the operation of these sections to those cases in which the Code has expressly authorized issues of fact to be framed. Without such a provision under the decisions, parties to a contest in the probate court would never be entitled to a jury trial. But we think the statute should not be construed as granting an absolute right to a jury trial in cases in which, according to the course of the common law, a jury trial was denied as inappropriate, and especially upon the settlement of the accounts of administrators and executors, where so much is left to the mere discretion of the judge, and in the face of the language of the Code, in many sections implying that the settlement shall be by the court. Sections 1632, 1636, 1637, 1638, Code Civil Proc.

We think the court erred in excluding the testimony offered to show that the widow was forcibly excluded from the family residence. It was claimed by the administrator that she had voluntarily left with her own child, and thereupon the administrator seems to have taken charge of the residence and the other children of the deceased. From that time only $50 per month was paid to the widow, although $250 had been allowed by the court. The pretended reason for this, of course, was that she had abandoned the other children of the deceased. The same fact constituted the excuse for expending the money of the estate in the support of the other children. The administrator had been allowed to testify that she voluntarily left; that she had not offered to return; and that he had interposed no objections to her doing so. She offered evidence to disprove all this, and to show that all the supplies, clothing, groceries, etc., contained in the account, were to maintain the homestead and family in the exclusive possession of respondent while she was forcibly excluded from the family residence by the administrator. Presumptively the mother would be the head of the family, and the proper person to receive the family allowance. It must be, however, in the power of the court to direct the expenditure of the allowance in such manner as will insure the maintenance of the family, and it may happen in some cases that the mother would not be a suitable person to be intrusted with it. The administrator does not, however, by virtue of his office, become charged with the care of the family, and had no right arbitrarily to remove the children from the mother. Nor were the disbursements here in question proper charges against the estate. If, however, the conduct of the administrator was upon investigation found to be justifiable, and the expenditures for the family necessary, a reasonable allowance could be made for the support of that portion of the family. It would appear that to determine this question the evidence excluded was material and proper.

For the same reasons we think the court erred in sustaining the objection to the question asked Mrs. Moore relative to her readiness and willingness to care for, educate, and support the minor children of deceased.

We cannot say that the court erred in admitting testimony as to the traveling expenses of the attorney for the administrator. In allowing such claims, two limitations must always be kept in view: (1) The allowance should not exceed a reasonable compensation for the labor actually performed; (2) It should never exceed just compensation for such legal assistance as was necessary to enable the administrator to properly discharge the duties of his trust. This measure of compensation would be the same whether the attorney resided at Santa Cruz or San Francisco. The question is, what would be a reasonable compensation for the services required? An allowance ought not to be made for an attorney for services which the administrator should perform himself, and for doing which he receives a commission, nor for services made necessary in consequence of neglect of duty, or unnecessary and unreasonable delay

in closing the administration. Such services should be paid for by the administrator from his commissions.

We think the court erred in allowing the claim for moneys expended in the erection of a new building to the Pacific Ocean House. This money was not expended in the care and management of the estate. It was the duty of the administrator to administer and turn over the estate as soon as possible, and not to speculate with it, or carry on business on its account, or to improve it for the benefit of the heirs. *Page's Estate*, 57 Cal. 240; *Brenham* v. *Story*, 39 Cal. 179; *Tompkins* v. *Weeks*, 26 Cal. 50; *Knight's Estate*, 12 Cal. 200.

In the matter of the items for clothing and supplies for the children of decedent enough has already been said. If there was error in allowing the other charges set out in point 6 of appellant's brief, such error is not made to appear to us.

As to the books of account, it does not appear what the nature of the account was. Probably it was an account of the receipts and expenditures on the farm. Nor does it appear that there was not other evidence as to each of those expenditures. From the bill of exceptions we cannot undertake to say that the evidence was not admissible in connection with other testimony.

We cannot lay down as a universal rule that in no case should an administrator be allowed to employ a book-keeper. This may properly be left to the probate judge. He may allow it if proper. If the services were such as, under the circumstances, the administrator ought to have performed, and for which his commissions are intended to compensate him, such charge should be disallowed.

We think the court erred in allowing the sum of $800 for the lot of land adjacent to the Pacific Ocean House. After what we have said in regard to the expenditure for building the addition to the hotel, it is not necessary to discuss the matter further.

We are unable to see how the appellant was injured by the ruling in regard to the certificate of discharge from the lunatic asylum.

We also think the court erred in excluding testimony offered to prove that the administration of the estate was unnecessarily prolonged through the willful fault of the administrator. This point seems to have been made in most, if not all, of the exceptions, and was a most important question with reference to the settlement. We refrain from expressing any opinion as to whether, as a matter of fact, the administrator is in fault in that respect; but, so far as the bill of exceptions discloses, there is no good reason why the estate could not have been settled up, and the property turned over, to the owners within one year. If he has failed in his duty in this respect, he should not be allowed any costs incurred which have been necessitated by such delay. It would seriously affect the question of the allowance of attorney's fees, and still more seriously the matter of the allowance for the support of the family. Apparently it is the most important question involved in the controversy.

There seems to have been no lack of evidence in regard to the expenses paid by the administrator before his appointment. They were fully proved to the satisfaction of the court.

There was no error in admitting oral testimony of the payment of taxes. The tax receipt is an official document provided by law, and raises a presumption that it is given for taxes duly assessed. This evidence, however, does not preclude other evidence, and in this case the loss of the receipts was shown before the oral testimony was received.

We do not understand from the findings that the estate suffered any loss from the loan of $2,000 to J. D. Chace & Co. It seems to have been found that the full sum was charged against the administrator without interest. If interest ought to have been charged upon that amount, the record fails to show the facts which would require it. While the good faith of the administrator is no defense for the loss of money so loaned by him, still he cannot be

held responsible for the interest stipulated to be paid unless he has collected or can collect it.

This decision is of course upon the facts as presented in the record, which is quite meager. Upon a retrial it is possible a very different case may be made. The order and decree are reversed, and the cause remanded for a new trial of the contest in accordance with this opinion.

We concur: PATERSON, J.; MCKINSTRY, J.

72 Cal. 359

In re Disbarment of MOORE. (No. 11,905.)

(*Supreme Court of California.* May 25, 1887.)

ATTORNEY—DISBARMENT.

In a proceeding for the disbarment of an attorney, *held*, that charges against defendant of receiving money from a client to apply to certain purposes, and of retaining the money, and not applying it as agreed, were sustained by the evidence, and that defendant should be suspended from practice for five years.

In bank. Original proceeding.

N. S. Wirt, for prosecution. *Mr. Moore*, for defense.

THORNTON, J. The accusation against Moore contains four charges: "*First.* That about the eleventh day of October, 1886, one Erza F. Denison paid to said defendant the sum of $65 to procure a searcher to search the records and files of the county clerk's office of the city and county of San Francisco, and to have an abstract made of the suits pending against said Denison in the various courts of said city and county; that said search and abstract were never made, and said $65 were never returned or repaid to said Denison in any way. *Second.* That about the thirteenth of October, 1886, said defendant was requested and authorized by said relator to collect the sum of $90 from said Denison as an attorney's fee for professional services rendered by said relator, and it was then and there agreed that said defendant should have thirty (30) dollars from your relator for collecting the said ninety (90) dollars from said Denison; that about the twentieth of October, 1886, said defendant collected said $90, and kept the $60, the balance belonging to your relator, and still keeps and detains all of the same, without just cause after demand. *Third.* That said defendant obtained the further sum of $60 from said Denison about the twenty-fifth day of October, 1886, to procure dismissals of said cases pending against said Denison in said city and county, and that said cases and suits were not and are not now dismissed. *Fourth.* That said defendant obtained the further sum of $150 from said Denison to procure dismissals of the cases of Burke, Bourne, Forbes, Treadwell, Warrington, and Gray against Denison, and agreed in writing to repay said sum of $150 to said Denison, in case said actions were not dismissed, and said actions were not and are not now dismissed, and the sum last aforesaid has not been repaid, and said defendant still keeps and withholds said sum of $150 after demand." It is further averred that at all times referred to in the accusation the defendant was an attorney and counselor at law of this court, having been duly admitted to practice herein.

As to the first charge, the abstract was in fact made by one Peterson at the procurement of Moore. The sum of $65 was received by defendant to pay a searcher for this service, a portion of which, amounting to $15, was paid to Peterson at or about the time he made the abstract. The remainder was paid him by Moore after this proceeding was commenced. The testimony shows that the $65 was received to pay a searcher to make the abstract mentioned in the charge; that the abstract was made; that $15 was paid for it; that the remaining $50 was retained by Moore, and paid to Peterson after this proceeding was commenced. The evidence strongly tends to show that the $50

was paid to Peterson for making an affidavit the contents of which were not true.

The second charge is proven, in substance. The $90 was received from Denison to settle a suit brought by the Miners' Foundry against Denison, which sum was, by agreement, to go to the relator, Wirt, as a fee for legal services for the Miners' Foundry in the action against Denison. This was received by the defendant for the purpose above stated, and never paid over, and the suit was not settled. The evidence is not clear that defendant knew that this money was to be paid to Wirt as a fee, but that, in our opinion, is immaterial. The charge is, in substance, that the money was to be collected and paid over to Wirt. Defendant did collect the money of Denison, and never paid it over.

The evidence as to the third charge is too general to establish it. We find it not proved.

The fourth charge is proved. The payment of the money by Denison to Moore is proved by a receipt dated October 27, 1886, as follows:

"Received of E. F. Denison the sum of one hundred and fifty ($150) dollars, the same being for fees and court expense in procuring dismissals of the following actions: *Burke* v. *Denison*, *Bourne* v. *Denison*, *Forbes* v. *Denison*, *Treadwell* v. *Denison*, *Warrington* v. *Denison*, *Gray* v. *Denison*,—the same to be repaid in case I am not successful in said matters of procuring dismissals. CHAS. H. MOORE."

We are satisfied this money was never used by Moore for the purpose for which it was received, and that it was never returned to Denison; nor was any settlement ever made by which Denison released Moore from the repayment of this money, or any other money to him in case it was not used in procuring the dismissal of the cases mentioned on the receipt, as was promised in the receipt. Denison denies that any such settlement was made, and, in our opinion, the proof sustains his denial.

In the matter of the three charges sustained, Moore was acting as attorney at law for Denison, regularly retained by him. As to the money he was to collect for the relator, Wirt, (specified in the second charge,) he was acting for Denison, and the money he was to collect was to settle the suit above named brought by the Miners' Foundry against Denison. The money was not paid to Wirt, and the suit was not settled. Neither was it returned to Denison. In the matter above mentioned, defendant was guilty of a violation of his duties as an attorney and counselor at law.

The judgment of the court is that the said Charles H. Moore be suspended from the practice of law in the courts of this state for the period of five years from the entry hereof.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; PATERSON, J.

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72 Cal. 353

ROWE *v.* COUNTY OF KERN. (No. 11,869.)

(*Supreme Court of California.* May 25, 1887.)

OFFICE AND OFFICER—COMPENSATION—COLLECTOR OF TAXES.

The tax collector of a county cannot recover, on a *quantum meruit*, from the county for services performed in the collection of county licenses, either by virtue of his office, or as a private individual, although the order imposing such licenses is passed after his term of office has begun, where the board of supervisors has made no provision for his pay for the collection of such licenses, where they have never authorized him to collect the same in any other capacity than as tax collector; and where both the supervisors and the tax collector supposed it to be his duty as such officer to collect the county license, and did not expect that he would receive any pay except as tax collector.

Department 1. Appeal from superior court, Kern county.

J. W. Freeman and *B. Brundage*, for appellant. *Taylor & Holl*, for respondent.

MCKINSTRY, J. The action is upon the *quantum meruit* to recover the reasonable value of services alleged to have been performed in collecting county license taxes. The board of supervisors passed an order requiring all persons engaged in enumerated business and occupations to pay a license tax. If, when the board passed that ordinance, the duty at once attached to and was imposed upon the plaintiff, as tax collector, to collect the county license taxes, it was a duty to be performed without additional compensation; since the board of supervisors did not fix or determine the compensation to be paid, or provide that any compensation should be paid, to the tax collector for his services in collecting county licenses. There is no implied obligation on the part of municipal or *quasi* municipal corporations which obliges them to make compensation to officers of the municipality, unless the right to it is expressly given by law, ordinance, or contract. Such officers are deemed to have accepted their offices with knowledge of the provisions of the charter or law. 1 Dill. Mun. Corp. (3d Ed.) 230.

If it was the duty of plaintiff, as tax collector, to collect the county licenses, he knew, when he accepted the office of tax collector, that the county super-

visors might pass a license ordinance, and that it remained with the supervisors in their legislative capacity (if, indeed, they had any power in the premises) to provide, or not to provide, fees or compensation for the service of collecting the licenses. Moreover, this action was not brought by the plaintiff as tax collector. His counsel insist that it was no part of his duty as tax collector to collect the county license taxes. But if the tax collector, as such, had nothing to do with respect to county license taxes, and the sole power of appointing a collector of such license taxes was in the board of supervisors, the supervisors of Kern county never, by ordinance or resolution, appointed the plaintiff license collector, or provided for his appointment, or authorized him to collect the same. The plaintiff, as a private person, could not, simply by inducing the payment of license taxes to himself, and then paying into the treasury the amount so received by him, establish a contract relation between himself and the county, from which could arise an implied promise to pay him for his services as having been performed for the county.

Whether the tax collector is *ex officio* collector of county licenses, or the county license collector must be a separate officer nominated by the supervisors, the collector of licenses is a county officer, clothed with public responsibilities, and invested with a public character. If the board of supervisors had formally appointed the plaintiff collector of county license taxes, without providing any salary or fees for the office, he could not, as we have seen, have claimed compensation after performing services, because he would have taken the office with knowledge that he was to receive no fees or salary. If the plaintiff voluntarily assumed public functions which there was no officer to perform, he can have no better claim to compensation than if the office had been created, and he had been duly appointed to fill it. Further, the fact seems to be that both the individual members of the board of supervisors and the plaintiff himself supposed it to be his duty as tax collector to collect the county license taxes, and did not suppose or expect he would receive any compensation for such service, except as tax collector. If the plaintiff may now say he did not perform the service as tax collector he must be treated as a mere volunteer. Thus, if any implied promise to pay the value of the services could arise *prima facie* out of the performance of the service, the presumption of promise to pay was overcome by proof of the circumstances showing that plaintiff did not expect any compensation, except as tax collector, but showing the contrary. Order reversed.

We concur: TEMPLE, J.; PATERSON, J.

72 Cal. 322

FURLONG and others *v.* COONEY and others. (No. 9,674.)

(*Supreme Court of California.* May 21, 1887.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—OFFER OF SETTLEMENT.
 The defendant, in an action of ejectment, had been in the open, exclusive, and notorious occupancy of the strip of land in controversy, claiming it as a portion of his lot, from 1850 to 1876, when it was discovered by a survey that it belonged to the lot of the plaintiff. As soon as the facts of the survey were made known to the defendant, he offered to buy the claim of the plaintiff, rather than have any trouble. *Held*, that the defendant had become invested with a perfect title to the land in controversy under the statute of limitations, which his offer to buy out plaintiff's claim did not invalidate.

2. ACTIONS—JOINDER—EJECTMENT.
 Under the California Code, the plaintiff, in an action of ejectment, cannot join a claim for damages done by the defendant to other property than that sued for.

Commissioners' decision. Appeal from superior court, San Francisco.

B. McKime, for respondents. *M. Cooney*, for appellants.

BELCHER, C. C. The controversy in this case is about a strip of land 68 feet 9 inches long and from 4 to 13 inches wide. The strip is a part of 50-vara lot No. 186, which is situated on the side of Telegraph Hill, in the city of San Francisco, and is bounded on the north by Union street, and on the west by Montgomery street. The plaintiffs claim title to the strip under an alcalde grant of the lot, and through sundry mesne conveyances from the grantee, and the defendants claim title to it under the statute of limitations. The case was tried before a jury, and the plaintiffs recovered a verdict, on which judgment was entered for the possession of the strip in question, and damages in the sum of $300 for the witholding thereof. The defendants moved for a new trial, and now prosecute this appeal from the judgment and an order denying their motion.

The material facts of the case, as disclosed by the evidence, are as follows: In 1850, John J. Cooney, the husband of the defendant Hannah Cooney, became the owner of a part of lot 186, bounded on the north by Union street, and extending back southerly 68¾ feet, and having its western line parallel with Montgomery street, and distant therefrom 68¾ feet. In 1851 Cooney had his lot surveyed out, and then built a two-story house thereon. The house faced on Union street, and from its south-west corner he built a fence back to his rear line, and then around, so that with the house the lot was wholly inclosed. Subsequently he built a one-story dining-room and kitchen at the end of his house, leaving then about 15 feet of the rear portion of his lot uncovered by buildings. The west line of the dining-room and kitchen was four inches further west than the corresponding line of the main house, and the roof extended out five inches further. From the time of its construction until his death, in 1879, Cooney resided with his family continuously in this house, and since his death his widow has resided in it. During all the time of his residence there Cooney claimed to own all the land covered by his buildings and improvements, and, so far as appears, his ownership was never questioned or disputed until 1876, when the plaintiffs became the owners of the lot lying west of and adjacent to his property.

A few years after Cooney erected his house, one O'Connor built a two-story house on the lot now owned by the plaintiffs, placing it back from Union street, so that the front line of it was only a few inches north of the rear line of Cooney's main building. Prior to 1876 that lot was owned and occupied by several different parties, one of whom, E. B. Mastick, was called as a witness for the plaintiffs, and he was the only one of them called by either side. He testified that he knew the lot from 1853 to 1864, and that he bought it and was in the use of it for five or six years, and built a barn there. "I never had the place surveyed. I supposed that the Cooney houses were east of my easterly line,—the easterly line of this land in controversy. No question arose about it when I lived there. When I bought the lot, Mr. Cooney's buildings were standing on the west line of his lot, where they stood during all the years I was there. We never had any dispute about our lines of land. They were good neighbors. Mr. Cooney's house was, I think, a two-story in front and one-story in rear, and a high board fence extended from his kitchen to the rear of the lot south. It was all inclosed. It was in that way all the time I was there." And on cross-examination, he said: "When I bought my lot I saw the Cooney buildings and fence there. Mr. Cooney occupied these premises and buildings with his family from 1853 to 1864. To my own knowledge he was in actual possession of the ground all that time. I never disturbed him, nor did he disturb me. The house now called Furlong house formed the inclosure on the east, and the Cooney fence was to the rear. *Question.* Did you during all that period, from 1853 to 1864, acquiesce in the possession by John J. Cooney of all this land inclosed and built upon by him? *Answer.* Yes, sir; I never knew of their being beyond the line."

The defendant Hannah Cooney was called as a witness for defendants, and

testified, among other things, that she began to live on the lot in 1850, and had resided there ever since. "My husband and family occupied the land and premises upon which our buildings and fences now stand since 1850 to the time of his death, continuously, without any interruption by anybody until Mr. Furlong interfered with us. * * * He did not hold this strip of land under anybody. He claimed it in his own right. He occupied it as his home and for his family during all those years, and he held it as his own. * * * Mr. O'Connor built this Furlong house where it stands. The eaves of my kitchen and the main house were just the same when he built his house as they are now. * * * We did not know we were off our line, and did not know until after survey made in June, 1876. * * * I believe my husband had a survey made in early times,—I think it was in 1851,—and according to the survey we built our house there. I recollect his making a survey. We lived on this property before we put up our building. We had a tent there before that."

Another witness was called for defendants who had owned and lived upon the lot adjoining on the south the Cooney and Furlong lots for about 30 years. He testified that he had known these lots since 1851, and as to the times when and the persons by whom the improvements thereon were erected and occupied, and then said: "I never heard any of the former owners of the Furlong lot dispute Mr. Cooney's right to occupy this land upon which his buildings stood. I never heard any one dispute Mr. Cooney's right to occupy the land in dispute, and upon which his buildings have stood since 1851. Hudson occupied the adjoining lot at one time as owner. He never disputed Cooney's right to it. His right to it was never questioned by the owners before Furlong. I never heard any controversy between them—Cooney and Furlong's predecessors—as to this boundary line. There never was any claim made, to my knowledge, by any owner before Furlong for anything east of the Furlong house; they never claimed east of that. Mr. Cooney always, since 1851, to the time of his death, claimed all the land upon which his buildings stand to be his property." And on cross-examination, he said: "I did hear Mr. Cooney speak of this property; of course I did. He said he owned it. He claimed it all, because he had a survey made in 1850 or 1851. When he built his house he told me so. When I bought my lot he told me that the lot was his lot. I never heard him say anything about thirteen inches of land on Furlong lot. He did not know that he was on the Furlong lot."

In June, 1876, after the plaintiffs purchased their lot, they had it surveyed, and then for the first time discovered that Cooney's main building extended over their line four inches, his dining-room and kitchen eight inches, the roof reaching out five inches still further, and that the fence in the rear was over the line four inches. Thomas Furlong, one of the plaintiffs, testified that after making this discovery he at once notified Cooney of it, and that, after looking at the surveyor's lines and conversing upon the subject for about an hour, Cooney said he "did not want any man's land, and that he would fix it, and would pay whatever the land was worth,—the value he would leave to arbitration. * * * He told me in June, 1876, if he had any land belonging to anybody he would leave it to arbitration; he would rather compromise than have any trouble." And in July, 1879, "he made the proposition to me to purchase the strip of land upon which his buildings encroached. * * * He said he did not desire to go to law; that he wanted to settle matters. * * * He then told me he had so much trouble about the land that he would rather fix it in some way. He said his buildings were upon it, and he supposed he was on his own land." The witness further testified that the first intimation Cooney ever gave him that he claimed any adverse interest in this strip of land was in February, 1877, and from that time until July, 1879, he was not on friendly terms with Cooney. Mrs. Furlong testified that she heard the conversation in July, 1879, and that her "husband then told him

that he was on a part of our land, and he [Mr. Cooney] seemed surprised. He said he was willing to leave it to arbitration; but nothing was ever done about it."

1. The action was commenced in April, 1881, and the first question is, "Did John J. Cooney acquire title to the demanded premises by adverse possession, under the operation of the statute of limitations?" It is, of course, settled law that, to constitute an adverse possession of land, so as to set and keep the statute of limitations in motion, the occupation of the one claiming to hold adversely must be open, visible, notorious, and exclusive, and must be retained under a claim of right to hold against the owner, and the owner must have knowledge, or the means of knowledge, of such occupation and claim of right. *Thompson* v. *Pioche*, 44 Cal. 508; *Thompson* v. *Felton*, 54 Cal. 547. Here the testimony shows, without conflict, that Cooney's occupation of the strip of land in controversy met all these requirements. For 25 years his occupation of it was open, visible, notorious, and exclusive. He claimed it, too, as his own during all that time, and the true owners had knowledge, or the means of knowledge, of his occupation and claim.

But it is urged on behalf of respondents that Cooney's statements, made to Furlong in June, 1876, and July, 1879, were, in effect, admissions that plaintiffs' title was good, and that he had not so claimed and occupied the property as to give him any right or title thereto under the statute. We do not think the statements referred to can have the effect claimed for them. They only show that he did not want any trouble or suit about the matter, and was willing to buy his peace. By his adverse occupancy he had already become invested with a perfect title, which could only be divested by a conveyance, or an adverse occupancy against him for five years; and by offering to buy out the plaintiffs' claim of title he did not thereby make good their title, or in any way render invalid his own title. *Arrington* v. *Liscom*, 34 Cal. 365; *Cannon* v. *Stockmon*, 36 Cal. 535.

In both these cases it was held that an adverse possession of land for the period prescribed by the statute of limitations not only bars the remedy, but practically extinguishes the right of the party having the true paper title, and vests a perfect title in the adverse holder. And in the last case an instruction in the following words was asked by the defendant, and refused: "A party in possession of premises, claiming to own the same, may buy his peace by purchasing any outstanding title, or claim of title, without admitting such title, or claim of title, to be valild." Of this, the court said: "We have no doubt that the instruction refused correctly states the law on the point. A party may very well deny the validity of an adverse claim or title, and yet choose to buy his peace at a small price, rather than be at great expense and annoyance in litigating it. And such is, doubtless, often the wiser course. It is notorious that, in the confusion of titles to land in this state, it is a matter of every-day experience to buy up not one only, but many, adverse claims, even where the party buying believes he has, and actually has, the better title. To adopt any other principle than that embraced in the instruction refused would, in this state, be to deprive a very large portion of the holders of real estate, if not all of them, who stand in need of it, of all benefit of the statute of limitations. A party is not bound to admit, and does not necessarily admit, title in another, because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession, and protect himself from litigation, in any lawful mode that appears to him most advantageous or desirable."

2. The only other question which need be considered relates to the damages awarded the plaintiffs. In their complaint the plaintiffs alleged that the value of the rents and profits of the property sued for was $1 per month, and for this they prayed judgment in the sum of $49. They also alleged that they had been damaged by the withholding of the property in the sum of $5,000,

and for this they prayed judgment. The answer denied that the value of the rents and profits was any sum greater than 20 cents per month, and denied that the plaintiffs had been damaged by the withholding of the property in the sum of $5,000, or in any sum whatever. No proof was offered as to the value of the rents and profits, but it was attempted to be shown that the plaintiffs' house on their adjacent land had been damaged very considerably by the obstruction by defendants of its lights, etc. Under our Code the plaintiff may unite in the same complaint a claim to recover specific real property with damages for the withholding thereof, or for waste committed thereon and the rents and profits of the same. Section 427, Civil Code Proc. The measure of damages caused by the wrongful occupation of real property, in a case like this, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action, and the costs, if any, of recovering the possession. Interest may also be allowed when necessary to a complete indemnity. Sections 3287, 3334, Civil Code; *Haggin* v. *Clark*, 51 Cal. 112; *Vandevoort* v. *Gould*, 36 N. Y. 646.

But a claim for damages done by the defendants to other lands or property of the plaintiffs cannot be joined in an action like this. If such damages have been sustained, they must be sued for separately. Here the damages given the plaintiffs were clearly in excess of the value of the use of the demanded premises for five years before the action was brought, with interest thereon; and besides they were admittedly for injuries done to other property.

It follows, in our opinion, that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

72 Cal. 330

NOBLE *v.* DESMOND. (No. 9,465.)

(*Supreme Court of California.* May 21, 1887.)

SHERIFF—LIABILITY FOR NEGLIGENCE.

The sheriff seized a lot of cattle belonging to one B. under a writ of attachment against B. One G. claimed the cattle, brought replevin against the sheriff, and, after executing the usual affidavit and undertaking with sureties, the cattle were delivered up to him. The sheriff took no steps to find out whether G.'s sureties were sufficient, nor did he compel them to justify. G. sold the cattle and left the state. The attachment creditor recovered judgment against B., but never could collect anything on it. Judgment was given in the replevin suit against G. and his sureties, but this also could not be enforced. The attachment creditor brought suit against the sheriff on his official bond. *Held*, that the sheriff was clearly negligent, and that the suit would lie.

Department 2. Appeal from superior court, city and county of San Francisco.

Clitus Barber, for appellant. *Stetson & Houghton*, for respondent.

THORNTON, J. In an action brought by plaintiff against one Bruce an attachment was regularly sued out and placed in the hands of the defendant as sheriff of the city and county of San Francisco, who levied it upon a lot of cattle as the property of Bruce, and took them into his possession. One Goss claimed the property, and sued the defendant in an action of claim and delivery, usually with us styled replevin, to recover the cattle seized under the writ. Goss made affidavit, and executed the usual undertaking with sureties, as required by the statute, (Code Civil Proc. §§ 510–519,) and upon the receipt of the affidavit, undertaking, and requisite notice, the coroner took the cattle

from the possession of the defendant. The latter did not execute the counter-undertaking, as required by section 514, Code Civil Proc., nor did he give notice that he excepted to the sufficiency of the sureties, (see section 513, Code Civil Proc.,) and the coroner delivered the cattle to Goss. It appears that Goss, not long after receiving possession of the property, sold it, and left the state. The action brought by Goss was tried, and the usual judgment in replevin passed for the defendant. The plaintiff herein recovered judgment against Bruce, on which he has been unable to make anything. Bruce had no other property at the time the attachment was sued out except the cattle above mentioned. The judgment against Goss has not been enforced, nor any part of it paid or satisfied.

It is claimed that Goss, and the sureties on the undertaking given by him, were insolvent when it was executed, and still continue insolvent; that the sheriff (Desmond) failed to except to the sufficiency of the sureties on the undertaking; that the sheriff did not reclaim, or attempt to reclaim, the property levied on, and did not notify either plaintiff or his attorneys of the commencement of the action against him by Goss, or that any undertaking had been given by Goss.

The evidence tends to show that the sureties were insufficient at the time they executed the undertaking, and the jury must have found such to be the fact in rendering a verdict for plaintiff. On the evidence appearing in the statement, we cannot say that it was insufficient to sustain the verdict. It was for the jury to say what weight the evidence was entitled to; and, as it tended to show that the sureties were insolvent at the time mentioned, we cannot interfere with the judgment or order in this case on that ground. That the sheriff did not except to the sureties or give a counter-bond is not disputed. And we are of opinion that the plaintiff knew nothing of the action brought by Goss, or of his having executed the undertaking above mentioned, until after the property had been delivered to Goss, when it was too late to except to the sureties, or execute a counter-undertaking.

It is argued that the defendant did nothing and omitted nothing in his capacity as sheriff for which he is responsible. In our opinion, the evidence shows negligence in the sheriff for which he is clearly responsible. When the sheriff seized the cattle under the writ of attachment, he was bound to hold them to satisfy any judgment which might be recovered in the action of Noble against Bruce. The measure of his obligation in regard to the property seized is that of a person of ordinary discretion and judgment in respect to his own property; that is, he is bound to use such care and diligence as a person of ordinary prudence might reasonably be expected to use in regard to his own property. *Jones* v. *McGuirk*, 51 Ill. 382. See the cases cited in Shear. & R. Neg. § 530, and notes.

The undertaking given in this case is intended by the law as standing in place of the property taken under it,—as the equivalent of it. See *Swezey* v. *Lott*, 21 N. Y. 483. It is conditioned for the return of the property taken to the defendant, if return thereof be adjudged, and for the payment to the defendant of such sum as may from any cause be recovered in the action against plaintiff. The sheriff is holding the property for another and is acting for another. He is to be regarded as an agent, and a paid agent of the plaintiff for whom he was acting. He is bound, in regard to the undertaking given to him as the equivalent of the property, to see that it is valuable; to act as an agent or a bailee for hire might reasonably be expected to act under the circumstances. Such agent or bailee would be expected to use every means to have his principal or bailor protected. It would be reasonable to expect him to inquire into the sufficiency of the sureties, and to use every reasonable mode of ascertaining whether they were or not solvent. If the plaintiff in the action in which he had seized the property, or his attorney, could be seen or communicated with, an agent of ordinary prudence would inform them,

or one of them that they might aid in ascertaining the condition of the sureties in point of responsibility.

In this case we are of opinion that the sheriff was clearly negligent in accepting the undertaking in question without taking the steps to find out whether the sureties were sufficient. At any rate, he should have compelled them to justify, which he totally neglected to do. It does not appear that he made any inquiry as to the pecuniary condition of the sureties, and we are convinced that if the sureties had been held to justify, that they would have been rejected as insufficient. The sheriff did not come up to the obligation of care and diligence required by law. He was therefore guilty of negligence in the discharge of the duties required of him by law, for which he and his sureties are responsible.

We find no error in the record, and the judgment and order are affirmed.

We think it proper to say that, feeling some doubt on the point whether the appeal should be dismissed on account of the language of the stipulation in regard to the transcript, we do not pass on the motion; and, as we conclude to affirm the judgment and order, it is unnecessary to pass on it. Ordered as above.

We concur: McFARLAND, J.; SHARPSTEIN, J.

72 Cal. 450

ALLEN *v.* COUNTY OF SAN BERNARDINO. (No. 11,683.)

(*Supreme Court of California.* June 4, 1887.)

DISTRICT AND PROSECUTING ATTORNEY — AUTHORITY — SPECIAL COUNSEL — DISMISSAL OF APPEAL.

As between the board of supervisors of a county and the district attorney, on the one hand, and an attorney claiming to be special *counsel* for the county, on the other, the former are superior in authority, and have a right to control all proceedings in a case to which the county is a party. An appeal taken by the county will therefore be dismissed on motion of the district attorney, made by direction of a resolution of the board, over the objection of such special counsel.

Department 1. Appeal from superior court, San Bernardino county.

Legare Allen, respondent, brought this action, as county recorder, to recover a money judgment against appellant, and the facts are as follows, viz.: The respondent from the first day of January, 1885, up to the first day of February, 1886, received the sum of $5,186.50 for official services as county recorder of the appellant, in the way of fees collected by him for recording instruments of writing, (and not as salary,) and then paid the same into appellant's treasury. Respondent asks to recover back a portion of said sum so paid over, to-wit, $301, for the reason this latter amount was received by him from diverse persons for recording, in his said office of county recorder, notices of location of mining claims, and that the law did not require him to record such notices, and, if recorded, did not require him to pay said sum into the county treasury. Plaintiff recovered judgment, from which, and an order denying new trial, these appeals are taken by the county.

John L. Campbell and *Chas. R. Gray*, for appellant. *Harris & Allen*, for respondent.

BY THE COURT. The board of supervisors, by resolution, directed the district attorney to ask this court to dismiss the appeal herein. The motion was made accordingly; counsel who had appeared specially in the court below for defendant objecting to the granting of the motion. As between the board of supervisors and district attorney, on the one hand, and an attorney claiming to be special *counsel* for defendant, on the other, the former are superior in authority, and have a right to control all proceedings in a case to which the

county is a party; at least, in the absence of an objection by the attorney general. It is therefore ordered that the appeal herein be, and the same is hereby, dismissed.

72 Cal. 356

WALLACE *v.* MAPLES. (No. 11,539.)

(*Supreme Court of California.* May 25, 1887.)

REPLEVIN—CROPS—CONTRACT.

Article 7 of a contract relating to the farming of certain lands provided that the title to the crops raised by M., the farmer, should remain in W., the owner of the land, until M. had performed the covenants in article 8. That article contained an agreement by W. to deliver four-fifths of the crop to M. "upon the full performance by him of all the stipulations and covenants *in this article above specified.*" *Held*, in claim and delivery by W. for the whole crop on the ground of a breach of covenants contained in other articles, that the covenants in articles 7 and 8 were independent of those broken, and that M., having fully complied therewith, was entitled to four-fifths of the crop.

Department 2. Appeal from superior court, Tulare county.

Brown & Daggett, for Wallace, appellant. *Atwell & Bradley* and *A. B. Hunt*, for Maples, respondent.

MCFARLAND, J. This is an action to recover certain wheat or its value. The sheriff took possession of the property under the statute, and delivered it to plaintiff. Defendant answered, denying plaintiff's right to the wheat, averred ownership in himself, and claimed a return of the property or its value. The case was tried without a jury, and the court found in favor of defendant, and gave him judgment for the return of 4,360 sacks of wheat, or $7,935.20, found to be its value. Plaintiff appealed from the judgment, and from an order denying a new trial.

The litigation arose out of a long, written contract between the parties about the farming of certain lands belonging to plaintiff. The contract is formally divided into 12 articles, numbered consecutively from "article 1 to article 12." The main drift of the contract is as follows: Defendant was to have possession of the lands, to be farmed and cultivated by him, for the term of four years from October 1, 1884. He was to cultivate all of said lands each season in a skillful and thorough manner, in alfalfa, corn, and wheat, at his own expense, and also to harvest, thresh, and sack the crops of corn and wheat. He was to give certain alfalfa and alfalfa seed to plaintiff. He was to pay all assessments on certain stock of water companies which furnished water for irrigating the land, and he was to do certain other things not important to be here mentioned. At the end of the harvest, and after the corn and wheat were sacked, defendant, upon certain conditions being complied with, was to have four-fifths of the grain, and plaintiff was to have one-fifth.

During the first year of the term, defendant failed to perform some parts of his contract. The main failures relied on by plaintiff are—*First*, that he failed to pay a small part of the assessments due on the water stock; and, *second*, that a part of the land was not cultivated, or, at least, was not cultivated in a "skillful and thorough manner." And plaintiff assumed that, on account of these breaches of the contract, defendant forfeited—or rather never acquired any interest in—the wheat which he raised on the lands. Upon this theory, after defendant had harvested, threshed, and sacked the wheat raised that year, and delivered one-fifth to plaintiff, and had hauled the other four-fifths to a warehouse as his own, she commenced this action, and took possession of it all.

The main question to be determined in the case is whether the covenants of articles 7 and 8 of the contract are independent covenants, or whether all the covenants are mutual and dependent. The parts of the contract which respondent failed to comply with, as above stated, are not contained in said

articles 7 and 8. Article 7 provides that all the wheat and corn shall be the property of appellant, and that respondent shall have no right or authority to sell or dispose of it "until all the stipulations and covenants *contained in article 8 hereof* are fully performed by said party of the second part." The first part of article 8 contains covenants of respondent that he will mark one-fifth of the grain, when sacked, in a particular manner, and deliver it at a warehouse to be designated by appellant; that he will then pay appellant certain moneys for loans and advances, with interest; and that he will also pay appellant all moneys due on account of sales of her alfalfa hay and seed, etc. Respondent fully complied with all his covenants contained in said article 8. The article then proceeds as follows: "And said party of the first part [appellant] agrees that upon the full performance by said party of the second part [respondent] of all the stipulations and covenants *in this article above specified*, but not otherwise, she will deliver to said party of the second part, to have and to hold as his property, four-fifths of each crop of wheat and corn produced upon said lands while the same are cultivated by said party of the second part under this agreement, which said four-fifths of said crop shall be delivered to said party of the second part on the land when the same is threshed and put in sacks, and which four-fifths of said crops said party of the second part agrees to take and receive as his compensation for his labor and expense in cultivating said lands to corn and wheat under this agreement."

It seems to us clear that the provisions of articles 7 and 8 are independent covenants; and that upon a full compliance with them respondent became the owner of four-fifths of the wheat. Of course, if respondent violated any of his covenants not contained in said two articles, appellant has her remedy in an action to recover whatever damages she has sustained by such violation.

There is nothing in the point that appellant did not "deliver" the wheat in contest to respondent. Respondent already had the actual possession of both the land and the wheat, and there was no further act of delivery to be done by appellant.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

72 Cal. 313

TOBELMAN and others *v.* HILDEBRANDT and others. (No. 9,597.)

(*Supreme Court of California.* May 20, 1887.)

1. JUDGMENT—ESTOPPEL—EXECUTORS AND ADMINISTRATORS.

Under Code Civil Proc. Cal. § 1637, providing that the settlement of the account of an executor, and the allowance thereof by the court, is conclusive against all persons, not under disabilities, in any way interested in the estate, heirs at law are estopped by a decree allowing the final account of their ancestor's executor, and ordering distribution, to bring an action against the executor to recover the amount of a promissory note alleged to have been given by him in payment of land which he bought of the testator, and by him fraudulently destroyed, when the note was omitted from his inventory, and the heirs had knowledge at that time of the fraudulent destruction set out in their complaint.

2. JUDGMENT—COLLATERAL ATTACK—COURTS OF PROBATE.

Under the law of California, an order of a probate court allowing the final account of an executor is a final settlement and adjudication of the matter of which it assumes to dispose, and it cannot, therefore, be collaterally impeached or attacked in the same or any other court by the parties thereto, or those in privity with them.

Commissioners' decision. Department 2.

Appeal from superior court, city and county of San Francisco.

J. C. Bates, for Tobelman and others, appellants. *A. H. Longborough*, for Hildebrandt and another, respondents.

SEARLS, C. This is an action to recover upon a promissory note alleged to have been made by defendant Hildebrandt to August Tittel, the testator of

plaintiffs. Judgment of nonsuit was rendered, from which, and from an order denying a new trial, plaintiffs appeal. The complaint alleges that on the twentieth day of August, 1866, August Tittel, in consideration of $13,000, sold and conveyed to defendant, Hildebrandt, a lot of land on Sutter street, San Francisco; that defendant paid in cash $3,000, and made his promissory note for the sum of $10,000, the residue of the purchase price of said lot; that this promissory note was, with other papers of Tittel, placed in an iron safe, to which defendant had access, and that defendant was the confidential agent of Tittel.

August Tittel departed this life February 1, 1868, leaving a last will under which defendant Hildebrandt was appointed executor. The will was duly admitted to probate, and administered upon by the defendant as executor, who filed an inventory, and ultimately rendered his final account, which was approved, and a decree made distributing the estate. The note in question was not included in the inventory, and, the complaint charges, was fraudulently destroyed by the defendant and omitted from the inventory, with the fraudulent intent of cheating plaintiffs, who are beneficiaries under the will. The answer denies making the note, and all allegations relating thereto.

At the trial plaintiffs sought to prove, by plaintiff Margaret Tobelman, conversation between August Tittel, deceased, and his wife, including declarations of the former in his own favor, touching the existence of the promissory note in suit. The court sustained an objection to the testimony. These declarations were hearsay and clearly incompetent.

The motion for a nonsuit was based upon the following ground: "The complaint, containing a copy of decree settling a final account, is final and conclusive as to the parties, and cannot be disturbed, except by a direct proceeding." According to the allegations of the complaint, defendant filed his final account, and prayed for a decree of distribution of the estate, which was granted; and the decree, a copy of which is attached to the complaint, and made a part thereof, was duly signed and filed January 4, 1882. "The settlement of the account, and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate." Code Civil Proc. § 1637. Section 1908 of the same Code declares that the judgment or order of a court, having jurisdiction as to the administration of an estate, is conclusive. *Reynolds* v. *Brumagim*, 54 Cal. 254; *Tebbets* v. *Tilton*, 24 N. H. 120; *Grady* v. *Porter*, 53 Cal. 680; *Estate of Stott*, 52 Cal. 403.

The plaintiffs herein appeared in the probate court and filed objections to the final account of defendant as executor. They do not aver in their complaint that they were ignorant of the facts constituting the alleged fraud on the part of the defendant, at the time the executor's account was settled, and the evidence shows that they were aware of such facts long prior thereto. The decrees and orders of a probate court, made in the exercise of jurisdiction conferred upon it by law, are as final and conclusive as the judgments, decrees, or orders of any other court. The character and finality of *res adjudicata* attach to the decisions of probate courts, irrespective of the nature of the issue determined, provided the court had jurisdiction to determine it. Freem. Judgm. § 319*a*. It follows that an order of a probate court allowing or disallowing a final account is a final settlement and adjudication of the matter of which it assumes to dispose, and it cannot thereafter be collaterally attacked or impeached in the same or any other court by the parties thereto, or those in privity with them. The decree of a probate court settling the account of an administrator may be attacked for fraud or mistake like other judgments.

It was said in *Griffith* v. *Godey*, 113 U. S. 93, 5 Sup. Ct. Rep. 383: "If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate, may require, even if the probate court might, in such case, open its decree, and ad-

minister upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity."

The evidence, as before stated, shows affirmatively that plaintiffs were aware of the facts constituting the alleged fraud, long prior to the settlement of the final account of the administrator. This being so, and there being no impediment to the investigation in the probate court, plaintiffs are concluded by the action of such court. For this reason, and for the further reason that there was no sufficient evidence to support a verdict in favor of plaintiffs, had such verdict been rendered, the judgment and order appealed from should be affirmed

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 371

HEILBRON and others *v.* HEINLEN and others. (No. 11,566.)

(*Supreme Court of California.* May 28, 1887.)

TRESPASS—QUARE CLAUSUM—EVIDENCE.

In an action of trespass *quare clausum*, defendant, without pleading the statute of limitations, offered evidence of his own occupation of the close for 15 years. *Held* that, the question being one of possession, and not of title, such evidence was admissible.

Commissioners' decision. Department 2.

Appeal from superior court, Fresno county.

G. A. Heinlen and *Atwell & Bradley*, for appellants. *D. S. Terry*, for respondents.

BELCHER, C. C. This is an action to recover damages for trespass upon real property. It is alleged in the complaint that for more than two years last past the plaintiffs have been seized and possessed of all that certain tract of land in the counties of Fresno and Tulare known as the "Rancho Laguna de Tache," containing about 48,000 acres, and for which a patent, dated March 6, 1866, was issued by the United States to Manuel Castro; that on the seventeenth day of December, 1883, the plaintiffs were engaged in constructing a fence of posts and wire along the right bank of Kings river, which is the southern boundary of the *rancho*, and had completed the fence for a great part of said line; that on the day named the defendants, without right, and against the will of plaintiffs, cut and destroyed the said fence for a distance of about one and a half miles on sections 30 and 31, in township 18 S., range 20 E., and on a portion of section 36, in township 18 S., range 19 E., and also cut and destroyed the posts which had been set by plaintiffs for the purpose of building a fence for a distance of about two and one-half miles on sections 1 and 2, in township 19 S., range 19 E.

The defendants, by their answer, deny that the plaintiffs are or ever were seized or possessed, or entitled to the possession, of the lands described in their complaint; deny that the plaintiffs at the time named, or at any time, were engaged in constructing or had constructed any fence along the right bank of Kings river; and deny that at any time, they, or either of them, ever cut or destroyed any fence, for any distance, on any sections in any township or range, or cut or destroyed any posts on any sections in any township or range, or at all, upon any lands of plaintiffs, or any or either of them, or that the posts or fence alleged to have been cut or destroyed were situate upon any lands of the plaintiffs, or either of them.

At the trial the plaintiffs introduced in evidence the patent, with the map

attached thereto, from the United States to Castro; deeds from Castro, conveying the whole *rancho* to Jeremiah Clark; and a lease of the whole *rancho*, dated May 1, 1880, from Clark to the plaintiffs for a term of 10 years. They then called a witness to prove the building of the fence, and setting of the posts along the right bank of Kings river on the sections named, and that the fence and posts were cut and destroyed by certain parties, who said they were in the employment of defendants.

The defendants then called several witnesses, some of whom had lived near and known Kings river, and the sections of land named in the complaint, since 1857, and others for shorter periods, who testified that the fence constructed and posts planted by the plaintiffs were not upon the right or north bank of that river, but upon the bank of a slough which commences on the south side of the river in section 30, township 18 S., range 20 E., and runs thence south of the river, and at a considerable distance from it, to section 12, township 19 S., range 19 E.; that the slough has never carried any water except in times of high water, and is and always has been known as "Button Willow Slough." The defendants then introduced in evidence swamp-land certificates of purchase and patents from the state, conveying to the defendant, John Heinlen all the lands lying between the river and slough, and on which the fence and posts were placed, except that part thereof lying in section 30, township 18 S., range 20 E., and for that they introduced a similar patent to Justin Esrey.

The defendants then offered to prove by competent witnesses that for the last 10 or 15 years they had been in the quiet and peaceable possession of all the land described in their patents and certificates of purchase, and that they had continuously used and occupied it, by farming a portion of it, and grazing stock upon it. The plaintiffs objected to this testimony, upon the ground that the defendants had not pleaded the statute of limitations, and therefore it was incompetent and inadmissible under the pleadings. The court sustained the objection, the defendants reserving an exception; and this presents the principal question for consideration in the case.

It will be observed that the plaintiffs claimed to be tenants of the property, and that they offered no proofs to show that they had ever taken or been in the actual possession of it. And that they did not claim possession is shown by statements made by their counsel during the progress of the trial, as follows: "We don't rely upon anything but strict legal right. We don't claim by virtue of possession." The question, then, is, what must a tenant show in order to maintain an action of trespass *quare clausum?*

In *Pollock* v. *Cummings*, 38 Cal. 685, the court says: "In an action of trespass upon real property, the plaintiff may recover upon alleging and showing, in addition to the injury complained of, his possession of the premises; and his *right* to the possession is not involved unless the defendant tenders an issue upon that fact; and in such case, as was said in *Holman* v. *Taylor*, 31 Cal. 338, the right of recovery depends both upon possession in fact and the right of possession."

In *Uttendorffer* v. *Saegers*, 50 Cal. 496, the defendant pleaded a general denial, and the court said: "The action is trespass *quare clausum*. Its *gravamen* is the alleged possession of the plaintiff at the time of the entry of the defendant. In this view the offer of the defendant to show that a tenant of the plaintiff, and not the plaintiff himself, was in the actual possession at the time of the alleged trespass should have been allowed."

In *Raffetto* v. *Fiori*, 50 Cal. 363, the plaintiffs obtained a patent for mining ground, and brought an action of trespass against the defendants for working the ground, and taking gold therefrom. The defendants were in possession of the ground, claiming title thereto before the patent was issued, and when the action was brought and tried, it was held that the action of trespass could not be maintained. There have been several other analogous cases in this

state where it was held that the owner of land could not maintain replevin for crops harvested therefrom by one in the adverse possession of the land; the court saying that the title to real property could not thus be tried in a personal action. *Page* v. *Fowler*, 37 Cal. 100; *Page* v. *Fowler*, 39 Cal. 412; *Pennybecker* v. *McDougal*, 46 Cal. 661.

In Greenleaf on Evidence (section 613) it is said: "Though the right of property may and often does come into controversy in this action, [trespass,] yet the gist of the action is the injury done to plaintiff's possession. The substance of the declaration, therefore, is that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff, and under the general issue the plaintiff must prove (1) that the property was in his possession at the time of the injury, and this rightly as against the defendant; and (2) that the injury was committed by defendant with force."

There are many other authorities to the same effect, but they need not be cited.

Here the defendants denied the plaintiffs' possession of the *locus in quo*, and offered to show their want of possession by proving that defendants had been in possession of the land, using it for farming and grazing purposes for 10 or 15 years. The object was not to prove title in the defendants under the statute of limitations, and it was not necessary that the statute should have been pleaded in order to make the testimony admissible.

In our opinion, the court erred in excluding the offered testimony, and the judgment and order should therefore be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

72 Cal. 376

HEILBRON and others *v.* HEINLEN and others. (No. 11,551.)

(*Supreme Court of California.* May 28, 1887.)

1. PLEADING—AMENDMENT—EJECTMENT.
 Plaintiffs in ejectment may be permitted to amend the number of the range described in their complaint. Such amendment corrects a mistake, and does not substitute a new cause of action.
2. EJECTMENT—EVIDENCE—INSTRUCTIONS.
 In an action of ejectment, where defendants claimed title by adverse possession, and there was evidence to support that defense, an instruction ignoring such defense, and directing the jury to find for the plaintiff if he established the title set up by him, *held* erroneous.
3. LIMITATION OF ACTIONS—ADVERSE POSSESSION—STATUTES.
 The amendment to section 325, Code Civil Proc. Cal., made April 1, 1878, which requires proof of occupation, claim, and payment of all taxes for five years, to establish adverse possession of real property, does not affect adverse holdings prior to the date of its passage.

Commissioners' decision. Department 2.

Appeal from superior court, Fresno county.

G. A. Heinlen, for appellants. *D. S. Terry*, for respondents.

BELCHER, C. C. This is an action to recover possession of a tract of land in Fresno county, which is alleged to be a part of the Rancho Laguna de Tache, and is described as "that portion of the north-west quarter of section 36, township 18 south, range 19 east, which lies north of King's river." The complaint is in the usual form for actions of ejectment. The answer denies the plaintiffs' seizin, or right to the possession of the land, and sets up the statute of limitations. The case was tried by a jury, and the verdict

and judgment were in favor of plaintiffs. The defendants moved for a new trial, and, their motion being denied, appealed from the judgment and order.

As originally filed, the complaint described the land sued for as in range *twenty* east. Shortly afterwards plaintiffs' counsel asked and were permitted, against the objections of defendants, to amend the complaint, by striking out the word "twenty" in the description of the range, and inserting in the place thereof the word "nineteen." It is claimed that the court erred in permitting this amendment to be made, as it substituted a new and different cause of action. We see no error in the ruling. A mistake had evidently been made in describing the land sought to be recovered, and it was not an abuse of the court's discretion to allow it to be corrected. Section 473, Code Civil Proc.

At the trial the plaintiffs introduced in evidence a patent from the United States to Manuel Castro, dated March 6, 1866, for about 48,000 acres of land, known as the Rancho Laguna de Tache, and deeds from Castro conveying all his right, title, and interest in the *rancho* to Jeremiah Clark, and a lease of the *rancho*, dated May 1, 1880, for 10 years from Clark to the plaintiffs, with the privilege of purchasing the property at any time during the term. They then called witnesses to prove that the demanded premises were included within the boundaries of the grant as fixed by the patent. In support of the issues tendered by them the defendants called witnesses to prove that the demanded premises were not within the calls of the Castro patent; that the land was swamp land, and was sold as such by the state in 1861, and that the defendant John Heinlen had been occupying and claiming it adversely to the plaintiffs and their grantor for more than 10 years before the commencement of the action.

At the request of the plaintiffs, the court instructed the jury as follows:

"The jury are instructed that in no case can adverse possession be considered established under the provision of any section of the Code of Civil Procedure of California, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and that the party or persons, their predecessors and grantors, have paid all state and county taxes assessed upon said land."

"If the jury believe, from the evidence, that the land in controversy is within the boundaries of the survey attached to the patent from the United States to Manuel Castro, and that Jeremiah Clark has succeeded to the title of Manuel Castro, and that the plaintiffs hold under title derived from Jeremiah Clark, then you will find a verdict for the plaintiffs."

These instructions were misleading and erroneous. The first is in the language of the amendment made on the first of April, 1878, to section 325 of the Code of Civil Procedure. But it has been held that that amendment was not retroactive, and did not at all affect adverse holdings prior to the date of its passage. *Sharp* v. *Blankenship*, 59 Cal. 288; *Johnson* v. *Brown*, 63 Cal. 391. The second took from the jury all right to consider the defendants' claim of title under the statute of limitations, and, in effect, told them to find a verdict for the plaintiffs. The principal question at the trial was whether the defendant John Heinlen did or did not have adverse possession, under a claim of right, commencing as early as 1872, and continuing for more than five years, and there was testimony upon that question, we think, which should have been submitted to the jury.

It is objected for the respondents that the appellants have not filed a printed transcript, properly authenticated as required by the rules of this court; that the transcript contains numerous interlineations and writings in the margin of pages, and it does not appear when or by whom such interlineations and marginal writings were made; and that the statement on motion for new trial, found in the transcript, is not shown to have been agreed to by counsel, or settled by the judge. It is sufficient to say, as to the first part of this ob-

jection, that, in considering the points here discussed, we have looked only to the printed transcript, which is properly certified by the clerk to be correct, and not to the interlineations and writings on the margins of pages; and, as to the last part of it, that the statement on motion for new trial was properly settled and certified by the judge who tried the case.

It follows that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

72 Cal. 367

COHN *v.* PARCELS, City Tax Collector of the City of Los Angeles.
(No. 11,845.)

(*Supreme Court of California.* May 28, 1887.)

1. EQUITY—PARTIES—ASSESSMENTS.
 By the charter of the city of Los Angeles, when land is condemned for the widening of a street, the damages are paid by the holders of property adjacent to the street to be widened, and in no event is the city liable for such damages. *Held*, in an action brought against the tax collector of Los Angeles to restrain him from a sale of plaintiff's property in payment of damages claimed to be due from plaintiff under the said provision of the city charter, that the city was not a necessary party defendant to the action.
2. MUNICIPAL CORPORATIONS—STREETS—CREATION OF.
 A tract of land in Los Angeles was set apart by ordinance as a public square. For some time the whole tract was used as such, but afterwards a fence was erected, which inclosed the greater part of it, but left out a strip of land between the fence and the lot of C. The public used this strip of land for a long time as a passageway for vehicles and animals, but it was never declared by any ordinance of the city to be a street, or ever graded by authority of the city. *Held*, that the strip of land in question was not a public street, and that damages assessed upon C. for the widening of it as a street were improper.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

J. C. Daly and *Williams & McKinley*, for appellant. *Howard & Scott*, for respondent.

BELCHER, C. C. It is provided by the charter of the city of Los Angeles that, when land has been condemned for the widening or extension of a street, the damages shall be paid by the holders of the property fronting on and adjacent to the street to be extended or widened, and that assessments shall be levied on the property in a certain manner to raise the amount needed; and "in case any street crosses the line of or forms a junction with any street so laid out, extended, or improved, * * * the land on the corners formed by said intersection or junction shall be assessed" for an additional sum. Under the provisions of the charter, proceedings were regularly taken by the city authorities to widen and extend Main street. The plaintiff owned a lot fronting on that street, which was assessed for an additional sum of $213.78 on account of a supposed frontage on another street "forming a junction with" Main street. The defendant was about to sell the plaintiff's lot to pay this additional assessment, when this action was commenced to restrain the sale, upon the ground that the assessment was improperly made, and the sale would cast a cloud upon the plaintiff's title. The defendant demurred to the complaint upon the ground that, in collecting the assessment, he was acting in his official capacity as the agent and servant of the city of Los Angeles, and the city should have been joined as a party defendant. The court overruled the demurrer, and this ruling is assigned as error.

We think the demurrer was properly overruled. There have been many similar cases in this state brought against collectors of taxes and assessments, but the point here presented does not appear to have been made in any of them.

In support of their contention, counsel for appellant cite *Gilmore* v. *Fox*, 10 Kan. 509. That was an action to restrain the sale of real property for an assessment, and it was held that the city was a necessary party defendant. The decision was, however, based upon the ground that the money, when collected, would belong to the city, which was liable for the payment of the damages in case the assessments were not collected. That case is not in point here, for the reason that under its charter the city of Los Angeles was not made liable for the payment of the damages in any event, and the money, if collected, would have gone into a special fund, to be paid out to the parties entitled to it. The city had therefore no such interest in the case as to make it a necessary party.

At the trial the case was submitted upon an agreed statement of facts, and the only question made in regard to the validity of the assessment was as to whether plaintiff's lot fronted on a street forming a junction with Main street. Plaintiff recovered judgment, and from that, and an order denying a new trial, defendant appealed.

It appears from the agreed statement of facts that the strip of land which is claimed by appellant to be a street, and to form a junction with Main street, is a part of a tract which was owned by the pueblo of Los Angeles, and prior to 1846 was laid out by the authorities of the pueblo as a public plaza, and on the twentieth of December, 1856, was, by an ordinance of the city of Los Angeles, declared to be a public square. For some time after the passage of the ordinance, all of the land so set apart was open and used as a public square; but prior to 1872 a fence was erected which inclosed the greater part of it, leaving out Main street to the west, (which had theretofore been set apart as a public street,) and also leaving out a strip along the north line of plaintiff's lot eight feet wide. In 1872 this fence was changed and made elliptical in form, and was so placed that, at its nearest point, it was distant from the plaintiff's lot 70½ feet. The ground within the inclosure has always been used as a public park, and the strip between the elliptical fence and the plaintiff's lot has since been used by the general public for passing and repassing on foot, and with vehicles and animals, but has never been declared, by any ordinance or resolution of the city, to be a street, nor has it ever been graded under authority of the city.

Upon these facts, did the strip of land in question become a public street? We do not see how it can be rightfully claimed that it did. As well might it be said, if the square had never been inclosed, and the public had been permitted to pass and repass, on foot and with vehicles and animals, diagonally across it, that the ways so used were thereby made streets of the city. Being a part of the land dedicated as a public square, the strip must be held, we think, to remain such until its character and use shall be changed by some official and authoritative action.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 462

MILLER *v.* DUNN, State Comptroller. (No. 11,288.)

(*Supreme Court of California.* June 6, 1887.)

CONSTITUTIONAL LAW—APPROPRIATIONS—NON-ENFORCEABLE CLAIM.

An act to appropriate money to pay the indebtedness incurred by the state of California under "An act to promote drainage," which was afterwards declared uncon-

stitutional, is not itself unconstitutional under article 4, § 32, Const. Cal., forbidding the legislature to pay claims against the state under an agreement made without express authority of law. TEMPLE, J., dissenting.

In bank. Appeal from superior court, Sacramento county.

D. M. Delmas, for appellant. *A. L. Hart*, *W. C. Belcher*, and *James A. Waymire*, for respondent.

PATERSON, J. In 1880 the legislature passed an act entitled "An act to promote drainage," which was approved by the governor April 23, 1880. St. 1880, p. 123. In the passage of this act all the proceedings necessary to the effective enactment of a law by the legislature were had; and it was regularly and duly approved by the governor. According to the provisions of this act, "drainage district No. 1" was regularly organized, and public work under it commenced. The directors of the district, after proposals for bids, let contracts to different parties to do various parts of the work, as they were expressly authorized by the act to do. Respondent, among others, took two such contracts, and the amount involved in this action is for work and labor done and materials furnished under such contracts. There is no question as to the justness of his claims; but after he had done the work, and furnished the materials under his contracts, and before he had received his pay therefor, sued for in this action, this court, in an action brought against the directors of said district, decided that said "act to promote drainage" was unconstitutional. All proceedings under said act ceased, and the state comptroller refused to pay any more claims under it.

This being the situation, and some just claims acquired under the act remaining unpaid, the legislature passed an act approved March 10, 1885, (St. 1885, p. 78,) entitled "An act to appropriate money to pay the indebtedness incurred under an act entitled, 'An act to promote drainage,' approved April 23, 1880." This act expressly requires the comptroller to draw his warrants in favor of certain audited claims which accrued under said act of 1880; and plaintiff's demand here sued for is admitted to be one of such claims. The appellant comptroller refused to draw his warrants for respondent's claims; and this proceeding in *mandamus* was instituted to compel him to do so. The court below granted a peremptory writ, and the comptroller appeals.

The judgment of the court below should be affirmed. It is claimed by appellant that the act of April 23, 1880, having been held to be unconstitutional in the case of *People* v. *Parks*, 58 Cal. 624, was void *ab initio*, the same to all intents and purposes as if it had never been enacted,—a pure nullity; that an unconstitutional law is no law at all for any purpose, and that the word "law" in article 4, § 32, was used in its full sense,—*i. e.*, a *valid constitutional law*. On the other hand, it is contended by respondent that the word "law" in its popular sense is a statute passed by the legislature and approved by the executive, and it is in this sense that the word was employed in section 32.

It is useless to attempt to apply iron-clad rules of interpretation to any phrase or word used in a constitution. Especially is this true of a word which has a technical as well as a popular meaning. There is no word in the language which, in its popular and technical application, takes a wider or more diversified signification than the word "law." Its use in both regards is illimitable. In determining the office of words used in a constitution, the object is to give effect to the intent of the people adopting it. Cooley, Const. Lim. (5th Ed.) § 66. And, "where a word having a technical as well as a popular meaning is used in the constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates or the text suggests that it is used in its technical sense." *Weill* v. *Kenfield*, 54 Cal. 111; *Sprague* v. *Norway*, 31 Cal. 173. Words used in a constitution should be construed in the sense in which they were employed. They "must be taken in their ordinary and common acceptation, because they are presumed to have been so

understood by the framers, and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face according to the general use of the words employed where they do not appear to have been used in a legal or technical sense." *Manly* v. *State*, 7 Md. 135. The term "law," as used in its popular sense and in its common acceptation by "those for whom laws are made," it may be admitted, includes the whole body or system of rules of conduct, including the decisions of courts as well as legislative acts, but it certainly does not include that refined, technical, and astute idea claimed by appellant which recognizes nothing within the meaning of the term which is not constitutionally and technically perfect.

In addition to considering the independent, technical, and popular meanings of a word used in an act or constitution, we may look at other sections of the same instrument for the sense in which the word is used, as an aid to determine whether it has been used in its popular sense in the particular provision under consideration. *People* v. *Eddy*, 43 Cal. 331. A word repeatedly used in a statute will bear the same meaning throughout the instrument unless it is apparent that another meaning is intended. *Pitte* v. *Shipley*, 46 Cal. 154; *Hoag* v. *Howard*, 55 Cal. 564. Upon an examination of the provisions of the constitution in which the word "law" is used, it will be found, in a majority of instances, that it has been employed in the sense of a statute, bill, or legislative enactment, regardless of the constitutionality or validity of the act. Thus it is said: "No law shall be *passed* to restrain or abridge the liberty of speech or of the press," (section 9, art. 1;) "no *ex post facto* law shall ever be *passed*," (section 16, art. 1;) "the enacting clause of *every law* shall be as follows," (section 1, art. 4;) "the legislature shall not *pass* local or special laws in any of the following cases," etc., (section 25, art. 4;) "the legislature shall not *pass* any laws permitting the leasing * * * of any franchise," (section 10, art. 12.) When speaking of certain requisites of a valid law, however, the framers of the constitution did not use the words "statute" and "law" interchangeably. Thus it is provided that "no *bill* shall become a *law* without the concurrence," etc., (section 15, art. 4;) "every bill which may have passed the legislature shall, before it becomes a *law*, be presented to the governor," (section 16, art. 4.)

Again, it is provided that "the making of profit out of county, city, or other public money, or using the same for any purpose *not authorized by law*, * * * shall be a felony." Can it be said that those who framed and adopted the constitution intended to use the word "law" in this section to mean a law absolutely unimpeachable on any ground? That every officer should handle and place the moneys intrusted to him at his peril, no matter how fair and regular the law directing him may be on its face? If yea, "then, indeed," as was said in *St. Louis & S. F. R. Co.* v. *Evans & Howard Brick Co.*, 85 Mo. 307, "are the rights of the citizen to be sacrificed on the altar of mistake, and the statute is to be made a veritable pitfall and snare."

And so it is with respect to section 32. If it places a citizen who has dealt with the state, under circumstances like those in the case at bar, beyond the pale of legislative relief for acts done by him prior to discovering the invalidity of the law, it will be very unsafe for any one to deal with our officers unless he be possessed of that superhuman intuition or mediate intelligence which alone can tell how the question of the validity of such an act may be raised and determined after he has performed the work. Of course there is no moral obligation on the part of the state which can be enforced upon equitable principles, nor does the good faith of the party dealing with the state cut any figure in the case if, in fact, the work was done "without express authority of law;" for this provision was placed in the constitution to cut off

all claims based upon mere good faith and equity. There was a feeling, which had been long suffering, that there should be some inhibition to prevent the legislature from allowing the payment of extra compensation to officers who, subsequent to their election or appointment, discovered that the regular salary was insufficient, and also to prevent relief bills in favor of those who had dealt with state and municipal officers acting without *express* authorization from any source, or under palpably unauthorized and invalid contracts, and who were constantly asking the legislature to consider their misfortunes in pity, and regard them as deserving subjects of public benevolence. All this was doubtless well understood, and the phrase "without express authority of law" was used in view of the judicial and legislative history of the state; and yet it is by no means clear that it was intended to prevent the payment of a just claim, expressly authorized by an act in due form, duly passed and approved, and within the scope of lawful legislation, simply because, after the work has been done, the court may upon great deliberation and searching investigation declare the act for some reason—such as defect in title or wrongful delegation of power—unconstitutional.

The case of *Nougues* v. *Douglass*, 7 Cal. 65, relied on by appellant, is unlike the case at bar. In that case, and in *People* v. *Johnson*, 6 Cal. 499, the legislature had contracted a debt admitted to be in excess of the $300,000 limit specified in the constitution, and the court held that, until the claim was legalized by being submitted to a vote of the people, it could not be paid. There is no doubt as to the correctness of the decision in those cases. The constitutional inhibition contained in article 8 of the old constitution was so clear that the conclusion, as said by the court, was "most obvious." The meaning of words similar to those in question here were not involved in that case. The court had no doubt as to the meaning of the language used in article 8; and, if we could say the same of section 32, which is before us, we should, of course, apply the same rule.

But it follows, we think, from what has been said, that the meaning contended for by appellant is not *necessarily* implied in the language of section 32; and, if there be a fair doubt as to the true construction of that section, we should refrain from declaring that the legislature and the governor have exceeded their authority in the passage and approval of the act of March 10, 1885, appropriating money to pay the indebtedness incurred under the so-called drainage act of April 23, 1880. The doctrine has been so often enunciated—it has passed into an aphorism—that statutes will not be declared unconstitutional if there is a fair doubt as to their validity. The judicial department will not hesitate to interfere with the work of a co-ordinate branch of the government when the latter goes beyond its constitutional limitations, but the ground of interference must be plain and substantial.

Again, it is not a universal rule, as claimed by appellant, that an unconstitutional law is void *ab initio* and absolutely wanting in all binding force, and a nullity. There is at least an exception, viz., that an act duly passed or approved has the force of law to protect citizens dealing with public officers under its provisions up to the time that it is declared unconstitutional. *Sessums* v. *Botts*, 34 Tex. 335. And, if a decision that an act is unconstitutional be afterwards overruled, the statute will be deemed to be valid for the whole period. *Pierce* v. *Pierce*, 46 Ind. 86. It has been held that an act creating an office, though unconstitutional, is sufficient to give color of title, and that an officer acting under it is an officer *de facto*. *Duff's Appeal*, 56 Pa. St. 436; *Clark* v. *Com.*, 29 Pa. St. 129. But, whether this be supported by the weight of authority or not, "nothing is better settled," it is said in *State* v. *Douglass*, 50 Mo. 596, "than that the acts of an officer *de facto* (although his title may be bad) are valid so far as they concern the public, or the rights of third persons who have an interest in the things done. Without this rule the business of a community could not be transacted. * * * It would cause a suspen-

sion of business till every officer's right *de jure* was established." *State* v. *Carroll*, 38 Conn. 462; *Harbaugh* v. *Winsor*, 38 Mo. 327; *Wilcox* v. *Smith*, 5 Wend. 221; *People* v. *Salomon*, 54 Ill. 39; *Ex parte Strang*, 21 Ohio St. 610.

It must be remembered that the act of April 23, 1880, was *judicially* declared unconstitutional solely on the ground that, under article 3 of the constitution, the legislature could not delegate to *executive officers* such legislative powers as it had attempted to confer by that act. This was the only ground upon which the minds of a majority of the members of the court met. *People* v. *Parks*, 58 Cal. 645. It has never been claimed seriously that the work contemplated by the act was beyond the power of the legislature to provide for in some manner. If the legislature had defined the boundaries of the several districts, instead of delegating the power to the judgment of the governor, surveyor general, and state engineer, and had provided, in the manner it did provide, for the appointment of the three directors who were authorized to let, and who did in fact let, the contracts for the work, the result might have been different. The act has not been declared to be and is not necessarily unconstitutional in all of its parts. It is true, this court held that the directors had no authority to contract, but the creation of the office of director by the act, the appointment by the governor of three directors, and the ostensible authority conferred upon them by the act to contract, furnish some color of right to do the thing attempted by them.

I do not wish to be understood as saying that the directors were officers *de facto* with color of authority sufficient to bind the state, notwithstanding the unconstitutionality of the act under which the contract was let, and without regard to the provisions of section 32 as to "express authority of law." I cite the cases upon the effect of the acts of officers *de facto* simply to show that an unconstitutional law is not always and for all purposes a nullity so far as the rights of a citizen are concerned, and refer to the history of the case simply in illustration of my conclusion that, after a citizen has dealt with the state under circumstances like those shown here, the case does not come within the purview of section 32, and the legislature is not prohibited thereby from authorizing the payment to him of such reasonable sums as shall to it seem proper. It is unnecessary to say whether in all cases an act duly passed and approved would be "express authority of law" within the meaning of that section. There may be statutes palpably violative of principles so plain and well understood as to be no authority or protection at all; but as to that I express no opinion. Judgment affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

TEMPLE, J., (*dissenting.*) I cannot agree with the conclusion of the majority in this case. It seems to be admitted that the contract was void, the law authorizing it unconstitutional; and, if this be so, the debt for the services is expressly denounced as unauthorized by the constitution. The language is: "The legislature shall have no power * * * to pay or to authorize the payment of any claim hereafter created against the state * * * under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." Article 4, § 32.

So far as I am able to understand the logic of the leading opinion, it is this: The constitution only forbids the payment of claims arising upon contracts made without express authority of law. The word "law" is a very general term, and was not used in any technical sense. It includes all sorts of laws. A void law, or at least a void statute, is in the popular sense *some* sort of a law. This contract was authorized by a void law; therefore the legislature is not prohibited from paying; therefore the legislature has the power to pay.

Now, in the first place, I deny that there is any common usage or popular sense in which a void statute is spoken of as a law which differs from the use of the words by lawyers or by the courts. We all speak of void laws, unconstitutional statutes, void contracts, void judgments, etc., meaning the things which in some respects appear to be the things named, but which really are not. So, if we desire to refer to one of these void instruments to identify it, we might say the contract A or the statute of April 1st, etc. If there be any common usage beyond this, and which is not common to lawyers, I challenge example and evidence of it.

But, admitting that even void laws or statutes are sometimes referred to as laws or statutes, that does not meet the necessities of the case. The phrase in the constitution is, "without express authority of law." Will any one assert that in any use whatever of language an act is ever said to be *authorized* by law, meaning that it is pursuant to law known to be void? How is it authorized if the law be void? The very words used imply a valid law. An act *authorized by law* must be a lawful act. Would it not have sounded strange if the convention had used the words "without authority of a *valid* law," or had added, "provided a void statute shall be deemed authority of law."

But waiving all this, and admitting that the contract we have just declared void because not authorized by law was authorized by law in the "popular sense," so that the legislature is not by this constitutional provision expressly prohibited from paying the claim, the difficulty is not ended. It is necessary to find in this negative language, not only no prohibition, but an affirmative grant of power to pay; for there still remains the implied prohibition that the legislature cannot authorize the payment of a debt created in violation of the constitution. There still remains the admission that the contract was void because not authorized by law.

If it requires authority to show that even without an express prohibition the legislature cannot authorize the payment of a claim created in violation of the constitution, we have it in *Nougues* v. *Douglass*, 7 Cal. 65. The legislature authorized a contract for a state capitol. Plaintiff took the contract, and performed labor upon it, for which he was entitled, by the terms of his contract, to receive an admitted sum of money. The act was within the general scope of legislative power, but the court held that the legislature could not pay the debt. It was said: "If, then, the legislature had no right to create a state debt beyond the limit fixed by the constitution, that body has no constitutional right to tax the people to pay a void debt. * * * The restriction upon the power of the legislature would be nugatory if the same *end* could be accomplished by other modes. The evil intended to be prevented would still exist, and the injury to the people would be the same. If the power to create the debt is denied, the power to levy taxes to pay it must be equally denied. The power to pay is a necessary incident to the power to tax, and they both must stand or fall together."

And, again, let it be admitted that there cannot be found in section 32 of article 4 of the constitution a limitation on the power of the legislature, either express or implied. Why is not this relief bill a gift within the meaning of section 31, article 4, of the constitution? "Nor shall it [the legislature] have power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." It is admitted that the contract is utterly void; that it imposes no legal liability or obligation upon the part of the state. The state has received and will receive nothing from the parties to whom this money is to be given. True, if the contract had been valid, in legal contemplation the state would have received a consideration in the service performed by reason of the contract, although there was nothing of benefit in it. Now, a gift is something bestowed without return. If this be not something bestowed without return, what is the thing returned? Can there be any other reason

for holding this appropriation not a gift, except that it would be highly inequitable and unjust not to compensate the respondent for services rendered pursuant to an act of the legislature believed to be valid? In other words, the claim is founded upon a moral obligation which the state ought to recognize and satisfy.

This construction, I submit, virtually repeals sections 31 and 32 of article 4 of the constitution. What sense is there in prohibiting the contract, and declaring it void, if the legislature may nevertheless voluntarily perform the contract on the part of the state? What practical purpose is served by forbidding gifts of the people's money or property if the legislature can recognize and discharge a moral obligation? The legislature must be the judge of the moral obligation, and would rarely ever care to make a gift where it could not claim the existence of a moral obligation. My brothers deny, as I understand the decision, that they hold any such doctrine. I hope this will prevent the decision from being regarded as a precedent upon this question; but will it? I have shown that, disclaim it as they will, such is the real ground of the decision. Our successors will justly claim that it can be sustained on no other theory. This is the excuse for all relief bills. Can any one deny that the sole purpose of the provisions was to prevent this very legislation?

But I do not care to pursue the subject further. The constitution itself directs how laws shall be made, and of course the law meant must be a law passed as in the constitution provided. The whole claim seems to be baseless. A void contract based on a void law, ratified against the express prohibition of the constitution, constitutes no valid claim against the state. I do not think it necessary to pass upon the question whether there might not be an unconstitutional statute which would have some effect.

We are not now considering such a question as was before the court in *Sessums* v. *Botts*, 34 Tex. 335. It might be admitted that the convention adopted sections 31 and 32 of article 4 of the constitution in view of such a rule, and to prevent its application to the cases like that in hand. The rule was there adopted, however, to protect ministerial officers who had obeyed the law before it was held unconstitutional, and to prevent judgment creditors from losing their liens because the officers had obeyed such law. Here the question is simply as to the meaning of two sections of the constitution.

72 Cal. 398

In re AMBROSE. (No. 20,299.)

(*Supreme Court of California.* May 31, 1887.)

DIVORCE—INTERLOCUTORY AND FINAL ORDERS—HABEAS CORPUS.

In an action of divorce, brought by the wife, an order was made on the twenty-sixth of July, 1886, allowing the wife $200 per month as alimony *pendente lite*. On the twenty-seventh of September all questions of property between the parties were referred to a referee. On the third of January, 1887, while the reference was still pending, judgment for divorce was entered, providing that "all questions as to property, and as to a suitable allowance to the wife, are hereby reserved." The husband refused to pay the alimony granted by the order of the twenty-sixth of July, claiming that that order was vacated by the judgment of the third of January, and was imprisoned for contempt. *Held*, on an application for a writ of *habeas corpus*, that the judgment of the third of January, as to questions of property, was interlocutory, and not final, and therefore did not vacate the order of the twenty-sixth of July.

In bank. On *habeas corpus*.

Stanly, Stoney & Hayes, for petitioner. *McAllister & Bergin*, for respondent.

MCKINSTRY, J. On the twenty-fourth of June, 1886, Mary C. Ambrose, wife of the petitioner, commenced an action for the dissolution of the bonds of matrimony. In her complaint, after alleging facts showing extreme cruelty, she alleged that the defendant in said action, the petitioner herein, was a man

of large means, and the owner of tracts of land therein described of very great value,—of the value of between $500,000 and $600,000. The prayer is for a divorce, and an injunction restraining defendant from disposing of his property *pendente lite;* that such portion of the property of defendant as the court might, on the hearing, think should be distributed to her, be adjudged and decreed to her; that reasonable alimony be allowed her for her support during the pendency of the action; that costs and counsel fees for plaintiff be forthwith paid by defendant; that in the final judgment there be adjudged to the plaintiff such portion of the property of defendant as might be deemed just; and for other and further relief, etc.

The action was called for trial in the superior court, and testimony taken therein in the months of August and September, 1886, and on the twenty-seventh of said September the court filed findings of fact, and the conclusion of law that the plaintiff was entitled to a divorce, with the further order:

"All questions as to property are hereby reserved, and the cause is now referred to B. A. Reynolds, Esq., as referee herein, to take such testimony as the respective parties may offer upon the question of property, and to report to this court: *First.* What is the common property of plaintiff and defendant? *Second.* What is the separate property of plaintiff, and the present income of said separate property? *Third.* What the separate property of the defendant, and the present income of said separate property? And also to report to this court all testimony taken before him."

On the thirtieth of December, 1886, and while the reference was pending, the superior court filed additional findings of fact, and a conclusion of law as follows: "And as conclusion of law the court finds that the plaintiff is entitled to a judgment for divorce from defendant on the ground of extreme cruelty;" and ordered: "Let judgment be entered accordingly; all questions as to property being reserved." (Signed by the judge.) And on the third of January, 1887, a judgment in form was made and entered in the action in words and figures following:

"[Title of court and cause.] In accordance with the findings heretofore entered and filed in this action, it is hereby adjudged and decreed that the marriage heretofore and now existing between the plaintiff, Mary C. Ambrose, and the defendant, Thomas Ambrose, be dissolved, and the same is hereby dissolved, upon the ground of extreme cruelty inflicted by the said defendant on the plaintiff; and the said parties plaintiff and defendant are, and each of them is, freed from the obligations of said marriage. All questions as to property, and as to a suitable allowance to the wife for her support, are hereby reserved."

On the twenty-sixth of July, 1886, an order was made by the superior court, in said action, that the plaintiff be allowed the sum of $200 per month as and for alimony "*pendente lite*," commencing with the date of the commencement of the action.

On the first of April, 1887, the plaintiff in the action aforesaid demanded of the defendant therein, the petitioner herein, the payment to her of $200 by virtue of said order of July 26, 1886, which petitioner refused to pay.

April 14, 1887, on application, the judge of the superior court ordered the petitioner to show cause why he should not be adjudged guilty of contempt in disobeying the order of the twenty-sixth of July, 1886. The petitioner appeared by himself and counsel in response to such order to show cause, and such proceedings were had under such order that the same came on for hearing before the superior court on the eighteenth of April, 1887, when the petitioner appeared and claimed to show, for cause, that the order of July 26, 1886, was vacated by the entry of the judgment and decree of January 3, 1887. The superior court made and entered an order adjudging the petitioner, defendant in said action, guilty of contempt, and that he stand committed to the jail of the city and county of San Francisco, there to remain

until he pay said sum of $200 to said Mary C. Ambrose, plaintiff in said action. A warrant of commitment was issued to the sheriff, who attached the person of the petitioner, and imprisoned him in the county jail, and continues to imprison him; the said $200 not having been paid. The petitioner contends that the imprisonment is illegal, and the order directing it void, and asks to be discharged.

It is contended by counsel for the petitioner that the sole question to be determined in this proceeding is, was the decree entered, in the case of *Ambrose* v. *Ambrose*, on January 3, 1887, a final or interlocutory decree? We do not find it necessary to decide, however, that the decree was not a finality, so far as it adjudged a dissolution of the marriage. We have only to consider the effect of the clause, "All questions as to property * * * are hereby reserved." The language imports at least a reservation of the issues made by the pleadings as to property, common or separate, for further investigation *in the action*. If not a reservation for that purpose, it means nothing. It would be a forced construction to say the words employed are simply a declaration that the court refuses to try or pass on those questions. Moreover, the same rules of interpretation apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing, and, if the language be in any degree uncertain, we may properly refer to the circumstances surrounding the making of the order or judgment,—to the condition of the cause in which it was entered. When the decree of January 3, 1887, was entered, the referee was proceeding under the order of July 26, 1886, which order remained in full force and effect. The decree may properly be read in connection with the order of reference, and the proceedings thereunder. All questions of property were "reserved," to be disposed of on the coming in of the referee's report.

It seems to us that, to justify an order discharging the petitioner, we would be compelled to treat the reservation clause in the decree as absolutely void, and that, on the entry of the decree for divorce, the superior court became *functus lite*, with no jurisdiction to proceed further in the cause, to entertain the report of the referee, to hear the parties upon any question of property, or to render judgment in the action with respect thereto. But this would be to disregard the clause of the order or decree which, as we construe it, reserves such questions, and, in view of the previous order, evidently contemplates further judicial action in the same cause; would leave untried important issues, and questions undetermined for the determination of which the suit was commenced and prosecuted. In construing its meaning, we are not required to decide whether it was an irregularity to enter the decree before all the issues were tried. If the court had no *power* to enter it, certainly the suit was not terminated by the decree. If the power existed, the meaning of the decree is that the questions as to property be reserved for further hearing and consideration in the same action.

Ordered that the petitioner be remanded to the custody of the sheriff.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.; PATERSON, J.

72 Cal. 487

STUTTMEISTER *v.* SUPERIOR COURT. (No. 12,168.)

(*Supreme Court of California.* June 9, 1887.)

APPEAL—FROM PROBATE COURT—APPEALABLE ORDER—CONTEMPT.

The claim of an attorney for services rendered to the estate of a deceased person, when allowed and approved by the probate court, not as costs, but to be paid in due course of administration, becomes one of the "acknowledged debts of the estate, to be paid in due course of administration," (Code Civil Proc. Cal. § 1497;) and an order for its payment is appealable, under section 963, Code Civil Proc. Cal., which provides that an appeal lies to the supreme court from certain orders of

the superior court in probate proceedings, among which are orders for the payment of a debt, claim, legacy, etc.;[1] and after an appeal taken by an administrator from such an order of the superior court, and the filing of a *supersedeas* bond, the action of the superior court in fining the administrator for contempt for refusing to pay the claim of the attorney is in excess of its jurisdiction.

Department 2. Review to superior court, San Francisco, department 9. *Ben Morgan*, for petitioner. *E. J. & J. H. Moore*, for respondent.

SEARLS, C. J. This case comes up on a writ of review issued to the superior court in and for the city and county of San Francisco, department 9. From the record presented it appears that, in 1884, John A. Collins presented a claim for services as attorney against the estate of F. W. R. Stuttmeister, deceased, to W. O. Stuttmeister, the administrator of such estate, and such proceedings were afterwards had therein that, on or about October 10, 1884, such claim was allowed and approved by the probate court for $300, and ordered to be paid out of the estate in due course of administration. On the seventeenth day of May, 1887, the said superior court, in probate, made an order upon the administrator, requiring him to forthwith pay to said John A. Collins said sum of $300, so allowed as aforesaid; that thereafter, and on the eighteenth day of May, 1887, W. O. Stuttmeister, administrator as aforesaid, took and perfected an appeal to this court from said order of May 17, 1887, requiring him, as such administrator, to pay said sum of $300 as aforesaid. A *supersedeas* bond was filed, and the appeal is in all respects regular in form.

Subsequent thereto the court below proceeded to adjudge said administrator guilty of contempt for failing to pay over said sum of money, in accordance with such order of May 17, 1887, and adjudged him guilty of such contempt, and fined him in the sum of $200, and, in default of payment thereof committed him to the custody of the sheriff, etc.; whereupon said administrator sues out this writ of review.

If the order for the payment of the $300 was appealable, then the proceedings thereon, having been stayed by an appeal and *supersedeas* bond as provided by the Code of Civil Procedure, the superior court was divested of jurisdiction to act further in the matter pending such appeal.

By section 963, Code Civil Proc., an appeal to the supreme court is given from certain orders of the superior court in probate proceedings, among which are judgments or orders for "the payment of a debt, claim, legacy, or distributive share," etc. The contention of counsel for respondent is that the demand in question is for services rendered in the progress of administration, and is not a *debt* or *claim* within the purview of section 963, *supra*, and consequently that no appeal lies therefrom. We are inclined to agree with counsel for respondent that the term "claim," as used in the Code, in reference to estates of deceased persons, has reference to such demands or debts against the decedent as existed and (if due) might have been enforced against him in his life-time by proper action, (*Fallon* v. *Butler*, 21 Cal. 24; *Estate*

[1]An order in probate proceedings directing the sale of real estate is appealable, In re Stuttmeister, (Cal.) 12 Pac. Rep. 270; but no appeal lies from an order dismissing a petition for the revocation of the probate of a will, or denying motions to set aside the orders and decrees made in the matter of the probate of a will, Estate of Sbarboro, (Cal.) 11 Pac. Rep. 563; nor from an order refusing to vacate an order of distribution and settlement of the final accounts of an executor, In re Lutz, (Cal.) 8 Pac. Rep. 39. As to appeals from other orders of probate courts, see Gilbert v. Thayer, (N. Y.) 10 N. E. Rep. 148; Putney v. Fletcher, (Mass.) 5 N. E. Rep. 640, Pemberton v. Pemberton, (N. J.) 7 Atl. Rep. 642; In re Pemberton, (N. J.) 4 Atl. Rep. 770; Morey v. Sohier, (N. H.) 3 Atl. Rep. 636; Charles v. Charles, (Minn.) 29 N. W. Rep. 170; Hardy v. Minneapolis & St. L. Ry. Co., (Minn.) 28 N. W. Rep. 219; Auerbach v. Gloyd, (Minn.) 27 N. W. Rep. 193; Daniells v. St. Clair Circuit Judge, (Mich.) 27 N. W. Rep. 1; Hart v. Circuit Judge, (Mich.) 23 N. W. Rep. 326; In re Brown, (Minn.) 21 N. W. Rep. 474; In re Huntsman, (Minn.) Id. 555.

of McCausland, 52 Cal. 568;) and that liabilities of the administrator or executor, incurred in the management of the estate, or in administering the trust, stand upon a different footing. Conceding all this, however, and the case is not altered. In this instance, it is apparent the demand was presented, allowed, and ordered paid as a claim against the estate; to be paid, not as costs, but in due course of administration. When so allowed, it became one of the "acknowledged *debts* of the estate, to be paid in due course of administration." Code Civil Proc. § 1497. When thus treated, an order for its payment was appealable under section 963, *supra*.

Respondent cannot treat the claim against the estate as an *established debt*, for the purpose of enforcing its payment out of the estate, and at the same time impugn it, and the order founded thereon, as the basis of an appeal. It follows that the action of the court below, in adjudging the administrator guilty of contempt after the appeal was perfected, and a bond for the stay of proceedings filed, was in excess of jurisdiction, and such proceedings to adjudge the administrator guilty of contempt, and to punish him therefor, are quashed, and the court below ordered to stay further proceedings in such behalf until the hearing and determination of the appeal from the order aforesaid.

We concur: McFARLAND, J.; SHARPSTEIN, J.

72 Cal. 379

FRESNO CANAL & IRRIGATION CO. *v.* WARNER. (No. 11,911.)

(*Supreme Court of California.* May 28, 1887.)

1. CORPORATIONS—EXISTENCE OF—ESTOPPEL.
When one has contracted with an alleged corporation, and is sued for failure to perform his contract, he cannot be heard to say that the corporation had no existence, and for that reason no contract was made.[1]

2. SAME—EVIDENCE OF EXISTENCE—ARTICLES.
A copy of articles of incorporation filed in the office of the county clerk of the county in which the principal business of the company is conducted, as required by Civil Code Cal. § 296, when certified by the secretary of state, as provided by section 297, is admissible as *prima facie* evidence of the existence of the corporation.

3. SAME—OTHER EVIDENCE.
In an action in California by a corporation, a certified copy of the articles of incorporation were introduced in evidence, but they were not read to the jury, nor was their reading waived. The president of the company testified that he owned all of the stock except a few shares, and that he had been its general manager or president since its organization. The court refused to allow the jury to take the copy of the articles with them when they retired, but instructed them to find specially whether or not the plaintiff was a corporation, as alleged, and told them that they could not consider any documentary evidence that might have been offered, unless the document had been read to them, or its reading waived. The jury found that the plaintiff was a corporation. *Held*, that the court properly submitted the special issue to the jury after the argument and instructions, under Code Civil Proc. § 625, authorizing the submission of special issues to the jury, and that the verdict was not contrary to the law and the evidence.

Commissioners' decision. Department 2.

[1]One dealing with a corporation is estopped by his contract from denying the validity of its organization, or its power to enter into the contract. Slater Woolen Co. v. Lamb, (Mass.) 9 N. E. Rep. 823; Town of Searcy v. Yarnell, (Ark.) 1 S. W. Rep. 319, and note; Wentz v. Lowe, (Pa.) 3 Atl. Rep. 879; Broadwell v. Merritt, (Mo.) 1 S. W. Rep. 855; Broadwell v. Weller, Id. 857; Broadwell v. Jenkins, Id. 857; Broadwell v. Alexander, Id. 858; Broadwell v. Terry, Id. 858; Grangers' Business Ass'n v. Clark, (Cal.) 8 Pac. Rep. 445; Inter-Mountain Pub. Co. v. Jack, (Mont.) 6 Pac. Rep. 20.

Appeal from superior court, Fresno county.

Wigginton, Creed & Hawes, for appellant. *Nourse & Church*, for respondent.

BELCHER, C. C. This is an action to recover the sum of $500 alleged to be due the plaintiff for conducting water, sufficient for irrigation purposes, upon the lands of defendant, under a contract made between the parties. The complaint alleged that the plaintiff was a corporation, incorporated under the laws of this state, and engaged in the business of diverting water from Kings river, and supplying therewith, for irrigation and other useful purposes, the people of Fresno county. The answer denied that the plaintiff was a corporation, and also denied the making of the contract alleged, or any contract, for conducting water upon his land. The case was tried by a jury, and the verdict and judgment were in favor of plaintiff. The defendant moved for a new trial, and now appeals from the judgment and order denying his motion.

It appears from the record that, at the commencement of the trial, counsel for plaintiff offered in evidence a copy, certified by the secretary of state, of the plaintiff's articles of incorporation. Counsel for defendant objected to the offered evidence, upon the ground that it purported to be a copy of a copy, and was irrelevant, immaterial, and incompetent. The court overruled the objection, and thereupon the paper was handed to the clerk of the court, and by him marked "Plaintiff's Exhibit A." It was, however, never read to the jury, and the reading of it was neither waived nor admitted.

M. J. Church was then called as a witness, and testified that he was "the M. J. Church named in the articles of incorporation of plaintiff as one of the corporators of said plaintiff, and that he owned all but five shares of the capital stock of plaintiff, and that he had been its president ever since its organization, except about three years, and its superintendent ever since its organization." No other or further evidence as to whether plaintiff was a corporation or not was offered during the trial of the cause.

Upon the other questions involved, considerable evidence was introduced by both sides, and at its conclusion counsel argued the case to the jury. The court then gave its instructions, and counsel for plaintiff asked that the jury be permitted to take with them, upon retiring for deliberation, the certified copy of plaintiff's articles of incorporation. This was refused, and thereupon counsel asked that the jury be instructed, in addition to their general verdict, to answer the question: "Was and is the plaintiff a corporation, as alleged in the complaint?" This last request was granted, against the objection and exception of defendant. The jury then retired, and in due time returned with a general verdict in favor of plaintiff, and an answer to the question submitted, as follows: "We, the jury, find that it was and is so a corporation."

The first point made for the appellant is that the court erred in submitting to the jury the special issue as to whether the plaintiff was a corporation or not. A sufficient answer to this point is that the Code fully authorized the ruling. Section 625 of the Code of Civil Procedure provides that the court, "in all cases, may instruct them, [the jury,] if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." That this was done after argument, and after the giving of the instructions to the jury, is not material.

It is next claimed that the court erred in admitting in evidence the certified copy, from the office of the secretary of state, of the plaintiff's articles of incorporation, as it was only a copy of a copy. Here, too, the Code furnishes full justification for the action of the court. Section 296 of the Civil Code provides that articles of incorporation must be filed in the office of the county clerk of the county in which the principal business of the company is to be transacted, and a copy thereof, certified by the county clerk, with the secretary of state.

And section 297 then further provides: "A copy of any articles of incorporation filed in pursuance of this chapter, and certified by the secretary of state, must be received in all the courts and other places as *prima facie* evidence of the facts therein stated."

Lastly, it is insisted that the verdict was not justified by the evidence, and was against law. The court charged the jury that, under the laws of this state, they could not consider any documentary evidence that might have been offered, unless the document had been read to them, or its reading waived; and the position of appellant is that, as the plaintiff's articles of incorporation were not read to the jury, nor the reading waived, there was no evidence before them showing the plaintiff's corporate character; and hence the verdict, finding that the plaintiff was a corporation, was contrary to the evidence, and also contrary to the instructions of the court.

Leaving out the articles of incorporation, we think there was some evidence before the jury tending to show that the plaintiff was a corporation. The testimony of Church was admitted without objection, and in that he speaks of the plaintiff as a corporation, and of himself as one of the corporators, and says he owned the larger part of its capital stock, and had been its president a part of the time, and its superintendent all the time, since its organization. How could this be true if the plaintiff never became a corporation, either *de jure* or *de facto*? But, however this may be, we think the verdict may be sustained upon another ground. It is not denied that there was ample evidence before the jury to show that the contract was made and executed by the plaintiff, as alleged in the complaint. This being so, the defendant, under the rule of law now generally accepted, cannot be heard to question the plaintiff's existence as a corporation.

In *Lehman* v. *Warner*, 61 Ala. 455, it is said, on page 466: "It is too well settled now to be controverted that a party who contracts with a corporation, whether it be by subscription for its stock, or by promissory note, bond, mortgage, or other form of contract, is estopped from denying the existence of the corporation;" citing authorities. It is then added: "It has often been said that, when a corporation sues, its corporate existence must be shown, if it is controverted. When the action is against one contracting with it in its corporate capacity, the contract furnishes the evidence."

In *Close* v. *Glenwood Cemetery*, 107 U. S. 477, 2 Sup. Ct. Rep. 267, it is said: "One who deals with a corporation as existing in fact is estopped to deny, as against the corporation, that it has been legally organized."

In *Oregonian Ry. Co.* v. *Oregon Ry. & Nav. Co.*, 10 Sawy. 470, 23 Fed. Rep. 232, it is said: "The law is well settled that the person who contracts with an apparent corporation as such is estopped, when sued on such contract, to say that the plaintiff had no corporate existence, or power to make such contract. A corporation, like an individual, when sued on a contract, may set up as a defense its want of power or capacity to make such contract; but the party with whom it contracts cannot set up such a want of power or capacity as a defense to an action by the corporation for a breach thereof." The same doctrine is announced in Bigelow, Estop. (4th Ed.) 527, and many authorities are cited in support of it.

In support of their contention that the existence of the plaintiff as a corporation may be questioned in an action like this, counsel for appellant cite *Mokelumne H. C. & M. Co.* v. *Woodbury*, 14 Cal. 426; *Harris* v. *McGregor*, 29 Cal. 127; and *Oroville & V. R. Co.* v. *Plumas Co.*, 37 Cal. 360, 361. But these cases are not in point. In neither of them was the action based upon a contract alleged to have been made between the corporation and the adverse party. The distinction seems to be this: In actions not founded upon contract made between the parties, the existence of the alleged corporation, if put in issue, must be proved; but when one has contracted with an alleged corporation, and is sued for failure to perform his contract, he cannot be

heard to say that the corporation had no existence, and for that reason no contract was made.

In our opinion the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 404

LENT and others *v.* TILSON and others. (No. 8,540.)

(*Supreme Court of California.* May 31, 1887.)

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—SUPERVISORS.
The act of California of March 23, 1876, providing for the widening of Dupont street in the city of San Francisco, defining the district benefited thereby, and appointing a board of commissioners to carry out the work, and assess the cost thereof on the property benefited, did not deprive the supervisors of the discretion with respect to local improvements secured to them by the city charter, because by its terms it was not to go into operation until the board of supervisors should declare, in such form as they should deem advisable, that it was expedient to widen the street in the manner proposed.

2. SAME—DUE PROCESS OF LAW—NOTICE.
Said act does not conflict with the provision of the constitution that no person shall be deprived of his property without due process of law, because, *first*, such process is provided by the notices, (that the board of commissioners is organized, and that its report, giving full information of every determination of the board which can affect the interest of any person, is open for inspection and objection,) which are required by the act to be published in the newspapers, and which are sufficient when construed together with the act; for the sufficiency of such notices is to be determined from the particular circumstances of the case in hand, and in this case the owners of property assessed knew that the act was passed, knew what notices were provided for, and knew that the entire cost would be a lien on their property; hence they ought to have been diligent to see that the board performed its duties properly. The district to be assessed was defined in the statute, and publication during 20 days that the report of the board was open for inspection for 30 days was reasonably sufficient, when helped out by the statute.

3. SAME—APPEAL TO COURT.
And, *second*, as the power to determine the expediency of a public improvement rests with the legislature, and is not judicial in its nature, the rights of persons whose property is taken are fully secured if they have a right to be heard as to the amount of compensation awarded, and as to the assessment levied, before the lien becomes final upon their property. Such right is protected by the provision that any objection to the action of the board, as shown in the report, may be heard and decided by the county court; and the notice to be given was sufficient to bring into court all parties interested, not as if the proceedings were judicial, but such as the case admits.

4. SAME—INJUNCTION—ESTOPPEL.
Owners of property assessed under said act of March 23, 1876, cannot bring suit, on account of the misconduct of the board of commissioners, to enjoin collection of taxes for the payment of bonds issued to pay for the improvement, when ample provision is made for the correction of such irregularities at the hearing before the county court, and the act itself provides that completion of the work "shall be deemed an absolute acceptance by the owners of all lands affected by this act of the lien created by this act upon the several lots so affected."

5. SAME—ASSESSMENTS—DISTRICT BENEFITED.
The legislature has authority to declare what district is benefited by a local improvement, and to levy on such district an assessment therefor, and the courts will interfere to set aside such assessment only where there has been a manifest abuse of discretion.

6. PUBLICATION—NOTICE—SUPPLEMENT.
Publication of a notice on the third sheet, called the "supplement," and containing matter for which there was no room in the two sheets on which the paper was usually printed, is sufficient when it appears that the so-called "supplement" is circulated co-extensively with the rest of the paper.

PATERSON, J., dissenting.

In bank. Appeal from superior court, San Francisco.

McAllester & Bergin and *D. M. Delmas*, for appellants. *Garber, Thornton & Bishop*, for respondents.

TEMPLE, J. This suit was brought to enjoin the tax collector of the city and county of San Francisco from selling certain real estate, for the collection of the tax imposed for the payment of the Dupont-street bonds, issued under the act of the legislature approved March 23, 1876, (St. 1875–

76, p. 433.) That act provided for the widening of Dupont street, but was not to go into operation until the board of supervisors should declare by resolution or order that in their judgment it was expedient to widen the street in accordance with and in the mode prescribed by the act. The act specially defined the district benefited by the proposed improvement which should bear the burden of making it, to be assessed to the owners of land in proportion to the benefit received. The district was described as two separate parcels of land, being two strips,—one on either side of the street,—extending from Bush street to Market; the strip on the east side in width extending half-way to Kearny, and that on the west half-way to Stockton,—such streets being the parallel streets nearest to Dupont on the east and west. In case the board of supervisors expressed their judgment in favor of the improvement, the Dupont-street commissioners named in the act, to-wit, the mayor, the auditor, and county surveyor, were to publish a notice in two of the daily papers printed in the city of San Francisco, informing property owners along the line of said street of the organization of the board, "and inviting all persons interested in property sought to be taken or which would be injured by said widening, to present to the board maps and plans of their respective lots, and a written statement of the nature of their claim or interest in such lots." The board was required to have an office in the city, and was furnished with a secretary, and allowed to employ clerks, attorneys, surveyors, draughtsmen, searchers of records, etc., and section 7 of the act defines with considerable particularity the duties of the commissioners, and the mode of performing them. It is provided, however, that within 30 days after the publication of the notice of the organization of the board the owners of a majority in value of the property fronting on the street may interpose their veto to the further prosecution of the work, which veto shall be final. If the proceeding was not thus arrested, the board was to proceed, and, having completed the work of estimating damages and benefits, was to embody the result in a report, the precise nature of which is minutely defined in the act, and which apparently, when so made, would give full and particular information of every determination of the board which could affect the interest of any person. This report, when thus completed, was to be left "at the office of the board daily during ordinary business hours, for 30 days, for the free inspection of all parties interested, and notice that the same is open for such time and such place," to be published by the board daily, for 20 days, in two daily newspapers printed and published in the city. At any time within this 30 days any person interested, who felt aggrieved by the action of the board, could file in the county court his petition setting forth his grievance, and the court was empowered to approve the report, or to cause the same to be altered or modified, and finally to approve as modified. When the report was finally approved, the board was to issue bonds of the city and county in a sum sufficient to pay the damages awarded, and all costs, the bonds to be paid by a tax on the district benefited. When the damages were all paid by the proceeds of the bonds, and the persons receiving the payments had conveyed to the city and county the lands taken, the board was to remove the buildings and widen the street; and it was provided that the completion of the work "shall be deemed an absolute acceptance by the owners of all lands affected by this act, and by their successors in interest of the lien created by this act upon the several lots so affected. * * *"

The complaint avers that the work was actually performed, that is, that during the first seven months of the year 1877 the street was actually widened from 44 feet to 74 feet, by the removal of the buildings, and the turning of the same into roadway and sidewalk; that the bonds were sold, and the money thus obtained was used for the payment of the damages and costs; but it is claimed that money was expended improperly, and a large sum retained without just authority, for costs to accrue.

The objections to the proceedings are numerous, but may be included under the following: (1) The act is unconstitutional; (2) the board of commissioners had no power or jurisdiction to act because the board of supervisors did not properly express their judgment that it was expedient to widen Dupont street; (3) the notices required to be given to parties affected were never, in fact, given as required; (4) the board was guilty of fraud and misconduct; and (5) the report, as confirmed, shows that the damages exceed the benefits.

1. It is claimed that the act is unconstitutional on many grounds.

First. Because it is an attempt by the state to exercise the power of assessment for local improvements within the limits of a municipality. *People* v. *Lynch*, 51 Cal. 34. In that case it was said of the statute there under consideration: "Such law is unconstitutional, because it is mandatory in its nature, and deprives the board of trustees * * * of all choice or discretion in reference to improvements." The act in question does not do that. It leaves the matter entirely to the local legislature to say whether the work shall be done or not. True, if the board of supervisors concludes to order the work to be done, the act designates the city officers who shall act as commissioners. This power to act as a board is given to such officers, and their successors in office. The mode of procedure is also prescribed. There is nothing unusual in this. Nor does it matter that the mode differed from that laid down in the consolidation act for inaugurating other improvements. But this question is not an open one. *People* v. *Bartlett*, 67 Cal. 156, 7 Pac. Rep. 417; *Pacific Bridge Co.* v. *Kirkham*, 64 Cal. 519, 2 Pac. Rep. 409.

Second. It is claimed that the act is unconstitutional because it does not provide for due process of law.

1. It is claimed that the parties to be affected had a right to be heard upon the question whether the street should be widened or not, that the proceeding is judicial in its character,—is, in fact, a part of the proceeding to take private property for public use, to which the persons whose property is affected must be parties. There was no provision for such hearing. But it is plain that it is not a judicial act in that sense. It may be said to be judicial in the sense that it is not ministerial. It is an act which rests in the sound discretion of the authority. It may act or not, or may act in such mode as it may deem best, within legal limits, but it is not a determination by a judicial tribunal of the rights of parties before it. It is a legislative act, and the power to determine the expediency of a public improvement rests with the legislature, or such local authorities as have been charged with the duty of determining the policy of the government in such matters. Some authorities from New Jersey are cited to the contrary, but the overwhelming current of decision is in accord with this view. Where compensation is provided for property taken, and persons interested are awarded an opportunity to be heard as to the amount, the constitutional requirement is satisfied. So, too, where a district is charged with an assessment for a local improvement, it is enough if the parties to bear the burden have a right to be heard as to the assessment before the lien becomes final upon their property. *Reclamation Dist.* v. *Evans*, 61 Cal. 104; *In re Zborowski*, 68 N. Y. 88; *Holt* v. *City*, 127 Mass. 408; *Pearson* v. *Zable*, 78 Ky. 170; *Brewster* v. *Syracuse*, 19 N. Y. 116; *People* v. *Smith*, 21 N. Y. 595.

2. It is claimed that the act does not provide for due process of law, because the notices prescribed are insufficient. The notices provided for in the act which are criticised under this head are the notice of the organization of the board; and the notice that the report of the board is open for inspection.

The sufficiency of the notice will depend, to a very considerable extent, on the nature of the proceeding, and the statute on which it is based. The statute is always presumed to be known, and whether the notice really affords the necessary information, and gives the party whose interests are affected

an opportunity to be heard, must depend largely upon those provisions. It has been repeatedly held that proceedings for the levy and collection of taxes are not necessarily judicial, and that due process of law, as applied to such matters, does not require such notice as is considered essential to the validity of a judgment. In *Kentucky R. R. Tax Cases*, 115 U. S. 331, 6 Sup. Ct. Rep. 57, it is said: "Notice by statute is generally the only notice given, and that has been held sufficient. 'In judging what is *due process of law*,' said Justice BRADLEY in *Davidson* v. *New Orleans*, 96 U. S. 97, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust it may be declared to be not *due process of law*.'" In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand. And further, in matters of assessment and taxation, the same character of notice is not required as in ordinary actions in a court of justice; for the reason, I presume, that in such summary proceedings it is not practicable or usual.

Now, then, what are the circumstances of this case which have a bearing upon this question? Dupont street is one of the oldest streets in the city of San Francisco. That portion affected by this proceeding was in the heart of the city, and had long been a finished street, the lots along it on both sides built upon and occupied. The district which it was alleged would be benefited was specifically defined in the act. Kearny street had shortly before been widened by a proceeding somewhat similar, and the result had been to make the street more attractive. The tendency of business was westward, and Dupont street was the next parallel street. It was 44 feet wide. It was not to any considerable extent a thoroughfare, except for local purposes. There was not much reason for widening the street which could interest the general public, but the case comes as near as can be imagined to being one in which it was a certain proposition that the proposed improvement would be greatly to the advantage of the individual property owners. The municipality and the general public, however, were obviously so little interested in the matter that it would hardly be putting the matter too strongly to say that there was no decent pretext for the improvement except upon the hypothesis that the local property holders desired it, and would be advantaged by it. It is inconceivable that the matter should be passed through the legislature without being a frequent subject of discussion among the lot-owners, even if it were not done at their instance. They had notice, not only as a rule of law which charges every one with knowledge of the statute, but must have had such information as a fact; and also that in making the improvement the officials were acting, in a certain qualified sense, as their agents, for their individual advantage, rather than for the public. After the supervisors had resolved that it was expedient that the street should be widened, and the board of commissioners was organized, the whole proceeding could even then be stopped by a majority in value of frontage on the street. And when the work should all be completed, the act provides, as already recited, that the completion shall be deemed an acceptance by the lot-owners of the lien of the debt, as an absolute waiver of all claim upon the city for any part of the debt, and as a contract between such owners and the holders of the bonds issued under authority of the act.

Under such circumstances, it seems to me the notices required are greatly helped out by the act itself. The owners are in a certain sense parties to a proceeding, and are informed beforehand of the notices which will or may be given and of the purpose of them. They are informed minutely of the course of procedure, and the duty, in my opinion, is cast upon them of exercising a

certain degree of diligence in regard to them. Having notice that the municipality would assume no part of the burden, and that when completed the entire cost would become a lien upon their property, and the bonds be considered as their individual contracts, they were put to their diligence to see that the board faithfully performed its duties, at least to the extent that they could not afterwards complain of mere irregularities, or of any misconduct on the part of the commissioners which they could have had reviewed and corrected in the proceeding itself, *dum fieri*. This, of course, if correct, does not obviate the necessity of notice, but I think it has an important bearing upon the issue as to the sufficiency of the notices provided; and, if I am right, it is unnecessary to mention particularly some objections to the statutory provision which I may venture to say, in such a view, seems almost trivial. Some of them, however, cannot justly be so characterized. Among these are the objections that the notice is not required to be addressed to any one; that, at the best, it is only for those owning property fronting on Dupont street.

As already indicated, the notice must be read in the light of all the provisions of the act. In *Boorman* v. *Santa Barbara*, 65 Cal. 313, 4 Pac. Rep. 31, which is much relied upon by the respondents, the act authorized the mayor and common council, upon petition, to lay out, widen, etc., *any* street in the city, and directed them to give notice by publication in a newspaper of the time and place where they would proceed to examine the property to be affected. St. 1877-78, p. 777. This court held the act unconstitutional, because it did not sufficiently provide for notice. As it "provides for no notice at all addressed to any particular person or class of persons, or which would inform any particular person that on failure of appearance any burden would be imposed upon him or his property," the court said: "It will be observed the act neither fixes the boundaries of an assessment district nor authorizes the common council to fix them. * * * It is possible, if the commissioners were authorized to fix the limits of the assessment district, finally or conditionally, in the first instance, and then to give notice—even by publication—to the owners of property within the district, the notice would be sufficient. But the act provides only for notice, at most, to all property owners in Santa Barbara. Who can know that his property may by the commissioners be deemed to be benefited?"

Plainly, that is not an authority against the sufficiency of the notice here. The authorities seem to be all, or nearly all, in favor of the proposition that when the limits of the assessment district are defined in the statute the notice need not be addressed to the persons whose property is affected by name; and certainly, in this particular case, we see no good reason for such a requirement. *In re Mayor*, 99 N. Y. 580; *City of Ottawa* v. *Macy*, 20 Ill. 413. Nor was it necessary that the property sought to be taken or affected should be specifically described in the notice. As a whole, the property is so described in the statute.

The first notice prescribed in section 6 was, in part, to inform property owners along the line of the street that the board was then organized. The words, "property owners along the line of said street," as there used, are not the equivalent of the words, "owners of property fronting on said street." For the meaning of the language we must again refer to the statute. There we find the lands to be assessed for benefits described as two narrow strips on either side of the street, each fronting on and along the line of the street. For one purpose, no doubt, the notice was effective only as to owners of frontage; that is, to set the time running in which the owners of frontage might have stopped the proceedings; for it seems that only such persons could act in the matter. But it was also a notice to all persons interested that the proceedings were then pending, and that the board, unless proceedings were arrested by the veto of the owners of frontage, would proceed with their labors.

3. Various objections are made to the notice prescribed in section 7 of the act. That provision is: "Such report, as soon as the same is completed, shall be left at the office of the board daily, during ordinary business hours, for thirty days, for the free inspection of all parties interested, and notice that the same is so open for inspection for such time and such place shall be published by said board daily, for twenty days, in two daily newspapers printed and published in said city and county." This must be construed to require the notice to be published as early as the first day of the 30 days during which the report was to remain for free inspection. Otherwise the notice could not truthfully state: "The report *is* open for inspection" for such time. It is said this is insufficient, because the 20-days publication of notice must come out of the 30 days, which would leave only 10 days for the parties to object; which would be an unreasonable period in which to require parties affected to make their objections. The idea that the notice only allows 10 days after notice seems to be derived from the practice concerning the service of summons. There the summons, when not personally served, may, under proper conditions, be sometimes served by publication for the two months, or such period as the judge may direct. The law provides that the service shall be complete when the term of publication has expired, and the person served may have a certain number of days after service within which to appear and answer. But evidently that is a mere statutory arrangement, and the service would be just as effectual if the time for answering was made to expire with the publication; provided a reasonable opportunity to be heard was afforded by the notice given. So here it would not matter if the publication were required to continue for the entire period of 30 days. It would be curious if the court should hold that the notice would have been good if it had been published only 5 days of the 30, as was very nearly the case in *San Francisco* v. *Certain Real Estate*, 42 Cal. 513, and bad because it was required to be continued for 20 days. On such principles there would have been no notice, though it were published for a twelvemonth, during all of which the report was open for inspection and objection.

Of course, unless the notice required can be helped out by reference to the statute, it would amount to nothing. It is true it is not required to be addressed to any one specially. It informs no one what property is to be affected. It indicates no steps to be taken by the person aggrieved to obtain redress, and mentions no tribunal before which, or any time or place at which, his grievance, if he have any, can be heard. But all this is provided for in the statute. He has been already informed that this very notice will be so published, and of all the steps he will be required to take to protect himself. The privilege afforded by the statute to apply to the court to fix a time for his grievance to be heard is as beneficial to him as though such time and place had been fixed by the notice. The authorities upon all these questions of notice are exceedingly numerous, and apparently, in some respects conflicting. Much of this apparent conflict disappears, however, when we remember that each case must be judged by its own circumstances, and under the rule I have cited from *Kentucky R. R. Tax Cases*, 115 U. S. 331, 6 Sup. Ct. Rep. 57. All the cases on the subject seem to be referred to by counsel, but I do not deem it important to cite or discuss them in this opinion. I call attention, however, to the numerous statutes of this and other states quoted by counsel for appellants, which show that the mode here adopted is not strange or novel to judicial proceedings. It seems to me quite clear that there is no objection to the act under consideration on the ground that it fails to provide for due process, so far as the matter of notice is concerned.

But it is contended, admitting that the notices were sufficient, no adequate hearing was awarded to the parties whose rights were affected. So far as the claim that there ought to have been a hearing by the commissioners before the assessment was made is concerned, the point has been settled in

this court by the case of *Reclamation Dist.* v. *Evans*, 61 Cal. 104, and by the *Kentucky R. R. Tax Cases, supra*, and, in fact, by all the cases upon the subject.

Section 8 of the act provides for a hearing before the county court. Any person interested, feeling himself aggrieved by the action or determination of the board, as shown in the report, might, at any time during the 30 days that the report was to be kept for inspection, "apply by petition to the county court, * * * setting forth his interest in the proceedings had before the board, and his objections thereto, for an order on said board requiring it to file with said court the report of said board, with such other documents or *data* as may be pertinent thereto, in the custody of said board and used by it in preparing said report. Said court is hereby authorized and empowered to hear said petition, and shall set the same down for a hearing within 10 days from the date of the filing thereof." It then provides for service upon the members of the commission, that they may answer the petition and appear by counsel in response thereto. "Testimony may be taken by said court upon said hearing, and the process of the court may be used to compel the attendance of witnesses, and the production of books or papers or maps in the custody of the board or otherwise. It shall be in the discretion of said court, after hearing and considering said application, to allow said order or deny the same; and, if granted, a copy thereof shall be served on said board, and it shall proceed to obey the same according to the terms of the order to be prescribed by the court. * * * The court shall have power to approve and confirm said report, or refer the same back to said board, with directions to alter or modify the same in particulars specified by the court in the order referring the same back."

Now, it is argued that after the person aggrieved has filed his petition, and a day has been fixed for the hearing, and the hearing had, witnesses summoned, books, papers, and maps produced under the process of the court, and counsel heard, and the court is fully advised as to the grievances, all the court can do in the matter is to order the report to be filed; and even this, although affording no relief, is in the discretion of the court. It is a proposition so often asserted by courts that perhaps now the question should be considered as closed, that the constitution is to be read in connection with laws of this character; and, if no hearing is expressly provided by the statute, still, if the constitution guaranties it, the statute is to be properly construed so as to allow it if possible, and not to deny it. The constitution and the statute will be construed together as one law. This rule was carried so far in *Neal* v. *Delaware*, 103 U. S. 370, that words denying the right were regarded as stricken out of the state constitution and statutes by the controlling language of the constitution of the United States. *Kentucky R. R. Tax Cases*, 115 U. S. 334, 6 Sup. Ct. Rep. 57.

We are not considering here a statute which is silent as to the hearing. The provisions in question were undoubtedly inserted in view of the constitutional requirement, and for the purpose of affording that opportunity to be heard without which the law would be void. To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding farcical. And I must confess it seems to me it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section, but it would not have provided so elaborately for a thorough investigation of grievances if it was not intended that redress should be awarded. The statute has apparently been patched and tinkered after it was first drawn, and incongruous matter injected into the body of it. But it still provides for a full hearing, and that the court may alter and modify. And it seems that such action is to be based upon the hearing provided for. The word "discretion" is used in various meanings, but here evidently it was intended to sub-

mit the whole matter to the sound judgment of the court, to be exercised according to the rules of law.

The statute does not expressly authorize the court to pass upon the validity of the act, or whether the board of supervisors had passed the necessary resolution, or the notices had been given. But the power to do this is necessarily involved in the power of the court to act at all. It may be that the court could not pass upon these questions upon which its jurisdiction depended, so as to conclude all inquiry even on a collateral attack. It was a constitutional court, invested with jurisdiction by the constitution of special cases. The parties had full notice of the proceeding, and of their right to be heard. If to be heard upon such questions was a constitutional right, and the constitution is to be read as a part of the law governing this procedure, as the authorities plainly hold, then the law must clearly be held to give the parties that right. In my opinion, however, the right is not doubtful under the statute itself, independent of this proposition. The statute places no limit upon the objections which might be made by those deeming themselves aggrieved by the action or determination of the board as shown in the report. As all their determinations which could affect any person were required to appear in the report, this would seem to include all possible objections. The determination, for instance, might have been objected to because, the act being invalid or the notices not having been given, the board had no right to proceed to act at all. If this contention were sustained, the result would have been that the court would not have confirmed the report, and the proceedings would have ended without fixing a charge upon the property of plaintiffs. They could have complained that a wrong basis was adopted in estimating damages or benefits; that the estimated cost was too much; or for any misconduct of the commissioners which could affect them; or that the cost exceeded the estimated benefits; and it does not seem to me that the court would have found any difficulty in granting relief.

I do not regard the fact that the commissioners were allowed to answer the petition of the aggrieved party as of any consequence. There was no occasion to require an answer at all. The provision was intended to prevent the matter from going by default, and to enable the commissioners to aid the court by such information as was in their power. This aid did not prevent any person interested from being heard, and, if the commissioners betrayed their trust in this matter, that of itself would have constituted a proper subject of complaint which any one might have presented to the court. The idea evidently was that there might be many complaints made by persons feeling themselves aggrieved. The court was bound to hear all and consider all competent and pertinent testimony offered. If any of the alleged grievances were found to be well founded, the report was to be ordered into court. After all complaints had been duly heard, and the court duly advised, the final order was to be made declaring what alterations and modifications were necessary. In this order the court was authorized, not only to grant the specific relief asked for by the petitioners, but also to so modify the report in other respects, so as to adjust the final determinations in regard to the assessment to the report as altered at the prayer of the petitioners.

I concede at once the proposition that, to maintain this final order, it is necessary to hold that all persons whose rights were affected by the proceeding were before the court; that the notice given under section 7 of the act was a process by which they were brought into court, and from that time on they were charged with notice of everything done, and of any step taken in the county court. I think this is perhaps the most debatable point in the case, but the difficulty arises to great extent from a disposition to compare the opportunity here afforded with that deemed essential in ordinary judicial proceedings. Measured by that standard, it would unquestionably be deemed insufficient. But that cannot be accepted as furnishing the rule. "Due process

of law," says Judge Cooley, (Const. Lim. 356,) "in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Under a statute which authorized the commissioner of immigration to prevent paupers, criminals, lewd women, and certain others to land, certain women were detained, and on application to this court on a writ of *habeas corpus*, it was adjudged that the act did not violate the requirement of due process. Here there was no hearing provided by the act at all. Any woman, if found on a vessel from a foreign port, was *liable* to be deprived of her liberty under circumstances most humiliating and degrading. This court, speaking through Justice McKINSTRY, said: "The peculiar necessities which call for the action of the officer, and whether a power was exercised in the same manner prior to the adoption of the constitution without being regarded a violation of the principles of *magna charta*, may be considered; and if it be found that like proceedings have always been recognized as constitutional in England and this country, and if the person who is subjected to them is accorded every reasonable opportunity to defend his individual rights which the nature of the case will admit,—the case being one in which the end sought to be attained is lawful,—a statute cannot be said to deprive a party of the benefits of due process of law." *Ex parte Ah Fook*, 49 Cal. 406.

This conclusion was based partly upon the fact that the object of the law could not be attained unless the action under it was prompt and summary, precluding the possibility of according a hearing at an appointed time and place, and, although it is not so stated in the opinion, perhaps to some extent because the imprisonment, if it can be said that there was any, was so only in a qualified sense. They were only prevented from entering this state, but were not prevented from going anywhere else. This is an extreme case, no doubt, but it well illustrates, as all quarantine laws do, the proposition that the constitutional provision will not be given such effect as will render impossible laws which are generally admitted to be essential to the safety and well-being of society, and that, when usage and necessity both sanction it, the opportunity may be so limited as not to render the law inoperative.

The sufficiency of the opportunity to be heard, accorded, must be ascertained in each case, not only by considering the adequacy of the opportunity to be heard, but the practicability of a more perfect and satisfactory hearing in the particular case; and if that which is provided is such as the settled maxims of the law permit and sanction in such cases, and is reasonable in view of the necessities of the case, it is enough. The practice upon this subject, so far as this particular question is concerned, seems to have been uniform. It has never been held, so far as I can find, by any case really in point, that a new notice is necessary, or that parties whose individual assessments have not been altered must be brought in and given a right to be heard as to other changes, no matter how much their individual burdens may be increased by such changes.

The precise question here raised has been often discussed. *Patterson* v. *New York*, 1 Paige, Ch. 114, is directly in point. The court said: "The notice to propose objections to the report is a sufficient notice to those who are satisfied with the original report to appear before the commissioners, and oppose any alterations which may be proposed by the persons objecting." To the same effect is *In re William St.*, 19 Wend. 680.

In *Gilbert* v. *City of New Haven*, 39 Conn. 472, it is said: "It is further objected that the defendant had no notice of the recommittal, and of the subsequent proceedings. We are satisfied none was required. The whole matter, from the time of its first reference to the board of compensation to the

time the report was finally adopted by the court of common council, is one proceeding. The appellant was notified in the first instance, and appeared. If he neglected to attend the subsequent stages of the proceeding, it affords no ground of complaint now."

Chamberlain v. *Cleveland*, 34 Ohio St. 569, was a case very similar to this in the respect under consideration. It was held that, after the notice, "all persons interested are bound to take notice of what is done up to the time the equalized assessment is confirmed." See, also, *Astor* v. *Mayor*, 62 N. Y. 588; *Murray* v. *Graham*, 6 Paige, 625; *Gates* v. *Brooks*, 59 Iowa, 510, 6 N. W. Rep. 595, and 13 N. W. Rep. 640; *Avery* v. *East Saginaw*, 44 Mich. 589, 7 N. W. Rep. 177.

That is all I deem it necessary to say upon the subject of due process of law.

It is charged, also, that the act is unconstitutional, because it was not competent for the legislature to determine that the improvement would benefit the property owners, or would benefit them to the extent of the costs and damages. While I understand that this point is made by the learned and able counsel for respondents, it is fair to say that they have not much insisted upon the proposition in this form. They really claim that the act directs the commissioners to ascertain the benefits; that they did ascertain them, and determined that the benefits would be less than the estimated cost of the improvement. In this, however, it is clear the counsel are in error. The act only requires the commissioners to estimate the benefit which will accrue to each lot relatively to the benefits to accrue to other lots. The act certainly was not constructed upon the idea that the proceedings could be arrested by any possible finding in regard to benefits. Unless its final operation was made to depend upon such a finding, it is difficult to see why there should be one. Nor, in my judgment, did the commissioners pretend to ascertain the amount of such benefits. The report as first filed showed benefits and costs exactly equal, being each estimated at $898,105. It would have been marvelous if, upon a real estimate of the amounts, they should have come out exactly equal, considering the great number of properties. If, however, they had first ascertained the amount of the costs of the improvement, it would then have been easy to have distributed them proportionately upon the properties benefited. And this is evidently exactly what they did do.

If I rightly apprehend the position of counsel, they seem to think the validity of the law in the first instance, and the jurisdiction of the court or commission which is to conduct the proceeding afterwards, will depend upon the fact as to whether the property is benefited, and this fact must appear affirmatively in order to give validity to the proceeding. But the power to assess for local benefits is not based upon the fact of local benefit in any other sense than all taxes are based upon supposed benefit to the tax-payer. The power of taxation is said by Chief Justice MARSHALL to be vested in the government by all for the benefit of all. "The state taxes are based upon the theory that all are benefited by the government which they are designed to support. And so of county and municipal taxation. And the legislature may also organize smaller or different districts than these usual political subdivisions, and place upon such districts the burden of taxation for purposes in which the inhabitants have a special interest, or which will specially benefit the property within the district."

Now, in regard to general taxation, if a case were presented in which we could plainly see that the tax was not for the benefit of the government, but was wholly for the private advantage of an individual, we should not hesitate to declare that it was not an exercise of legislative power, and the levy would be held void. The same rule, and no other, applies to assessments for local improvements. The main practical difference between assessment for a local improvement and general taxation seems to be that in general taxation it is difficult, and generally impossible, for the court to say that the purpose of the

tax is not a public purpose, or that no benefit will result to the tax-payers, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the constitution, or by its own nature and purposes. Within these limits the legislature is the sole judge of when and to what extent the power shall be used.

It may be said that all the cases on this subject are exceptional, and many of them are cases of great hardship and clear extortion, in which the local benefit claimed is only a pretense to cover the unjust exaction, and the courts have often attempted to find some limitation, in the nature of the power, which would enable them to prevent the injustice. Thus it has sometimes been said that, the power being based upon the supposed benefit, the burden cannot go beyond the actual benefit, which may be inquired into whenever the attempt is made to enforce the tax; but this, obviously, cannot be so. The legislature must act, after all, in providing for the public good, upon the judgment of its members as to what is expedient or will prove beneficial. The most wisely planned projects often fail to realize the good expected. And then the benefits need not be immediate. I see no just limitation in this respect, except that the tax will not be upheld when the courts *can* plainly see that the legislature has not really exercised this judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result. The judge should not place his mere opinion against that of the legislature. So, too, it has been said, that as the tax is in this instance imposed by a power *ab extra*, it is taxation without representation. I find no such limitation upon the power in the constitution, though if there were it might be questionable whether in this case there has been a violation of it. These, and some other limitations which courts have attempted to find in the nature of the taxing power, seem to me to be plain attempts to import into the constitution restrictions which cannot be found there by any just reasoning.

Judge Cooley, in his work on Taxation, 622, says: "The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. We dismiss this topic, therefore, with the simple remark that with the wisdom or unwisdom of special assessments, when ordered in special cases in which they are admissible at all, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

The power being in the legislature, the limitations upon it must be found in the constitution, either in express provisions or by implication; and there exists, which must be recognized by the courts, the same presumption that the law is within legislative power that applies to any other statute; that is, the law will not be declared unconstitutional unless it plainly appears to be so. Therefore it is presumed that the power of assessment existed, and the contrary must be very clearly made to appear before the court could declare the law invalid. It does not so appear in this case.

But it is contended, admitting that the law is valid, the board of supervisors did not authorize the work to be done by expressing their judgment that such improvement would be expedient. March 27, 1876, the board passed a resolution which fully satisfies the act. The proceeding was not conducted under the consolidation act. The statute is complete in itself, and it prescribes no preliminary notice. It furthermore expressly authorizes the board to express such judgment in such form as they might deem advisable. Counsel say this has reference only to the language in which the judgment should be expressed. Since the board could not express its judgment at all without choosing the language, that construction is not tenable.

It is objected that the notices were not duly published because sometimes printed in the supplements. The supplements, however, in this particular instance, were part and parcel of the newspaper itself. They constituted only a third sheet when there was too much matter for the usual two-sheet issue. Why they were designated as "supplements" I do not know, nor does it matter. The mere fact that the word "supplement" was printed at the head could not change their character. I have looked in vain for any evidence to sustain the finding that the so-called supplement was not circulated co-extensively with the balance of the paper. All the evidence upon the subject is the other way.

If I am correct in my conclusions as to this point, the remaining objections do not require much consideration.

That the benefits, as shown in the report, are less than the cost of the improvement, has been already sufficiently noticed. If the intervenors in their cross-complaint have improvidently admitted the construction of the act contended for, it will not help the plaintiffs. It cannot change the meaning of the law, or the legal effect of the finding. If there was a valid law authorizing the improvement, and the board was authorized to act and the county court obtained jurisdiction, the plaintiffs cannot complain here of mere irregularities or bad conduct on the part of the commissioners for which that court could have afforded relief. The alleged frauds were all such as by the exercise of a proper diligence ought to have been known by the interested parties in time to present to the county court. This action is by the property owners on the east side of the street; the property taken was immediately opposite. It is averred that the commissioners, willfully and intentionally, determined the value of lots taken to be more than three times as much as they in fact were, and omitted from their estimate of benefits to the same lots about two-thirds of the actual benefit. This overestimate of damages and underestimate of benefits, so far as I can judge from the statement of the case in the record, seems to be fully sustained. But the report showed fully what the estimates were, and the injustice was so obvious that a mere inspection by those familiar with the property, as the plaintiffs were, could not fail to disclose the fact. As to the interest of Bryant, one of the commissioners, I find no evidence of it except the admission in the cross-complaint that he had for seven or eight years owned the undivided half of a certain lot on the northeast corner of Dupont and Morton streets, which fact appeared upon the maps and reports made by the commissioners.

But admitting the validity of the statute, and that the preliminary steps were taken which authorized the work to be done, the plaintiffs cannot now maintain this action. The statute, as I have already stated, manifested very plainly that the improvement was to be made for their special benefit, and that they were to bear the entire cost. They were afforded an opportunity, even after the board was organized, to arrest proceedings, if a majority in value of frontage should be of opinion that it would not be to their advantage; and were distinctly notified that if they permitted it to be completed their acquiescence would be deemed an absolute acceptance by them of the lien created by the act. Under such circumstances, they could not remain silent, and permit the money obtained of the bondholders to be expended in the improvement of their property, and then escape liability on the plea that the officers charged with the work, who were in a sense their agents, were guilty of misconduct and fraud, which they by proper diligence could have prevented.

The pleadings and the briefs are full of the most positive charges of fraud and corruption against the commissioners, and, although apparently hurled at the board, they are constantly put forward as though the bondholders were in some way responsible for them. They represent themselves as victims who should be relieved at the expense of those who were induced by their former silence to loan the money to improve their property. There was fault and

culpability over and above that of the board which is charged with the perpetration of the frauds. The culpability is on the part of the lot-owners who remained silent while the bondholders were advancing the money to their agents and it was being expended by them for their benefit. I see no reason why the legislature might not declare, by a law before the fact, that such remissness shall constitute an estoppel. Certainly, under such circumstances, a court of equity would not lend its aid to the plaintiffs. Authorities are not wanting on this point, many of them going much further than this court is prepared to go. They fully sustain the proposition, however, that it is competent for the legislature to declare that the tacit acquiescence of parties interested, and their failure to challenge proceedings while in progress, will estop them from questioning them after they are completed; that they cannot accept the benefits and avoid the burdens.

In *Palmer* v. *Stumph*, 29 Ind. 329, an assessment was laid for the improvement of a street, under a statute which provided for an appeal, but declared that no question or act shall be tried which may arise prior to the making of the contract. The court held that the plain intent was that the owner should not remain silent until he had secured the full benefit of the work, and then avoid payment. It is said: "If he denies the power of the council to order the improvement, he must test the question by injunction before the work is done. Acquiescence in the action of the council is by law made to estop him from going behind the making of the contract."

The same statute was under consideration, and the same ruling made, in *Commissioners Allen Co.* v. *Silvers*, 22 Ind. 491. See, also, *Quinlan* v. *Myers*, 29 Ohio St. 500; *State* v. *Wertzel*, 62 Wis. 184, 22 N. W. Rep. 150; *People* v. *Common Council*, 65 Barb. 9; *State* v. *Mayor*, 40 N. J. Law, 244; *Kellogg* v. *Ely*, 15 Ohio St. 64; *Pittsburgh* v. *Scott*, 1 Pa. St. 309; *Patterson* v. *Baumer*, 43 Iowa, 477; *Weber* v. *City of San Francisco*, 1 Cal. 455.

I think the cause should be remanded, with directions to dissolve the injunction and dismiss the complaint. So ordered.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND,

MCKINSTRY, J., (*concurring.*) I concur in the order of judgment directing the court below to dismiss the complaint.

1. If there were irregularities in the proceedings to widen Dupont street, which did not deprive the plaintiffs of opportunities to contest them, they should have been objected to in the course of the proceedings. If the statute is a valid statute, but it appears from the record that there were omissions, defects, or departures from the procedure prescribed by the statute, which render the assessment of the commissioners, or judgment of the county court invalid, for want of jurisdiction of the persons or property of the plaintiffs, each of the plaintiffs had a plain, speedy, and adequate remedy at law, by means of the writ of *certiorari*. *Ewing* v. *City of St. Louis*, 5 Wall. 413; *Spring V. W. Co.* v. *Bryant*, 52 Cal. 132; *People* v. *El Dorado*, 8 Cal. 61; *People* v. *Board of Delegates*, 14 Cal. 479.

2. And so, if the assessment or judgment is void because of the invalidity of the statute, each of the plaintiffs could have resorted to *certiorari*. Moreover, if the act of March 13, 1876, is unconstitutional and void, as contended by counsel for respondents, a sale of the lands assessed, and the tax collector's deeds thereof, would constitute no cloud on the title of the plaintiffs. An injunction will not be issued to restrain the collection of a tax or assessment by the sale of real property, unless it appears that the plaintiff would suffer irreparable injury, or an injunction is necessary to prevent a multiplicity of suits, or the sale would cast a cloud on his title. *Dean* v. *Davis*, 51 Cal. 407; *Houghton* v. *Austin*, 47 Cal. 647; *Savings & Loan Soc.* v. *Austin*, 46 Cal. 448; *Wiggin* v. *Mayor*, 9 Paige, 23; *Dows* v. *City of Chicago*, 11 Wall. 108;

Central P. R. Co. v. *Corcoran*, 48 Cal. 65. When a statute gives to a tax deed, the tax being levied by a valid law, effect as evidence *prima facie* of the regularity of the assessment, and of all proceedings under it, the deed may create a cloud. *Palmer* v. *Boling*, 8 Cal. 384; *Bucknall* v. *Story*, 36 Cal. 73; *Patten* v. *Greene*, 13 Cal. 328; *High* v. *Shoemaker*, 22 Cal. 372; *People* v. *Crockett*, 33 Cal. 157. But whatever effect the legislature may attempt to give to a tax or assessment deed as evidence, every such deed must be read with the statute under which it purports to have been issued, and, if the statute is void, the deed issued under it can cast no cloud on the true title.

3. At a very early day in the judicial history of this state it was held where an assessment was laid for improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons, and the improvement was completed without the plaintiff's interposing to prevent it, an injunction to prevent the sale for the assessment was properly denied on the ground that he who seeks equity must do equity; and that the city should be permitted to proceed and sell the plaintiff's land, leaving him after the sale to the technical rights which he set up in his bill. *Weber* v. *City of San Francisco*, 1 Cal. 455. I know of no case in which the doctrine of that case has been expressly overruled, or overruled by necessary implication. And while there is some conflict in the decisions of the courts of the several states with reference to the conditions under which equity will interpose to enjoin the sale of lands for assessments, there is ample authority to uphold the view taken by the supreme court of this state in *Weber* v. *San Francisco*. "One of the first of these [equitable principles] is that parties coming into equity must do equity. * * * If parties cannot come into equity without submitting to do equity, *a fortiori* they cannot come for the summary interference of the court when their conduct before coming has been such as to prevent equity from being done." Per TURNER, L. J., *Great Western Ry.* v. *Oxford, etc., Ry. Co.*, 3 De Gex, M. & G. 359. Here the plaintiffs with full knowledge of what was done by the officers and others under color of the statute,—for the contrary is not alleged, found, or proved,—with full knowledge of all the acts of which they now complain as wrongful and unlawful, remained quiescent until they had received the benefits of the work. The legislature had declared that their lands would be benefited, and there is nothing in the record to indicate that their lands were not, in fact, benefited to the full amount for which they have been or will be assessed. When the complaint was filed, valuable buildings belonging to many different persons may have been removed or destroyed, and the work of widening the street had been completed at very great expense. So far as appears, while great loss and injury to others would be the consequence of an injunction herein, the plaintiffs will suffer no real injury by a denial of an injunction. Under these circumstances, I think it clear that the plaintiffs so far acquiesced in the work of widening the street and the issue of the bonds as that they should have been denied an injunction decree. *Lux* v. *Haggin*, 10 Pac. Rep. 694, and cases there cited.

Where the county commissioners contracted for the building of a bridge without legal authority, and the bridge was completed, it was adjudged that payment for it could not be enjoined at the suit of a tax-payer. *Clark* v. *Dayton*, 6 Neb. 193. When an improvement had been made along a public street, to which the owner of property abutting thereon had made no objection until after its completion, upon a bill being filed by him to enjoin the assessment for want of notice, it was held he must do equity by paying the amount which his property was benefited. *Barker* v. *Omaha*, 16 Neb. 269, 20 N. W. Rep. 382. In Indiana the doctrine has been carried further, and it is settled that a property owner cannot quietly permit money to be expended in a work which benefits his land under a contract with a city, and then deny the power of the city to make the contract. *Palmer* v. *Stumph*, 29 Ind. 329;

Hellenkamp v. *Lafayette*, 30 Ind. 194; *City of Lafayette* v. *Fowler*, 34 Ind. 146.

4. It may be urged, however, that equity should entertain jurisdiction of a suit like the present "to prevent multiplicity of actions." The multiplicity of actions which it may be said (although in the absence of averment) the complainants here seek to avoid would not injuriously affect any one of them. Cooley, Tax'n, (2d Ed.) 771; *Dodd* v. *Hartford*, 25 Conn. 232. But, if that be not the true rule, and a bill may be filed by many persons to enjoin sales of the separate property of each for the same assessment; if the only necessary community of interest among the plaintiffs is in the questions at issue to be decided by the court,—"in the mere external fact that all their remedial rights arose at the same time, are of the same kind, involve similar questions of fact, and depend upon the same questions of law," (1 Pom. Eq. § 260,)—the question still remains: Will a suit be entertained to prevent multiplicity, when it appears that no one of the plaintiffs could separately demand equitable relief? The cases sometimes supposed to do so do not, when examined, answer the foregoing question in the affirmative.

Kennedy v. *City of Troy*, 14 Hun, 308, and *Clark* v. *Village of Dunkirk*, 12 Hun, 181, were cases in which it was held that, when an assessment is invalid, but such invalidity is shown only by matters *dehors* the record, which in itself is in all respects regular, and within the power and jurisdiction of the authority laying the same, an action in equity may be maintained by any one upon whose real estate an apparent lien has been created by the assessment on behalf of himself *and others in like situation;* but to justify such an action it must be alleged in the complaint that the assessment is regular upon its face, and apparently in accordance with the provisions of the law authorizing it.

In *Ireland* v. *City of Rochester*, 51 Barb. 435, the supreme court said: "The assessment being void as to the plaintiffs, their right to maintain this action is clear, not only to avoid a multiplicity of suits, but to remove a cloud from their respective titles;" citing 14 N. Y. 534. The case referred to is *Heywood* v. *City of Buffalo*, 14 N. Y. 535. That was a suit by a single plaintiff, and the decision was: When an action was brought to restrain the collection of and annul an alleged illegal assessment, which, if legal, was a lien on the plaintiff's real estate, but the complaint did not show but that its invalidity appeared on the [face of the] proceedings imposing it, on demurrer to the complaint, held the action could not be maintained. And in *Scofield* v. *Lansing*, 17 Mich. 437, the supreme court of Michigan held that, when by the provisions of a city charter a tax was declared to be a lien on premises, it constituted a cloud on the title. In these cases each of the plaintiffs could have claimed separately (as was held by the courts of New York and Michigan) the aid of equity to remove a cloud from his title, as well as have maintained his action or defense at law. In some of them the plaintiffs were permitted to join as plaintiffs in an equitable suit, because the title to their respective tracts of land was affected by the same cloud, created by the same proceedings.

Even if there are cases in which each of the several plaintiffs would not be allowed to maintain a separate suit in equity, but yet all would be entitled to unite in one suit for the determination of questions which might arise in separate actions at law, the result herein must be the same. The plaintiffs, by their acquiescence and consent, having lost their right to ask the aid of equity by injunction, the court ought not to have granted to all that which it should refuse to each. To grant the injunction to all because each may be subjected to a separate action at law is to reward the laches and neglect which has deprived each of his right to seek the equitable relief. The acquiescence which estops the plaintiff from obtaining an injunction is in the nature of a defense in equity, and, by holding all estopped by such acquiescence, it is

not necessarily held that the plaintiffs were improperly united as plaintiffs, whether they were united to prevent multiplicity of actions or for any other reason. It is simply to say that none of the plaintiffs are entitled to the preventive decree.

PATERSON, J., (*dissenting.*) I think the judgment should be affirmed. I assent to some of the propositions advanced in the leading opinion, but the statute and proceedings in controversy are in many respects, it seems to me, plainly violative of that clause in the constitutional declaration of rights, which says: "No person shall be deprived of * * * property without due process of law."

1. That the act itself should provide for "due notice" to the property owner, and afford him an opportunity to be heard, is settled beyond all controversy; and, whatever may be the conflict of opinion upon the question of what is "due notice," there can be no question that it should be notice of a full hearing as to time, place, and liability. Section 7 is the only provision which assumes to satisfy this requisite, but it provides no notice at all. It affords no notice of a hearing, and none was given. It provides for a notice, after assessment is complete, that the report "is open for inspection." It is true section 8 attempts to give any person dissatisfied with the report a hearing upon petition before the county court, which court could not, under sections 6 and 8, art. 6, of the old constitution, be clothed with jurisdiction of any case involving the title or possession of real property; but it is only by implication, if at all, that the court could aid him, the language of the statute being: "It shall be in the discretion of the court, after hearing and considering said application, to *allow* or *deny* the same." As to those, however, who were satisfied with the report, which had been left "open for inspection," there is no hearing provided, although the court is given in such cases absolute power to fix values and assess damages of its own motion, and according to its own rules and estimates, notwithstanding the report of the commissioners, with which the owner may be content.

The following is the concluding portion of section 8: "But, in case no such petition shall be filed with said county court within the time above limited for the filing thereof, the said report shall be presented by the said board to the said county court, with a petition to the court that the same be approved and confirmed by the court. The court shall have power to approve and confirm said report, or refer the same back to said board, with directions to alter or modify the same in the particulars specified by the court in the order referring the same back; and thereupon the said board shall proceed to make the alterations and modifications specified in the order of said court. The alterations and modifications aforesaid being made, the report shall be again submitted to the said court; and if the court, upon examination, shall find that the alterations and modifications have been made according to the directions contained in said order, the said court shall approve and confirm the same by an order to be entered on its minutes; but, if the said board shall have neglected or failed to make the alterations and modifications set forth in the order of reference, the court may again refer the report back to said board, and so on until its original order of alteration and modification shall have been complied with by said board, and the said court shall then approve and confirm said report." St. 1875–76, p. 436, § 8.

Of course, if we can say that the citizens of the state are charged with notice of all the acts of the legislature affecting their private interests, and must be on the alert to prevent fraud in the carrying out of the work provided for, the objection just considered is not well taken; but that would be equivalent to saying that "notice" and "opportunity to be heard," are not essential elements of "due process of law."

2. We might be able to overlook the defects referred to if it were clear that

the parties whose property was affected had, as matter of fact, due notice and substantial hearing; but, as I read the record, such is not the case here. Many of the orders seem to have been made *nunc pro tunc* in regard to the time for hearing. Several of the petitions were set for hearing on December 8th. On that day no orders were made; nothing was done until December 15th, when they were continued to December 18th. On December 19th the whole matter was continued to and set for hearing December 22d. Thereafter, *and without further notice or opportunity to appear*, the court, on an *ex parte* motion, took up the case and finally disposed of the matters before it, two days before the day set for regular hearing. These interesting, if not suspicious, facts appear on the face of the court's records, and in ordinary cases would not support a judgment. *Tompkins* v. *Clackamas*, 4 Pac. Rep. 1210.

3. The report and judgment show that the assessment was for about $100,000 in excess of the benefits. If I understand the authorities on this proposition, a statute which imposes an assessment in excess of special benefits is unconstitutional. *Davidson* v. *New Orleans*, 34 La. Ann. 170; *Taylor* v. *Palmer*, 31 Cal. 254; *Creighton* v. *Mason*, 27 Cal. 624; *In re Market St.*, 49 Cal. 549; *Chicago* v. *Larned*, 34 Ill. 203.

It may be admitted that the legislature had the power to declare the benefit, but I fail to find any declaration of that kind in the act referred to. It is true the act speaks of "the district hereinafter described as benefited by said widening," but there is no direct finding of the fact of benefit therein by the legislature. On the contrary, the board of commissioners are therein directed to ascertain and fix the extent of damages and benefits "according to the judgment of the board." Section 7.

4. The bondholders stand in no better position than the municipal authorities. The bonds are not general or ordinary municipal bonds, issued for the benefit of the general fund. They are payable out of a special fund, raised by special tax, on a small district. They do not show on their face that the act has been complied with,—which is essential even if the act referred to be valid, —and consequently they are not negotiable so as to cut off the defenses claimed. *Carroll Co.* v. *Smith*, 18 Reporter, 33; *Williams* v. *Roberts*, 88 Ill. 11; *Cagwin* v. *Hancock*, 84 N. Y. 532; *Craig* v. *Andes*, 93 N. Y. 405; *Lyons* v. *Chamberlain*, 89 N. Y. 585.

72 Cal. 475

WHITE *v.* SUPERIOR COURT, etc. (No. 11,614.)

(*Supreme Court of California.* June 7, 1887.)

NEW TRIAL—PRACTICE—PROHIBITION.

Under the California practice, where the notice of the intention to move for a new trial, as served upon the opposite party, specifies that the motion will be heard upon a statement of the case, and the notice is not filed, and no draught-statement of the case for new trial has been served or filed, the trial court has no power to consider the motion; and if it persists in doing so the supreme court will issue a writ of prohibition to prevent it.

In bank. Petition for writ of prohibition.

The petition prayed that a writ of prohibition issue directing that the superior court, and judge thereof, be absolutely restrained from any further proceedings in the hearing of motion for new trial in the case of *White* v. *Gutenberger*, which was an action brought originally in a justice's court to recover a debt of $100.

Wilbur F. George, for petitioner. *Grove L. Johnson*, for respondent.

BY THE COURT. On appeal from the justice's court upon questions both of law and fact, the action (*White* v. *Gutenberger*) was retried in the superior court, and a judgment therein rendered in favor of the plaintiff, the pe-

titioner for prohibition. The defendant Gutenberger served a notice of intention to move for a new trial, specifying that said motion would be heard upon a statement of the case, but such notice was never filed. No draught-statement of the case for new trial was ever served or filed by the defendant in said action. Neither the plaintiff, White, nor his counsel, ever stipulated that the statement of facts on which the cause was tried, should be adopted as the statement on motion for new trial, nor was it ever agreed between White and Gutenberger, or their respective counsel, that the motion should be heard, although the notice of intention was not filed. The notice of intention to move for new trial was served July 10, 1882. The present proceeding was commenced May 5, 1886. December 15, 1885, plaintiff, White, moved to dismiss the motion for new trial on the grounds (1) no notice of intention, etc., had been filed; (2) no statement had been served or filed, or any affidavits, etc.

The superior court has no jurisdiction to hear and determine the motion. Ordered and adjudged that the writ issue prohibiting said superior court, and the judge thereof, as prayed for in the petition herein.

72 Cal. 363

HECHT *v.* SLANEY and others. (No. 11,908.)

(*Supreme Court of California.* May 28, 1887.)

1. LIMITATION OF ACTIONS—RUNNING OF STATUTE—IMPLIED TRUST.

Upon a suit to subject to the satisfaction of a judgment property of an insolvent debtor, upon which he has filed a declaration of homestead, and which he has procured to be set apart to him as exempt in insolvency proceedings, upon the ground that the property was not subject to be selected as a homestead, and that the order in the insolvency proceedings was obtained by fraud, and without notice to the parties interested, and that, therefore, the debtor holds the property as trustee for his creditors, the statute of limitations will begin to run at least from the time when the stay effected by the insolvency proceedings ceased to operate.

2. SAME—NOTICE.

A party is presumed to know whatever he might with reasonable diligence have discovered; and when the fundamental facts upon which an alleged fraud rests are matters of public record, open to his inspection, ignorance of the fraud will not excuse his laches, nor stay the running of the statute of limitations.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

Graves & O'Melveny and *Chapman & Hendrick,* for appellant. *H. M. Smith* and *W. H. Clark,* for respondents.

BELCHER, C. C. This is an appeal by the plaintiff from a judgment entered against him, after demurrer sustained to his complaint. The facts set forth in the complaint may be briefly stated as follows: On the seventeenth day of May, 1879, S. W. Levy recovered a judgment in the district court of the Twenty-third judicial district of this state against the defendant William Slaney for the sum of $2,296.17, and $32.20 costs. On the tenth of May, 1884, Levy assigned the judgment to the plaintiff, and no part of it has ever been paid. On the twenty-fourth of July, 1879, Slaney filed a petition in insolvency in the county court of Los Angeles county, and on the same day an order was made staying all proceedings against him; which order remained in full force till the twenty-eighth of February, 1882. On the thirtieth of August, 1879, H. M. Mitchell, sheriff of Los Angeles county, was appointed assignee of the estate of Slaney, and received the usual assignment; and he continued to act as such assignee until he was discharged, on the twenty-eighth of February, 1882. On the twenty-fifth of February, 1879, Slaney was the owner of certain real property in the city of Los Angeles, and filed a declaration of homestead thereon. On the seventeenth of September, 1879, he filed a petition in the county court, where his insolvency proceedings were pending, asking that the property on which he had filed his declaration of

homestead be exempted and set apart to him. The petition represented that the property had been duly selected as a homestead, and was exempt from execution; and without any notice of the filing of the petition, or of the time set for the hearing thereof, the property was, by an order of court made on the twenty-fourth of January, 1880, set aside to him as a homestead.

It is then alleged that the representations in the petition were false; that the property was then worth at least $10,000, and was not subject to be claimed as a homestead, because at the time of its selection, and up to the time when it was set aside, it was used almost wholly for business purposes.

It is further alleged that the representations were fraudulent, and made for the purpose of defrauding his creditors by withdrawing this property from the assignee's hands, and that it really constituted all the assets of the insolvent; that neither the plaintiff nor his assignor had any notice of the order setting aside the property, or of the representations, until the seventh day of May, 1884, and that, by reason of the imposition practiced upon the court in procuring the order, he became, and now holds the property as, a trustee for his creditors, including the plaintiff.

The prayer is that he be adjudged to hold the property in trust for his creditors, and that it be sold, and the proceeds applied to the payment of the debt of plaintiff, and other creditors who may come in. The defendants, other than Slaney, were made parties to the action because they claim some interest in or lien upon the property.

The demurrer was upon the grounds—*First*, that the complaint did not state facts sufficient to constitute a cause of action; *second*, that Mitchell should have been made a party plaintiff; *third*, that the action was barred by sections 336 and 343 of the Code of Civil Procedure.

The action was commenced on the ninth day of April, 1886,—more than six years after the homestead was set aside, and more than four years after the insolvency proceedings were terminated,—and it was brought to set aside a judgment, and to establish and enforce against the defendant a constructive trust. The plaintiff set forth in his complaint the facts in regard to his judgment; but this was only to show that he was a creditor, and as such entitled, with the other creditors, to the relief which he sought.

The theory upon which the action was commenced evidently was that the property was not subject to be selected as a homestead, and so the declaration filed did not constitute it a homestead, and that, as there was no valid homestead when the order was made setting it apart, the order was a nullity, and the property was still subject to the payment of the insolvent's debts. And this theory was supposed to be sustained by the decisions of this court. *Tiernan* v. *His Creditors*, 62 Cal. 286; *Laughlin* v. *Wright*, 63 Cal. 113; *Matzen* v. *Shaeffer*, 65 Cal. 81, 3 Pac. Rep. 92.

In this view of the case the principal question is, was the action barred by the statute of limitations? Whatever may once have been the rule, it is now well settled that the statute of limitations runs in favor of a defendant chargeable as a trustee of an implied trust, and it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust. *Howell* v. *Howell*, 15 Wis. 55; *Haynie* v. *Hall*, 5 Humph. 290; *Wilmerding* v. *Russ*, 33 Conn. 67; *Kennedy* v. *Baker*, 59 Tex. 150; *Currey* v. *Allen*, 34 Cal. 254; Perry, Trusts, § 865. In such a case the statute begins to run when the wrong complained of is done, and under our Code the limitation is four years. Section 343, Code Civil Proc.; *Piller* v. *Southern Pac. R. Co.*, 52 Cal. 42.

As the plaintiff's action was commenced more than four years after the order staying all proceedings against the insolvent ceased to be in force, it was clearly barred, unless saved by the averment in the complaint that neither the plaintiff nor his grantor had any notice of the order setting aside the homestead, or of the false and fraudulent representations in the petition asking that it be set aside, until the seventh of May, 1884.

But these were matters of record in the court, which, with reasonable diligence, Levy, the assignor, might seasonably have known, and, it would seem, should have known. As no averment is made to the contrary, it must be presumed that he actually knew of the filing of the declaration of homestead, of the value and use of the property at that time, and that, notwithstanding the declaration, it did not become a homestead in fact; that proceedings in insolvency were commenced, and regularly conducted to an end; and that he, as a creditor, was entitled to have the property sold, and the proceeds distributed. Still, though no dividend was received, both he and the plaintiff slept on their rights for years. No reason being assigned why notice of the representations and order was not sooner had, the case would seem to be one where the maxim, *vigilantibus non dormientibus, jura subveniunt*, has peculiar application. The rule in such cases is that a party is presumed to know whatever he might with reasonable diligence have discovered: and when the fundamental facts upon which the alleged frauds rest, are matters of public record, open to his inspection, ignorance of the fraud will not excuse his laches, nor stay the running of the statute. *Smith* v. *Talbot*, 18 Tex. 775; *Nudd* v. *Hamblin*, 8 Allen, 130; *Manning* v. *San Jacinto Tin Co.*, 7 Sawy. 418, 9 Fed. Rep. 726.

It follows, in our opinion, that the action was barred, and the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

72 Cal. 390

PEOPLE *v.* BROWN. (No. 20,277.)

(*Supreme Court of California.* May 31, 1887.)

QUALIFICATION OF JUROR—OPINION—CROSS-EXAMINATION.

Where a proposed juror, who was challenged for actual bias, stated on his examination that he had formed an opinion on the subject of defendant's guilt which it would require evidence to remove, but that he could give the defendant a fair trial, *held*, that the exclusion of questions asked by defendant's counsel, evidently designed to bring out the character and force of the opinion, was error.[1]

Department 1. Appeal from superior court, Tulare county.

Trial for murder. Defendant was convicted. The point referred to in last paragraph of the opinion is the exclusion by the court of a question put by defendant to a witness, as follows: "*Question.* Was the wound inflicted on the breast of Luther Brown (deceased) made by the entry or exit of the bullet?" The objection was that no sufficient foundation had been laid for the introduction of such testimony, and that it did not appear that the witness was an expert on gunshot wounds and was a surgeon.

Oregon Sanders, *J. W. Davis*, and *P. Reddy*, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

TEMPLE, J. The defendant was tried upon a charge of murder, and was convicted of murder in the first degree. The appeal is from the judgment, and from an order denying a new trial.

On the trial, M. P. Troxler was examined as to his qualifications as a juror. He stated that he had heard some talk of the case, and had read accounts of the affair in the local newspapers, and he thought he read the evidence taken

[1] See People v. Crowley, (N. Y.) 6 N. E. Rep. 386, and note; Stoots v. State, (Ind.) 9 N. E. Rep. 380; State v. Vatter, (Iowa,) 32 N. W. Rep. 506; State v. Sopher, (Iowa,) 30 N. W. Rep. 917; State v. Saunders, (Or.) 12 Pac. Rep. 441; Steagald v. State, (Tex.) 3 S. W. Rep. 771.

before the coroner, and had formed an opinion in reference to the guilt or innocence of the defendant. He was then asked by defendant's counsel, was that opinion favorable or unfavorable to the defendant? Objection was made that it was irrelevant, incompetent and immaterial, and the court sustained the objection. Defendant then asked: "What is your opinion *now*, from what you have read, as to the guilt or innocence of the defendant?" To which there was interposed the same objecton, and the same ruling was made.

The court also refused to allow the following: "What impression did the reading of these articles make on your mind? Counsel then asked: Could you enter upon the trial of this case with the presumption that the defendant is innocent until he was proved guilty, or would you enter upon the trial presuming that defendant is guilty, and desiring to see him vindicated by the testimony of the witnesses here? *Answer.* I don't think I could. *Question by Counsel for the Defense.* That is, you don't think you could enter upon the trial of the case with the belief that the defendant is innocent? *A.* No, sir. *Q. by Counsel for Defense.* Do you think you could give the defendant a fair and impartial trial? *A.* I think I could, notwithstanding I have an opinion from what I have heard and read. It would take good evidence to remove that opinion. *Q.* In other words, you would be of opinion that defendant is guilty until he had proved himself innocent; isn't that the exact state of your mind?" Objected to as being irrelevant, incompetent, and immaterial.

All of these rulings against the defendant were duly excepted to, and the juror was challenged for actual bias. The juror proceeded to say further, in reply to the district attorney, that he could and would give the defendant a fair trial, etc. The court denied the challenge, and the defendant exhausted all of his peremptory challenges before the panel was completed.

The precise question before the court was as to the existence of a state of mind on the part of the juror which would or might prevent him from acting with entire impartiality, and without prejudice to the rights of defendant. It was evident the juror had a fixed opinion as to the guilt of defendant, which he said would require good evidence to remove. The purposes of the attempted examination was to ascertain, so far as possible, the extent of this opinion, its character, and whether it resulted to any extent from prejudice against defendant or his case. We think the examination was proper, and that the court erred in sustaining the objections of the district attorney. This matter was discussed in the case of *People* v. *Hamilton*, 62 Cal. 377. The precise point here made was, perhaps, not involved in that case, but we are satisfied with the reasoning upon this subject in that opinion.

Misapprehension upon this seems to have arisen from the fact of the former practice under a different statute, and the decisions based upon it. The former statute made an unqualified opinion upon the subject of defendant's guilt a disqualification, without reference to the state of the juror's mind in other respects. Of course, on such an issue, it was not important to know whether the opinion was favorable or unfavorable. But even then, when the challenge for actual bias was interposed, it was competent to ask the questions here excluded. Now, the whole inquiry is made upon the challenge for actual bias, and is not confined to the question as to whether the juror has a fixed opinion or not, but extends to all matter of prejudice which would tend to establish that the juror would not be impartial. Entertaining a fixed opinion that the defendant is guilty would seem, under the present statute, to be sufficient to sustain a challenge, unless the court finds something else, to-wit, that he can and will act fairly and impartially upon the matters to be submitted to him. The court is not bound to take the simple statement of the juror upon these matters, but counsel have a right to make such inquiries as will bring out the character and force of the conviction he has. How else

can the court determine whether he is able, notwithstanding his prejudice, to act fairly and impartially?

The other question raised may not arise upon the new trial, or, if it should, the circumstances may be very different. The cases upon the subject are very numerous, and from them it is very difficult, probably impossible, to deduce any rule or body of rules which would satisfactorily indicate when a witness may be allowed to give his opinion. A decision of this question, therefore, which may not again arise, would serve no practical end.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: McKINSTRY, J.; PATERSON, J.

2 Cal. Unrep. 761

HALEY *v.* HALEY. (No. 11,778.)

(Supreme Court of California. May 28, 1887.)

1. DIVORCE—GROUNDS OF—CHARGE OF UNCHASTITY.
 A charge by a husband, in a cross-bill filed by him for divorce, that his wife was pregnant by some one other than himself when he married her, and that she concealed the fact from him, tends to cause the wife "grievous mental suffering," and is a sufficient ground to sustain a subsequent bill by the wife, where it appears that the charge was false and malicious, and that the husband's bill was dismissed.[1]

2. SAME—EVIDENCE.
 The provision of Civil Code Cal. § 130, that "no divorce can be granted upon the uncorroborated * * * testimony of the parties," has no application to a case where the wife seeks a divorce on the ground of a false and malicious charge against her by the husband of concealed pregnancy by another man at marriage, although she is the only witness who gave testimony as to what her feelings about the charge were. Where the court finds that the charge was false, and there is nothing in the record to negative the fact that the wife is a pure and virtuous woman, the presumption is that such a charge had its natural effect on such a woman, and caused her "grievous mental suffering."

3. SAME—DECREE—ASSIGNMENT OF JUDGMENT TO WIFE.
 Where the court, upon decreeing a divorce in favor of the wife, finds that there is a judgment outstanding against her in favor of the husband, and that the judgment, which was wrongfully rendered, was for money which he had given her in consideration of the relinquishment by her of her rights in the homestead, so that he might sell it, the court may order the judgment to be assigned to her.

4. ESTOPPEL—JUDGMENT—DIVORCE.
 A decree dismissing a bill filed by the wife for divorce, and also dismissing the husband's cross-bill, because the charges of neither party had been sustained, does not operate as an estoppel upon the wife to bring another bill against the husband on the ground that the charges in his cross-bill, which the court had found to be false, amounted to cruel and inhuman treatment.[2]

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

In 1884, some time between June 7th, at which date the parties were married, and September 19th, Presentacion B. De Haley, respondent, commenced suit in the superior court of Los Angeles county against her husband, Salisbury Haley, appellant, for divorce. The bill was based upon a charge of "cruel and inhuman treatment, in that he had accused her of having committed adultery." This suit, which is known and referred to in this statement as No. 3,449, resulted October 7, 1884, in a decree in favor of the wife of

[1] See Minde v. Minde, (Mich.) 32 N. W. Rep. 868; Whitacre v. Whitacre, (Mich.) 31 N. W. Rep. 327, and note; Vanduzer v. Vanduzer, (Iowa,) Id. 956; Burlage v. Burlage, (Mich.) 32 N. W. Rep. 866; Williams v. Williams, (Tex.) 2 S. W. Rep. 823, and note; Leach v. Leach, (Me.) 8 Atl. Rep. 349.

[2] As to when a judgment is not an estoppel, see Bigley v. Jones, (Pa.) 7 Atl. Rep. 54; Dicken v. Hays, Id. 58; Riverside Co. v. Townsend, (Ill.) 9 N. E. Rep. 65, and note; Weiss v. Guerineau, (Ind.) Id. 399; Richardson v. Richards, (Minn.) 30 N. W. Rep. 457; Elgin Nat. Watch Co. v. Meyer, 29 Fed. Rep. 225.

absolute divorce. A motion was made by the husband, December 16, 1884, for a new trial, which was overruled, and an appeal was thereupon taken to the supreme court, which, May 14, 1885, reversed the superior court, and granted a new trial. *Haley* v. *Haley*, 7 Pac. Rep. 3. The motion for the new trial in the superior court was supported, in part, by the affidavit of the husband set out below. On May 8, 1885, the husband filed a bill for divorce against the wife. The substance of this bill is also set out below. This bill was dismissed, on advice of counsel, May 13, 1885, pending the appeal in No. 3,449. When the *remittitur* in that case reached the superior court, the husband filed a cross-complaint containing the substance of the bill filed by him May 8, 1885, and subsequently dismissed. A supplemental complaint was filed by the wife, June 17, 1885, setting out the affidavit used by the husband on his motion for a new trial, and the bill filed by him, May 8, 1885, and alleging statements by him to various persons that his wife was pregnant by some one other than himself, and that she had had a child by some other than himself. This bill was demurred to, and the demurrer was sustained. The court (BRUNSON, J.,) found January 14, 1886, as a matter of fact, among other things, "that defendant, during said marriage, and before plaintiff left his house, never accused her of being pregnant by some or any man other than himself, or desiring to have sexual intercourse with some or any man other than himself; nor did he taunt or accuse her of committing adultery, or of desiring to commit adultery with some or any man other than himself." As to the cross-complaint of the husband, the court found, among other things, "that at the time of said marriage, June 7, 1884, plaintiff was not actually or at all pregnant with child by the paternity of any individual." The complaint and cross-complaint were thereupon dismissed, and the divorce refused.

The wife then filed this bill, alleging in paragraphs 4, 5, and 6 as follows:

"*Fourth.* Plaintiff alleges that, since said marriage was consummated, the said defendant has treated the plaintiff in a cruel and inhuman manner, and particularly in this: On or about the sixteenth day of December, 1884, the said defendant filed in this court an affidavit, verified by himself, in a certain action then and there pending between plaintiff and himself, which said affidavit was thereafter read by and made known to a number of persons, and is in words and figures, to-wit:

"'IN THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATE OF CALIFORNIA.

"'*Presentacion Haley, Plaintiff*, vs. *S. Haley, Defendant.*

"'S. Haley, being duly sworn, deposes and says that on December 12, 1884, the plaintiff in this action arrived from San Francisco, since which time affiant has seen her numerous times, and finds that she is in an advanced state of pregnancy; and, as she appears to affiant, she is from six to seven months advanced in pregnancy; that affiant first discovered that she was pregnant in July last past, in seeing that her belly, breasts, and feet were swelling, of her having nausea in the morning, since which time affiant, on every occasion of seeing her, discovered that she was advancing in pregnancy, and on the fourth of October, at the trial of this cause, affiant discovered unmistakable signs of pregnancy in plaintiff. Affiant and plaintiff intermarried June 7, 1884, and affiant had no connection with plaintiff until June 19, 1884.

"'S. HALEY.

"'Subscribed and sworn to before me this sixteenth day of December, 1884.

"'A. W. POTTS, Clerk.

"'By A. RIMPAU, Deputy Clerk.'

"All of which statements in said affidavit contained were wholly and absolutely false and malicious, and became known to many persons in this com-

munity, and were communicated to this plaintiff, by reason whereby she suffered grievous mental pain and anguish.

"*Fifth.* Plaintiff further alleges that on or about the eighth day of May, 1885, defendant caused to be prepared and filed in this court a complaint in a certain action entitled '*Salisbury Haley* vs. *Presentacion Ballestero De Haley*,' in which said complaint he charges plaintiff, to-wit: 'That heretofore, to-wit, on the seventh day of June, 1884, the plaintiff and defendant were intermarried as husband and wife. Now plaintiff shows to the court and avers that the defendant, by his inducement of this plaintiff to enter into marriage with her, perpetrated a grievous fraud upon this plaintiff, and that the defendant did willfully deceive and cheat this plaintiff as to the defendant's capacity to fulfill the duties, obligations, and ordinary incidents of marriage, in this: That at the time of the intermarriage of plaintiff and defendant, on the seventh day of June, 1884, as aforesaid, this defendant was in fact, unknown and unsuspected by this plaintiff, actually pregnant with child by some person other than this plaintiff, and that this plaintiff was entirely ignorant of the fact of this defendant's pregnancy at the time of the intermarriage of plaintiff and defendant as aforesaid. And plaintiff avers that such pregnancy of this defendant was not by this plaintiff, and plaintiff avers that he never had sexual intercourse with defendant prior to the marriage of plaintiff and defendant on the seventh day of June, 1884, as aforesaid.'

"*Sixth.* That each and every of said allegations and statements were false, unfounded, and malicious, and were made by the said defendant for the sole purpose of grieving the said plaintiff, and that, before the commencement of this action, the same were made known to this plaintiff, and that thereby she was subjected to great shame, and to grievous mental anguish and suffering, and was made sick, and her life rendered miserable and wretched. Wherefore plaintiff prays judgment."

There was a demurrer to the complaint, which was overruled. The husband then filed a cross-complaint, alleging desertion. On May 3, 1886, the court passed a decree dissolving the marriage, allowing the wife to resume her maiden name, and awarding her $1,500 and costs. The decree was based on the following findings of facts:

"(1) That all the allegations of the complaint herein are true, and that the articles set forth in said complaint as cause of action are complete, are not misleading, nor are they mutilated.

"(2) The judgment made and entered in the action of *P. B. De Haley* vs. *S. Haley* on January 14, 1886, in said court, was not and is not an adjudication of any of the matters charged in the cross-complaint in this action, or of any of the issues tendered thereby.

"(3) That on the eighth day of April, 1886, the defendant herein filed a cross-complaint against the plaintiff praying for a decree of divorce upon the ground of desertion.

"(4) That the allegation of desertion pleaded in said cross-complaint is true.

"(5) That plaintiff and defendant intermarried on the seventh day of June, 1884, at the city and county of Los Angeles, state of California; that after said marriage, and on the same day, the defendant filed his homestead declaration upon certain lands and premises situated in said city of Los Angeles, and upon which he and the said plaintiff then resided; that said homestead declaration was in all respects duly made, certified, and recorded as the law required; that on the trial of the cause of *P. B. De Haley* vs. *S. Haley*, (No. 3,449,) this court awarded to the defendant, S. Haley, the said homestead, and to the plaintiff, P. B. De Haley, the sum of $1,500, for and on account of her interest therein; that subsequent to said decree, and while the same was in full force, the said S. Haley, being desirous of selling said homestead property, paid to the plaintiff herein the said sum of $1,500, whereupon, and by

reason of such payment, this plaintiff made, executed, and delivered her abandonment of said homestead in due form of law, and quitclaimed all her right, title, and interest therein, as directed by the said S. Haley. Thereafter the said judgment was, on appeal to the supreme court, reversed, and the cause remanded for a new trial, and said action was thereafter, and after the filing in this court of the *remittitur* from the supreme court, tried, and the prayer of the complaint denied; that subsequent to such determination of said action, the said S. Haley commenced an action in this court against the plaintiff herein for the recovery of the said sum of $1,500 so as aforesaid awarded to her in lieu of her interest in the said homestead property, and the action herein last above referred to came on regularly for trial, and thereupon, to-wit, on the twenty-first day of April, 1886, a judgment in favor of S. Haley, plaintiff, and against the said P. B. De Haley, defendant, was duly made, given, and entered; and it appearing to the court that the money for which said last-named judgment was given, equitably and of right represented the interest of the said P. B. De Haley in and to the homestead so declared as hereinbefore found, it is further found that plaintiff herein is entitled to have awarded to her, as and for her interest in the estate and homestead of the defendant, S. Haley, the said judgment of $1,500 and costs, and the whole thereof, rendered as aforesaid on, to-wit, the twenty-first day of April, 1886."

The husband thereupon took this appeal.

S. Haley and *D. Lyons*, for appellant. *Hupp & Glowner*, for respondent.

FOOTE, C. Mrs. Haley instituted an action for divorce against her husband, Salisbury Haley. She alleged and proved that, in a former action for divorce instituted by him against her, he had, in his pleading and affidavits filed in the cause, charged her falsely and maliciously, and for the purpose of grieving her, with having been pregnant at the time of their marriage by a man other than himself, and that she had concealed her condition from him, and by such concealment induced him to marry her. The averments of the complaint were found to be true.

We think that such a charge tends to cause "grievous mental suffering," and comes within the rule laid down in *Powelson* v. *Powelson*, 22 Cal. 358. The plaintiff testified that it did in fact cause her grievous mental suffering. It is contended, however, that, inasmuch as no other witness gave evidence as to what her feelings were, her testimony on this point is uncorroborated. But the court finds that the charges were false, and there is nothing in the record to negative the fact that Mrs. Haley was a pure and virtuous woman. This being the case, we think the presumption is that the charge had its natural and usual consequence, and that it is no more necessary to prove that it induces suffering than to prove that bodily injury is followed by pain. The court was entirely justified in its finding on that point.

The judgment made and entered in a former action between these same parties was not such an adjudication of the matters set up by the cross-complaint in the present action as would bar the plaintiff's right of recovery; for, although Mr. Haley's charges against his wife of a want of chastity, etc., had been previously passed upon by the trial court in the former action, yet that court found adversely to him on the point, and repudiated the charge as being untrue. Therefore it would be a violation of Mrs. Haley's legal right to say that because her husband had in that first action made groundless and cruel charges against her, on which the court had fixed the seal of disbelief, that she, in this action, may not, by her complaint, make such charges so made the proper basis of present judicial inquiry, with a view to determine whether such conduct on his part did or not entitle her to seek for and obtain a divorce from him.

We perceive no error in the trial court's assigning to her the judgment for $1,500, which her husband had formerly obtained against her; for to enforce

that judgment would have been inequitable, since the money, which was the basis of the action wherein that judgment was recovered, had been voluntarily given to her by him on the settlement of a former suit, and he had no just right to recover it back.

Upon the whole record, we observe no prejudicial error, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 384

Ex parte McCARTHY. (No. 20,314.)

(*Supreme Court of California.* May 31, 1887.)

VAGRANCY—COMPLAINT.

Where the acts relied upon to establish vagrancy are that the accused was "an idle and dissolute person, who wandered and roamed * * * about the streets of the city at late and unusual hours of the night," the complaint is sufficient to charge the offense under Pen. Code Cal. § 647, defining who are "vagrants." If it sets out those facts, it need not allege that the person prosecuted is "without visible means of support," and, having "the physical ability to work, does not, for the space of 10 days, seek employment, nor labor when employment is offered."

On *habeas corpus*.

M. S. Wert and *Martin Quinlan*, for petitioner. *E. B. Stonehill*, Dist. Atty., for respondent.

SEARLS, C. J. The petitioner, Alice McCarthy, was convicted of vagrancy in the police court in and for the city and county of San Francisco, and upon an appeal to the superior court the judgment was affirmed. She now asks to be discharged upon the ground that the complaint against her stated no offense of which the court could take jurisdiction, and hence that the judgment is void.

The substance of so much of the complaint as is necessary to be stated is that Alice McCarthy, on and from the twenty-sixth day of April to the twenty-sixth day of May, 1887, at the city and county of San Francisco, committed a misdemeanor, and during said period "willfully and unlawfully was, has been, and during said time continued to be, and still is, an idle and dissolute person, who wanders and roams, and has during said time wandered and roamed, about the streets of said city and county at late and unusual hours of the night."

Section 647 of the Penal Code, under which petitioner was convicted, specifies various acts as constituting vagrancy, among which are common prostitutes, common drunkards, etc., including, also, idle and dissolute persons who wander and roam about the streets, etc., using the language of the complaint herein. The first clause of the section is in the following language: "Every person (except a California Indian) without visible means of living, who has the physical ability to work, and who does not for space of ten days seek employment, nor labor when employment is offered him, every healthy beggar who solicits alms as a business, * * * is a vagrant."

The contention of petitioner is that the statute is to be construed in the light of this first clause, and as though its requirements were repeated in connection with *each* of the other acts defined as constituting vagrancy, and that to charge a defendant with being a common drunkard, a healthy beggar, an associate of known thieves, etc., is not sufficient to constitute him a vagrant, without further charging him to be without visible means of living, etc. I do not so construe the statute. It enumerates in several groups certain acts which shall constitute vagrancy, and he or she who is guilty of the acts thus enumerated in any one of these groups is liable to the penalty of the statute.

People v. *Frank*, 28 Cal. 508. The complaint charges all of the acts specified in one of these groups, and is therefore sufficient. The fact that it states, in addition, some of the acts specified in other and independent groups of the same section does not invalidate it.

The case of *People* v. *Forbes*, 4 Parker, Crim. R. 611, relied on by petitioner's counsel, is not in point. In that case the defendant was shown to have been convicted as a vagrant in this, to-wit: "That she is a common prostitute and idle person." In that state (New York) there were two separate statutes under which a conviction of vagrancy could be had. One applied to "all common prostitutes who had no lawful employment whereby to maintain themselves," under which the defendant was presumed to have been convicted, and as the record only showed that she was a common prostitute, etc., and failed to show or charge that she was "without lawful employment," etc., it was held sufficient. Under our statute, as was well said in that case, every word which *defines the class or makes a part of the description*, is material and important, but those words which go to define any other class of vagrants need not be inserted. The doctrine of *People* v. *Forbes*, *supra*, applies to those of the charges set out in the complaint which fail to state all the requisite facts to constitute vagrancy, but has no application to the charge against defendant herein quoted, which, standing alone, is sufficient to maintain and uphold the judgment.

The court had jurisdiction of the prisoner, and she was convicted of an offense within the statute. The prayer of the petitioner is denied, and she is remanded to the custody of the sheriff.

72 Cal. 402

PEOPLE v. WATSON. (No. 20,282.)

(*Supreme Court of California.* May 31, 1887.)

LARCENY—ALLEGATION OF OWNERSHIP.

Where the information charges larceny from the person of one "Lizzie G.," and that the property was the personal property of "Lizzie G.," it is sufficient, under Pen. Code Cal. § 956, providing that "an erroneous allegation as to the person injured * * * is not material" when the "offense * * * is described with sufficient certainty in other respects to identify the act," although "Lizzie G." was a married woman, and the property stolen was bought with the money of her husband.

In bank. Appeal from superior court, San Francisco.

Indictment for grand larceny.

J. T. Rogers, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted of grand larceny of a purse. The information charges larceny from the person of one Lizzie Golden, and that the property taken was the personal property of Lizzie Golden. On the trial the defendant asked the court to instruct the jury that if they find the said Lizzie Golden, at the time of the larceny, was a married woman, and that the purse was bought with the money of her husband, they should acquit the defendant. The court not only refused the instruction, but gave instructions of an exactly opposite effect.

Section 956, Penal Code, seems to settle this appeal: "When an offense involves the commission of, or the attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." In this case there can be no question whatever as to the sufficiency of the description to identify the act.

The order and judgment are affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

(72 Cal. 393)

SCAMMON *v.* DENIO. (No. 11,909.)

(*Supreme Court of California.* May 31, 1887.)

1. CONTRACT—FOR BUILDING—ACTION.

In an action to recover for building a house for defendant under a contract, the court refused to allow for extra work claimed to have been done, the contract providing that claims for extras should be submitted to arbitration, and deducted the expense incurred by defendant in completing the house, plaintiff having refused, upon notice, to complete it, in which case defendant, under the contract, had a right to do so himself; *held*, that there was no error.

2. COSTS—OFFER OF JUDGMENT.

Under Code Civil Proc. Cal. § 997, providing for the entry of judgment upon an offer of compromise, if accepted within five days, and, in case plaintiff does not accept the offer, and fails to recover more than the amount of it, that he shall pay the costs from the date of the offer, plaintiff is not affected by an offer, not accepted by him, in case the trial comes on, and is concluded within five days after the making of the offer.

Appeal from superior court, county of Los Angeles.

Action to recover balance due on building contract, and to enforce a lien.

Barclay, Wilson & Redick, for appellant. *Wells, Van Dyke & Lee*, for respondent.

MCFARLAND, J. This action was brought by appellant (plaintiff in the court below) to recover $1,348.10, the alleged balance due upon a written contract by which appellant was to build a house for respondent, and to enforce a mechanic's lien against the house and premises on which it was erected. The court gave judgment to appellant for $483.72 only, and without costs or attorney's fee, and also gave judgment for respondent for all costs which accrued after the date of a certain offer to compromise hereinafter mentioned. The judgment provides for the enforcement of the lien for the amount above stated. Appellant appeals from that portion of the judgment which allows him only $483.72, and also from that portion of it which denies him costs and attorney's fees, and gives costs to respondent. The case was tried without a jury.

1. Appellant complains of the refusal of the court to consider evidence about certain extra work and materials which he claims to have done and furnished during the construction of the house. But the court finds that the contract provides that claims for such extras should be submitted to arbitration, and that appellant made no request or offer to so submit them, and the finding is apparently correct. The court finds that appellant neglected and refused, after notice, to furnish workmen and materials to finish the house, and that respondent was compelled to furnish, and did furnish, the same at an expense of $58.45, which sum the court allowed respondent. This ruling is assigned as error. The court finds that respondent was allowed to do this by the contract; and, as the whole contract was introduced in evidence, although only a part of it is put into the transcript, we see no error in the finding. It does not appear that this expenditure comes within the arbitration clause of the contract, as contended by appellant. We think, therefore, that the judgment of the court below, as to amount found due, should not be disturbed.

2. On the day of the trial of the action, which was the day on which it regularly came on to be heard, but before the trial had actually commenced, respondent served on appellant a notice in writing offering to allow him to take judgment for the sum of $500; and, as appellant finally recovered a little less than $500, the court refused to allow him any costs, and gave judgment to respondent for costs accruing after the date of the offer. This ruling was made in supposed pursuance of section 997 of the Code of Civil Procedure. But that section, after providing for such an offer of compromise, proceeds as fol-

lows: "If the plaintiff accept the offer, *and give notice thereof within five days*, he may file the offer, *with proof of notice of acceptance*, and the clerk must thereupon enter judgment accordingly. If the acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay defendant's costs from the time of the offer."

It will be observed that this section requires no affirmative action on the part of a plaintiff unless he elects to accept the offer, and then he must give and file a notice of acceptance. There is no provision for an affirmative refusal to accept, and he may give and file the notice at any time within five days. The offer, therefore, has no effect whatever until after the expiration of five days, unless before that plaintiff accepts in the mode provided. It is clear that the Code does not mean that a plaintiff, on the very eve of a trial, with his witnesses perhaps all present, and his expenses nearly all incurred. shall, on the spur of the moment, be forced to determine at once the important question whether he shall yield a part of what he may consider a just and legal claim, or run the hazard of losing all his costs and necessary disbursements, and having judgment against him for costs of the other party. The clear meaning is that he shall have five days in which to consider the proposal made by the defendant. And if, in the mean time, without acceptance by plaintiff in the manner prescribed, the trial shall have regularly progressed and been concluded, the offer of compromise, as against plaintiff, simply goes for naught. Whether or not, in such a case, after the trial had progressed, and plaintiff had discovered his case to be much weaker than he supposed, he could stop at any time, within the five days, and accept the offer, is a question that does not present itself here; but a case can easily be imagined where the question would be an exceedingly interesting one to a defendant who sought an advantage by serving the offer to compromise on the eve of trial. The above views are entertained by the courts of New York with respect to a similar provision in the Code of that state. *Herman* v. *Lyons*, 10 Hun, 111; *Pomeroy* v. *Hulin*, 7 How. Pr. 161; *Walker* v. *Johnson*, 8 How. Pr. 240.

It is true that the court found that appellant refused to accept the offer; but, in the first place, there is no provision for a refusal, except by a failure to serve and file a notice of acceptance, which may be done at any time within five days; and, in the second place, there is no evidence at all to support the finding. It was evidently based upon the mere fact that appellant proceeded to trial. But he had the right to go to trial on the day regularly set for it, and within the five days, without regard to respondent's offer. He could treat it at that time as of no avail. Section 1195, Code Civil Proc., provides that, in an action to enforce a mechanic's lien, the plaintiff may recover as costs money paid for recording the lien and a reasonable attorney's fee. The court found that the expense of recording was $7.70, and that $100 was a reasonable attorney's fee.

It is ordered, therefore, that the parts of the judgment which adjudge that plaintiff do not recover any costs, disbursements, or attorney's fees, and that defendant recover her costs accruing after the date of the offer of compromise be reversed, and the superior court is directed to modify its judgment so as to adjudge to appellant his costs, including his expenses for recording his lien and his attorney's fee of $100, as found by the court, and so as to direct the sheriff to apply the proceeds of the sale of the premises to the satisfaction of the amount found due appellant, viz., $483.72, together with his costs, including said expense of recording his lien, and his said attorney's fee, and not to apply any of said proceeds to the costs of respondent. In all other respects the judgment is affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(72 Cal. 387)

LASSEN CO. *v.* CONE. (No. 11,877.)

(*Supreme Court of California.* May 31, 1887.)

CONSTITUTIONAL LAW—LICENSE TAX—DISCRIMINATION.

A so-called license tax, levied by a board of supervisors on all sheep pastured in the county, from which those who list their sheep, and pay taxes on them, in said county, are exempted, *held* unconstitutional, under section 21, art. 1, Const. Cal., forbidding grants of special immunities and privileges, as a discrimination against sheep-owners in other counties.[1]

Commissioners' decision. Department 1.

Appeal from superior court, Lassen county.

Chipman & Garter and *E. V. Spencer*, for appellant. *E. R. Dodge*, and *A. L. Shinn*, for respondent.

FOOTE, C. This is an appeal from a judgment rendered against Cone, in favor of Lassen county, whereby there was recovered from him a certain sum of money, viz., $500, being 2½ cents upon each of 20,000 sheep, which he had pastured in that county, and for the further sum of $100, as a penalty in not paying the first-named sum, which, by an ordinance passed before that time by the board of supervisors of said county, had been denominated a license tax.

The county claims the right to collect such license fee and penalty by virtue of section 35, part 27, of the county government act, the portion of which, as it is alleged, that gives power to make and enforce such an ordinance, being in these words: "To license for purposes of regulation and revenue all and every kind of business not prohibited by law." Deering, Pol. Code, 845.

The ordinance under consideration, as we think, discriminates in favor of those engaged in the business of raising sheep in Lassen county, as against persons who raise sheep and pay taxes upon them in other counties in the state, and, although denominated a license tax upon business, is in reality a tax upon property. It levies a tax of 2½ cents per head upon all sheep which are pastured in that county, for any period of time during any given year, which tax is, however, *not* to be paid by those who list their sheep as taxable property in that county, and pay taxes on them as such. Thus it undertakes to force sheep-raisers from another county of the state to pay a tax upon property in Lassen county upon which they had already paid a property tax in another county, where it is listed and assessed for taxation. If this is a mere police regulation, why excuse those of the same class from paying it, if they pay a property tax upon it to Lassen county?

Does not this appear as if the two taxes were considered by the board of supervisors as interchangeable and similar? The sheep-raiser of Lassen county need not pay the so-called license tax, if he will pay in lieu thereof the property tax levied and assessed. Taxes for revenue is what the county wants, and to get it, as against those who do not have their property listed and assessed in that county, it levies upon the property of residents of other counties, who have already paid a tax upon it for revenue in their own county, that which is *called* a license tax, *i. e.*, 2½ cents upon each head of sheep that Cone grazes in Lassen county for a few months in the year, (upon his own land mainly,) upon which he has already for that year paid full property taxes in Tehama county.

It appears to us clear that this ordinance cannot be regarded as a police regulation, and that, so far as the defendant is concerned, it is a discrimination against him upon his property, as a citizen of this state, which is not applied to others of his class, and that it grants an immunity to the same class of persons in Lassen county which is not given to the defendant as one of that class. We are of opinion, therefore, that the ordinance in question is

[1] See note at end of case.

violative of that part of section 21, art. 1 of the state constitution, which is as follows: "Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens," and which applies as well to an ordinance as to a legislative act.

The judgment should be reversed, and the cause remanded, with directions to the court below to render judgment for the defendant on the findings.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion judgment reversed, and cause remanded, with directions to the court below to render judgment for the defendant on the findings.

NOTE.

Any law which imposes on any person any charge or burden greater than those which are imposed on all others, under like circumstances, is in conflict with the fourteenth amendment to the United States constitution, and therefore void. County of Santa Clara v. Southern Pac. R. Co., 18 Fed. Rep. 389, and note, 450; Stockton Laundry Case, 26 Fed. Rep. 611; Barthet v. City of New Orleans, 24 Fed. Rep. 563; Custard v. Poston, (Ky.) 1 S. W. Rep. 434; Railroad Tax Cases, 13 Fed. Rep. 724, and note, 782; Town of Monticello v. Banks, (Ark.) 2 S. W. Rep. 852; City of St. Louis v. Spiegel, (Mo.) 2 S. W. Rep. 839; Town of Highgate v. State, (Vt.) 7 Atl. Rep. 898; Excelsior, etc., Co. v. Green, (La.) 1 South. Rep. 873.

As to laws held not to violate the constitutional provisions requiring equal and uniform taxation, see Bartlett v. Wilson, (Vt.) 8 Atl. Rep. 321; Wurts v. Hoagland, 5 Sup. Ct. Rep. 1086; Barbier v. Connolly, Id. 357; Pace v. State of Alabama, 1 Sup. Ct. Rep. 637; Claybrook v. City of Owensboro, 16 Fed. Rep. 297.

72 Cal. 486

SIMMONS *v.* BRINKMEYER. (No. 11,568.)

(*Supreme Court of California.* June 9, 1887.)

MALICIOUS PROSECUTION—ACTION—EVIDENCE.

In an action for malicious prosecution for indecent exposure, a nonsuit was entered on the ground that the evidence failed to show want of probable cause for such prosecution. Plaintiff's evidence showing that, at the time of said alleged exposure, he did not know that he was in sight of any person, or in a place where he was likely to be seen, that there was in fact no indecent exposure, and that he supposed the place was frequently used for the purpose for which he was using it, *held*, that the nonsuit was erroneous, and the evidence should have been submitted to the jury.[1]

Department 1. Appeal from superior court, San Bernardino county.

Curtis & Otis, for appellant. *Rowell & Rowell*, for respondent.

TEMPLE, J. This is an appeal from a judgment of nonsuit in an action to recover damages for malicious prosecution. The nonsuit was granted on the ground that the evidence failed to show want of probable cause in the prosecution complained of. There was no question as to the sufficiency of the evidence as to malice, or that the charge had been dismissed, and we think there was evidence to sustain the charge that the prosecution was without probable cause. The plaintiff was prosecuted for indecent exposure of his person; and, if his testimony in this case be true, there was no ground whatever for making such a charge against him. He testifies that he did not know that he was in sight of any person whatever, or at a point where any one was likely to see him, and, in effect, also, that there was in fact no improper exposure of his person. He further testified that, at the time, he supposed the place was one frequently used for the purpose for which he was using it, and did not know

[1] As to the province of the court and jury, respectively, in actions for malicious prosecution, see Johnson v. Miller, (Iowa,) 29 N. W. Rep. 743, and note; McNulty v. Walker, (Miss.) 1 South. Rep. 55, and note; Wilson v. Bowen, (Mich.) 31 N. W. Rep. 81, and note.

that the prosecuting witness or his family were likely to see him, or be offended by the act. If this be so, the mere fact that he was seen would not constitute a violation of the law. At all events, there can be no doubt that the evidence made a case for the jury.

Judgment reversed, and cause remanded for a new trial.

We concur: McKINSTRY, J.; PATERSON, J.

(72 Cal. 494)

DAVIS *v.* BAKER. (No. 11,589.)

(*Supreme Court of California.* June 10, 1887.)

1. ATTACHMENT—LEVY—HOW MADE.
 Under Code Civil Proc. Cal. § 542, requiring the sheriff in levying an attachment upon real estate, after recording the attachment papers, to serve them upon the occupant of the property if there is one, otherwise to post them upon the property, posting instead of serving is proper, if the officer, when he goes to make the levy, can find no occupant.
2. SAME—POSTING PAPERS.
 In attaching a lot having a small building upon it, posting the attachment papers upon the building complies with the requirement of the statute that they shall be posted in a conspicuous place upon the property.

Department 1. Appeal from superior court, Butte county.

Action to quiet title.

Hundley & Gale, for appellant. *Park Henshaw*, for respondent.

TEMPLE, J. This is an action to quiet title, and the only question in the case is whether a writ of attachment was so levied as to constitute a lien on the premises prior to the conveyance under which the plaintiff claims title. The premises constitute one-half of a lot in the town of Chico, having a frontage of 33 feet; and extending back 132 feet. One Ashbrook, at the time of the levy, had an office upon the lot in a small building, the dimensions of which were said to be 12 by 15 feet. No copy of the writ or notice was left with Ashbrook, but the levy was made by posting on the house as though the premises were unoccupied. The sheriff was examined as a witness, and testified: "*Question.* Do you know whether or not, at that time, there was any one living on the premises? *Answer.* I do not. When I went there to serve the papers, I did not find any one in the house. I waited there quite a while without finding any one, and * * * I posted the papers on the house. Think there was a table, and perhaps a chair or so, but it did not look to me as though it was occupied by any one. There was a light burning in the room, and I waited a long time, but no one appeared. * * * I found nobody in possession when I went there, and no person came while I was there, and there was no occupant at all there that I saw."

It is insisted that the levy is void, because a copy of the writ and a notice was not served upon Ashbrook, who, it is claimed, was, at the time of the levy, an occupant within the meaning of section 542, Code Civil Proc.

The portions of section 542 which are material to this discussion are as follows: "The sheriff, to whom the writ is directed, must execute the same without delay, * * * as follows: (1) Real property * * * by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property if there be one. If not, then by posting in a conspicuous place on the property attached."

It must be admitted that the most ordinary meaning of the word "occupant" is "one who occupies or takes possession; one who has the actual use or possession, or is in the possession of a thing." Occupancy is said to be the

act of holding possession. It will be presumed that the word is used in its most usual sense, unless there can be discovered something in the statute itself which indicates a different use of the word in this particular instance. And we think such intent is readily found. The officer is required to execute the writ without delay. Promptness is generally essential to the beneficial use of the writ at all. The sheriff would be held responsible for any lack of diligence by which loss should accrue. It is not always easy to find out who is in possession of property. In view of the promptness required, it must have been intended that the occupant should be easily discoverable,—in fact, some one visibly occupying the property,—so that, when the officer visits the property for the purpose of completing the levy, he can determine then, by what he can see, whether he shall serve the copies by leaving with an occupant, or by posting.

Again, it was evidently intended that all real estate not by law exempt should be subject to be attached for the debts of the owner. But, if the word "occupant" means simply one in the actual possession of land, there would be a large amount of such property not declared to be exempt, and yet which could not be levied upon. One may be in the actual possession, and yet not be in the county or state. And there might be no other occupant. In such case, there could be no levy if the position of respondent be correct. One fearing an attachment would have but to lock up his place, and go out of the county to be beyond the reach of the writ, so far as his real estate is concerned, of which there was no other occupant. A construction which would lead to such a result is of course inadmissible. Subdivision 2 of section 542, Code Civil Proc., seems to favor this view. That provides for the levy of the writ when the property, though belonging to the debtor, stands on the records of the county in the name of another. It requires copies of the papers to be left with the occupant, if any, and also with such other person, or his agent, or at the residence of either, if within the county. That is to say, it specifically directs, when the property stands in the name of another, the papers shall be served upon him or his agent; and, if they cannot be found at the residence of either, while it omits to provide that, if the occupant cannot be found, it shall be left at *his* residence. Therefore we conclude, repeating what we have already said, the provision as to the occupant is a direction to the officer as to posting when he goes upon the land to complete his levy. If he find an occupant, he must leave the copies of the papers with such occupant; but, if he can find no such occupant, he must post them in a conspicuous place upon the land.

It is also claimed that the levy is void because it is not stated in the return that a copy of the writ, with a description of the property attached and the requisite notice were posted in a conspicuous place on the land. On the trial the officer testified that the papers were posted on the building which was upon the place. The return, *prima facie*, is sufficient. *Porter* v. *Pico*, 55 Cal. 172. Under the circumstances, we think the evidence must be held as showing a compliance with the statute in this respect. The land levied upon was a small lot, vacant except as to the portion occupied by the building used as an office. It would appear that the building must necessarily be the most conspicuous place on the land. The attention of the parties in the court below seems to have been engrossed with the question as to whether there was an occupant or not, and the particular point now under consideration was apparently not thought of. On the new trial, the whole matter can be more thoroughly investigated.

Judgment and order reversed, and new trial ordered.

We concur: McKinstry, J.; Paterson, J.

(72 Cal. 510)

Ex parte LEZINSKY and another. (No. 12,131.)

(*Supreme Court of California.* June 10, 1887.)

CONTEMPT—WITNESS—NOTARY PUBLIC—POWER OF COURT.

Under Code Civil Proc. Cal. § 1991, providing that disobedience to a subpœna may be punished by "the court or officer issuing the subpœna," the court cannot punish for disobedience to a subpœna issued by a notary public before whom a deposition is to be taken. The matter is governed by that section, and not by section 1209, "in respect to a court of justice, or proceedings therein."

Certiorari to superior court, Contra Costa county.

George Lezinsky, for petitioners. *Charles F. Hanlon*, for respondent.

MCFARLAND, J. Proceedings on *certiorari* to review the orders of the superior court in and for the county of Contra Costa adjudging the petitioners, Lezinsky and Mason, guilty of contempt of said court, and punishing them therefor by fine. The facts are these: In a certain action pending in said superior court the plaintiff therein served a notice upon the defendants therein that the deposition of the petitioner John Mason would be taken at a certain time and place before a certain notary public. The notary issued a subpœna requiring said Mason to appear before him at said time and place, and depose and testify as a witness. This subpœna of the notary was served on Mason, who appeared at the time and place mentioned; but, upon the advice of the other petitioner, Lezinsky, who is an attorney at law, and was attorney for an intervenor in the action, and who contended that plaintiff in said action had no right to proceed with it, or to take testimony therein, Mason refused to testify, or to be sworn. The notary certified these facts to the superior court, whereupon the court adjudged both of the petitioners guilty of contempt,—one for refusing to testify before the notary, and the other for advising him to refuse,—and imposed a fine upon each. And the question to be determined is, was such action beyond the jurisdiction of the court?

Proceedings in contempt, being in their nature arbitrary, can be upheld only in a case which comes within "the provisions of the law by which such proceedings are authorized; for mere presumptions and intendments are not to be indulged in their support." *Batchelder* v. *Moore*, 42 Cal. 414. And we are not able to find any "provisions of the law" which authorize a superior court to punish a person for contempt because he has refused to obey a subpœna issued by a notary public before whom his deposition was to have been taken upon notice. In such a case there is certainly no actual contempt of the court, because the party has committed no act in the presence of the court, nor has he, without the presence of the court, disobeyed any of its judgments, orders, or processes. Section 1986, Code Civil Proc., provides that, when a subpœna is issued to require attendance "before a court," it must be under the seal of the court; and that, when the attendance is to be "out of court, before a judge, justice, or other officer," the subpœna must be issued by such judge, justice, or other officer. And section 1991 provides that disobedience to a subpœna may be punished by "the court or officer issuing the subpœna." This means, construed with the context, by "the court issuing the subpœna," or by "the officer issuing the subpœna." It does not mean by "the court *not* issuing the subpœna." In such a case the offending party is not guilty of two contempts, or subject to two punishments. These two sections govern the matter under discussion, and not subdivision 10 of section 1209, which is "in respect to a court of justice or proceedings *therein*."

Counsel for respondent complains that a notary has no power to punish for contempt, (and whether or not he has we do not here decide,) and that, therefore, if the above views are correct, a party cannot enforce the taking of a deposition before such officer. But he would have had a similar grievance of more magnitude if the legislature had not provided at all for taking

testimony out of court. The right to take and use a deposition is a mere statutory privilege, and can be exercised and *enforced* only in the manner and to the extent provided by the statute which gives it. And if a party selects, out of the officers before whom depositions may be taken, one who cannot punish for contempt, he puts himself, so far as *that* method of enforcing the attendance of his witness is concerned, out of the reach of legislative grace, and must rely upon the provisions that the disobedient witness forfeits to the aggrieved party $100, and all damages sustained by his failure to attend, and that, if he be a party, his complaint or answer may be stricken out. Sections 1991, 1992, Code Civil Proc. Whether or not the power to enforce the attendance of witnesses out of court should be enlarged, is a question for legislative determination.

The orders adjudging petitioners guilty of contempt, and punishing them therefor, are annulled, and the court below is directed to dismiss the proceeding.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; TEMPLE, J.

72 Cal. 520

HEDGES *v.* DAM and others. (No. 11,612.)

(*Supreme Court of California.* June 13, 1887.)

1. PLEADING—AMENDMENT—RIGHT OF.
 Defendant filed a demurrer to plaintiff's complaint, and thereafter, and before the issue of law raised by the demurrer was heard, filed an amended demurrer by leave of court, a copy of the same being served upon the attorney of plaintiff before the motion for leave to amend was made. *Held* permissible, under Code Civil Proc. Cal. § 472, which provides that "any pleading may be amended after demurrer, and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party.
2. COUNTIES—ACTION AGAINST SUPERVISORS—COMPLAINT.
 In an action against the members of the board of supervisors of a county for having wrongfully allowed certain claims, a complaint which does not show the nature of the claims allowed, or wherein the acts complained of are unlawful, and simply alleges that the defendants "wrongfully paid out large sums of money," and "that the said claims were wrongfully and without authority of law ordered paid," states mere conclusions of law, and is insufficient.
3. SAME—JURISDICTION.
 Such a complaint does not charge a cause of action, under the provisions of section 4086, Pol. Code Cal., which prescribes the jurisdiction of the county commissioners.
4. SAME—PARTY PLAINTIFF.
 Where an action is prosecuted in behalf of a county by a tax-payer, instead of the district attorney, facts must be alleged in the complaint showing a refusal or neglect on the part of the district attorney to institute the action.

In bank. Appeal from superior court, Yuba county.

Cross & Simonds, for appellant. *E. A. Davis* and *A. L. Hart*, for respondents.

PATERSON, J. 1. This action was commenced on the thirty-first of July, 1885. A demurrer was filed on August 11, 1885. Thereafter, and before the issue of law thus raised was heard, the court, on motion of counsel for defendants, allowed defendants to file an amended demurrer. The attorneys for plaintiff were served with a copy of the amended demurrer before the

motion was made, and were present in court at the hearing. Section 472, Code Civil Proc., provides that "any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or *after demurrer and before* the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party. * * *" The amended demurrer, having been served and filed before trial of the issues of law raised by the original demurrer, took the place of the original, and the court committed no error in allowing it to be filed. Appellant contends that the "pleading" referred to *after demurrer* is the complaint; but the section says *any* pleading, and, of course, a demurrer to the complaint is a pleading, and, for the purpose of raising an "issue of law," is as important as the complaint.

2. The complaint does not state facts sufficient to constitute a cause of action. It alleges that "said board of supervisors misappropriated, wrongfully, unlawfully, and illegally allowed and paid out, large sums of money, and ordered the same to be paid out of the county treasury of said Yuba county, which sums of money were paid out upon demands presented against said Yuba county to said board of supervisors, which demands were not legal demands against said county of Yuba, nor had said board of supervisors any authority or right to allow or audit or order them paid. But said board of supervisors, as such, did examine, allow, audit, and order paid all of the said illegal demands, well knowing them to be illegal demands, and all of said demands were paid out of the county treasury of said Yuba county because the said board of supervisors did examine, allow, audit, and order the same paid." Then follows a list of 49 names, with simply dates and the amounts set opposite thereto, amounting in the aggregate to $13,007.08, and the complaint concludes with the following allegation: "That each and all of the said demands were wrongfully, unlawfully, and without authority of law allowed and ordered paid by said board of supervisors, and by reason of being so allowed and ordered paid were afterwards in fact paid out of the county treasury of said county, whereby the said county treasury has been depleted to the extent of the said amount of $13,007.08." The defendants Flathman, Dam, and Babb were the three members of the board who voted for the allowance and payment of said claims, and the other defendants are sureties on their official bonds. There is nothing to show the nature of the claims allowed, and the complaint is clearly insufficient. Allegations that the members of the board "misappropriated, wrongfully, unlawfully, and illegally allowed and paid out, large sums of money," and "that the said demands were wrongfully, unlawfully, and without authority of law allowed and ordered paid," are mere conclusions of law. It has been held repeatedly that the facts must be stated showing wherein the acts complained of are unlawful, wrongful, or illegal. *Payne* v. *Treadwell*, 16 Cal. 220; *Branham* v. *San Jose*, 24 Cal. 585; *People* v. *San Francisco*, 27 Cal. 655; *Triplett* v. *Munter*, 50 Cal. 644; *Smith* v. *Ling*, 68 Cal. 324, 9 Pac. Rep. 171. If plaintiff bases his right to maintain the action under the provisions of section 4086, Pol. Code, it is sufficient to say that the complaint does not charge even in the general language of that law.

3. No reasons are set forth in the complaint why this action is prosecuted by and in the name of plaintiff, a tax-payer, instead of by the district attorney, in the name of and in behalf of the county. It is not alleged even that any demand was made by plaintiff either for the money, or for the institution of an action for its recovery. The county is the real party in interest, and the district attorney is the proper person to prosecute actions in the name of the county. Pol. Code, § 4256, subd. 3; section 136, County Government Act. If it be admitted that a tax-payer has the right, even in the absence of an express statutory authority, to prosecute actions of this kind, yet we think facts should be alleged showing a refusal or neglect on the part of the proper officer to institute an action. Judgment affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

MCFARLAND, J.; TEMPLE, J. We concur in the judgment on the last ground stated, and also agree to the views expressed in relation to the amended demurrer.

72 Cal. 513

COLLINS *v.* ANGELL and others. (No. 9,642.)

(*Supreme Court of California.* June 13, 1887.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—PRACTICE—WAIVER.
A judgment creditor secured an order from the court, requiring the judgment debtor to appear before a referee, and answer concerning his property, which order was obtained on an affidavit that was not filed until the filing of the report of the referee. *Held* that, after service of the affidavit and order on the debtor, and after he had appeared before the referee, and gone through the examination without objection, any irregularity was waived.

2. SAME—NECESSITY OF AFFIDAVIT.
But, where an execution has been returned unsatisfied, the judgment creditor has a right to an order requiring the debtor to appear and answer concerning his property without an affidavit, under section 714, Code Civil Proc. Cal., which provides for supplementary proceedings against debtors.

3. SAME—INTEREST IN PROPERTY—ORDER TO ASSIGN.
Where, in supplementary proceedings against a judgment debtor, he is ordered to assign all his "right, title, and interest" in certain letters patent to his creditor, it is immaterial that he claims to have no property in the patents.

4. SAME—ASSIGNMENT OF JUDGMENT—EFFECT.
A judgment creditor, after execution returned unsatisfied, in supplementary proceedings against the debtor, stated in his affidavit that he had assigned his judgment. *Held* that, even if the proceedings were based upon the affidavit, the order requiring the debtor to appear and answer concerning his property should not be reversed, on the ground that the creditor was not the real party in interest, since the supplementary proceedings could not be regarded as a new action.

5. SAME—INTERPLEADER.
The refusal of the motion of a judgment debtor in supplementary proceedings against him, when he has been ordered to assign his interest in certain letters patent "for leave to commence an action to interplead certain other parties to compel them to litigate their claims to the said patents," is not error.

Department 2. Appeal from superior court, San Francisco.
Gray & Haven, for appellant. *S. W. & E. B. Holladay*, for respondent.

MCFARLAND, J. Plaintiff having recovered judgment against defendants for $2,742, with interest and costs, and an execution issued thereon having been returned wholly unsatisfied, he procured an order from the judge of the court in which the judgment was rendered, requiring defendants to appear before the court commissioner, as referee, at a certain time and place, to answer concerning their property. Defendant H. B. Angell appeared before the referee, who took the evidence offered, and reported the same to the judge. Thereupon the court made an order that said defendant execute and deliver to A. B. Forbes, a receiver appointed for that purpose, assignments of his right, title, and interest in and to certain letters patent issued to him by the United States, to be thereafter sold in such manner as should be directed, for the satisfaction of respondent's said judgment. From this order the defendant Angell appeals.

Appellant's first contention is that the order requiring him to appear before the referee was void, and therefore all subsequent proceedings invalid, because the affidavit made by the respondent at the time said order was made was not filed by the clerk until the filing of the report of the referee. This contention goes upon the assumption that there is a radical distinction between the provisions of section 714 and those of section 715 of the Code of Civil Procedure. But, admitting this to be so, the point is too inconsiderable to

bear the weight it is expected to carry. It would have been more regular, of course, to have filed the affidavit before its presentation to the judge. And, no doubt, it would have been filed immediately at any time, or a new proceeding would have been commenced, upon suggestion or objection by appellant. But, after service of the affidavit and order upon appellant, he appeared before the referee, and went through with the examination without any objection whatever. Thereupon the report of the referee, together with the affidavit, were filed; and the order appealed from was made after such filing. Under these circumstances the point that the whole proceeding is void for want of jurisdiction is untenable.

Bryant v. *Bank of California*, 7 Pac. Rep. 128, cited by appellant, decides no more than that, when papers are offered to prove a judicial record, it must appear that they came from the files of the court and the custody of the clerk. But, as the execution in this case had been *returned* unsatisfied, respondent was entitled to the order without any affidavit, as provided in section 714 of the Code of Civil Procedure. The main distinction between that section and section 715 seems to be that, under the latter, supplementary proceedings *may be* commenced before the return of the execution, provided it has been issued, and that in such case an affidavit is necessary showing that the judgment debtor has property which he refuses to apply to the satisfaction of the judgment. In other respects, the proceedings under these two sections, and those which follow on the same subject, seem to be the same. The fact appearing in the affidavit, if the latter is to be considered at all, that respondent, upon information and belief, had some knowledge of certain specific property of appellant, is immaterial.

Appellant also makes the point that it does not appear from the evidence that he had any property in the letters patent. But there was evidence to that effect, and the conclusion to which the court came upon the question is not assailable upon the ground that there was no evidence to support it. Moreover, appellant was only ordered to assign all his "right, title, and interest" in the patents. Appellant, assuming that this proceeding is equivalent to a new suit, and that the affidavit should be regarded as a creditor's bill, contends that the order should be reversed because respondent states in the affidavit that he has assigned the judgment, but still claims a contingent interest in the same. This view, however, would not be correct, even if the order had been made under section 715, and necessarily based in part upon an affidavit. It would still have been a proceeding in the original case, auxiliary and supplementary thereto, and not a new action. But, as before stated, the order was based on the record facts of the judgment and the returned execution. The affidavit merely informed the judge of those facts which an inspection of the record would have disclosed. The affidavit on the trial of an issue involving the extent of respondent's interest in the judgment might, like any other declaration, be admissible as an item of evidence, but in other respects it has no virtue.

Appellant also appeals from another order—or rather from another part of the same order—"refusing to grant the motion of said H. B. Angell for leave to commence an action to interplead plaintiff and Elizabeth A. Risdon with certain other parties to compel them to litigate their several claims to said patents." This motion was based on section 386, Code Civil Proc.; but, as that section refers to cases where "an action is pending," it is doubtful if it applies at all to a "proceeding" like this. Assuming, however, that it might apply here, the section provides for an application to "substitute" some other person as defendant in place of the moving party, not "for leave to commence an action to interplead" other parties. And then the defendant must be in the position of a stakeholder having no interest in the litigation, which is not the position of appellant here. Lastly, the appellant could have commenced his proposed action without any "leave."

No questions as to the requirements of a legal assignment of patent rights, or as to what title purchasers from the receiver would get, arise in this case.

The orders appealed from are affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

72 Cal. 517

MERRIAM *v.* BOARD OF SUPERVISORS OF YUBA CO. (No. 11,611.)

(*Supreme Court of California.* June 13, 1887.)

INJUNCTION—COUNTY SUPERVISORS—ILLEGAL PAYMENT OF CLAIMS.

In California an injunction to restrain the anticipated action of the board of supervisors of a county, in paying certain alleged illegal claims, will not be granted, it being hardly claimed that there is an excess of jurisdiction on the part of the board. MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Nevada county.

This action was commenced by Joseph Merriam, a tax-payer, on behalf of the tax-payers of Yuba county, to restrain the supervisors from paying certain attorney's fees, and other claims against the county, alleged to be illegal, amounting to about $10,000. The defendant filed a demurrer, and afterwards obtained leave to file an amended demurrer, based upon the incapacity of the plaintiff to sue, and that the complaint did not state facts sufficient to constitute a cause of action.

E. A. Forbes, *E. A. Davis*, and *A. L. Hart*, for respondent. *Cross & Simonds*, for appellant, Yuba county.

TEMPLE, J. It is not necessary to consider the alleged error in allowing the amendment to the demurrer, as the only questions which we find it necessary to consider arise upon the general demurrer, which are the same in each demurrer filed. The case appears to be clearly within the rule laid down in *Linden* v. *Case*, 46 Cal. 171. In other states, it is true, such suits have been maintained, although the rulings do not seem to be uniform upon the subject. It is hardly claimed here that there is an excess of jurisdiction. It may be that facts exist which would justify the board in allowing the claims. We must presume that the board will do its duty, and we cannot assume that the claims will be allowed improperly. How can the plaintiff know, or this court decide in advance, that the claims will not be rejected for the objections alleged against them by petitioner? Besides, as stated in *Linden* v. *Case*, *supra*, even if the board should allow them, the county and tax-payers are not without remedy. The auditor ought not to draw his warrant for an illegal demand even, although allowed by the board, and, if he does so knowingly and willfully, he is personally responsible, and may be made to refund the money thus illegally paid. The same rule applies to the treasurer. The warrant drawn by the auditor would be no excuse for the payment of a claim known to be not a lawful charge. Then the district attorney is required to look after the affairs of the county, and it is his duty of his own motion to commence suits to recover moneys illegally paid out. Section 4086, Pol. Code; section 8, County Government Act. The members of the board would themselves be individually responsible for moneys willfully paid out without authority of law. They are trustees of the funds for certain specified purposes, and cannot, except by violating their oaths, allow them to be applied to other purposes. They act judicially, it is true, and will not be held accountable for mere errors, but they will not be excused on the ground that they have acted honestly, merely because they do not steal the funds. If they willfully appropriate moneys for a purpose not authorized by positive law, they are liable civilly and criminally. If other safeguards are needed, the legislature can provide them. It is not the province of the courts. Judgment affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; PATERSON, J.

MCKINSTRY, J. I concur in the judgment on the authority of the decision in *Linden* v. *Case*, 46 Cal. 171.

MCFARLAND, J. I dissent, and that *Linden* v. *Case* should be overruled.

72 Cal. 523

BROWN and others *v.* CENTRAL PAC. R. Co. (No. 11,383.)

(*Supreme Court of California.* June 13, 1887.)

MASTER AND SERVANT—LIABILITY OF MASTER—CONTRIBUTORY NEGLIGENCE—FELLOW-SERVANTS.

A mixed train of 20 cars, run by a crew consisting of the conductor, head, middle, and rear brakemen, and engineer and fireman, parted, on a clear night, while running down a slight grade. The forward part, on which were the engineer, fireman, and head brakeman, went on some distance before the separation was discovered. The brakeman, who, under the rules, had control of the detached part of the train ordered it backed, to couple with the part left. That part had continued down grade of its own momentum. There was a collision, and the conductor was killed. At the time of the accident the rear and middle brakemen—the latter by the conductor's express orders—were in the baggage car with the conductor. The engine gave no signals as it came back. *Held*, in an action by the heirs of the conductor, that he was guilty of negligence in not having the two brakemen at their stations, and that the head brakeman was also guilty of negligence in backing up, and that there could be no recovery, as the conductor's death had been caused by his own negligence as well as by that of his fellow-servants.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

This is an action to recover damages brought by the widow and children, as heirs, of Gilman George Brown, deceased, for the death of the latter, through the alleged negligence of defendant, a railroad corporation. Plaintiffs had a verdict and judgment for $10,000 and costs, from which judgment, and from an order denying a new trial, the defendant appeals.

On rehearing. See 12 Pac. Rep. 512.

Glassell, Smith & Patton, Creed Haymond, and *W. C. Belcher* for appellant. *Howard, Brousseau & Howard,* for respondents.

HAYNE, C. Since the former decision (12 Pac. Rep. 512,) the case has received a thorough discussion, which has induced a change of view.

Gilman G. Brown was conductor on one of the defendant's trains running between Los Angeles and Yuma. During the night of April 7, 1877, his train parted. The forward portion, on which were the engineer, the fireman, and the head brakeman, ran ahead of the rear portion, on which were the conductor and the two other brakemen. When the forward portion had got considerably in advance, the head brakeman discovered what had occurred, and he thereupon had the engine stopped, and, going upon the top of the rear car, signaled the engineer to back. The engineer obeyed the signal, and, the other portion of the train coming on of its own momentum, a collision occurred, which caused the death of the conductor. His widow and heirs bring this action against the company.

Nothing can be plainer than that, if two bodies keep moving towards each other on the same track, a collision must result. It is evident, therefore, that somebody on those trains must have been guilty of negligence. Who was it,—those on the forward portion, or those on the rear portion, or both? We think that there was negligence on both sides.

1. The track being slightly down grade, the head brakeman ought to have known that it was imprudent to back. He ought to have kept his portion of the train moving on, "even to the next station, if necessary," or, at least, he should have allowed ample time to elapse before starting back to see what had

become of the other portion of the train. The course adopted was, under the circumstances, dangerous in the extreme, and was one of the main causes of the accident. But the blame rests upon him, and not upon the engineer. The uncontradicted evidence is that when a train parts, under the circumstances shown in this case, the head brakeman becomes the conductor of the portion on which he is, and has control of the engineer. Rule 44 is not in conflict with this. The injunctions laid by that rule upon the engineer are not intended to prevent his obeying the higher authorities. If the conductor or head brakeman is there, the engineer must obey his instructions, and the evidence shows that he did obey them. This being the case, the evidence introduced to show the incompetence of the engineer becomes immaterial. The negligence was that of the head brakeman; and since he was the fellow-servant of the deceased, and no want of care in his selection is imputed to the company, it cannot be held liable for what occurred. And if it be said that, conceding the engineer did right in obeying the signals to back, yet that, in backing, he ought to have sounded his whistle and rung his bell, the answer is that the inducing cause of the accident was backing at all, and that, this having been done, there is only a bare possibility that the taking of the precautions mentioned would have made any difference, especially in view of the fact that neither of the brakemen on the other portion of the car was at his post, and that nobody there was aware that the train had parted.

2. There seems to have been even greater negligence on the part of those on the rear portion of the train. They were not aware that the train had parted. This resulted from the brakemen not being at their posts. The middle brakeman and the end brakeman were in the baggage car with the conductor. They should have been at their posts; one towards the middle of the train, and the other at the end. In view of what happened, it was especially important for the middle brakeman to have been attending to his duties. He testified as follows: "*Question.* Had you been there could you have had an opportunity of finding out that these rear cars had become detached and uncoupled? *Answer.* Most assuredly I should have seen it." There was not the shadow of an excuse for his absence. He had been called into the car by the deceased to assist in calling off way-bills, a thing which he should not have been taken from his post to do, and was allowed to lounge there after the calling off of the way-bills had been concluded, which was inexcusable. There is some testimony that he was "sick" at the time; but it is not pretended that he was incapacitated from attending to his duties; and nothing short of incapacity would have justified the conductor in jeopardizing the lives and property on the train by allowing the brakeman to neglect his duty.

The rear brakeman was in the car, "assorting out some mail that I had to distribute." It is not suggested that he had any connection with the post-office, and we do not understand what business he had with the mail. Just before the accident he had taken a seat in the baggage car. He says: "I had no more than seated myself in the end of the coach than the collision took place."

All this showed negligence on the part of the deceased. It was his duty as conductor to see that the brakemen were at their posts. He not only did not do this, but he was the direct cause of the absence from duty of the most important of them. He was therefore directly chargeable with the consequences.

Either of the foregoing grounds constituted a defense to the action; and the evidence in support of each is uncontradicted. If it be said that the presence of the middle brakeman at his post might have made no difference, because he might not have discovered the parting of the train, the answer is that he testifies that he would have discovered it; and this testimony is not only uncontradicted, but is in accordance with all the probabilities. And if it be objected, with reference to the other ground, that if the engineer, when

backing, had blown his whistle and rung his bell, it might have apprised those on the rear portion of the train of their danger, the answer is that backing at all was, under the circumstances, the fatal move, and that, in view of the state of things on the rear portion of the train, there is no reason to suppose that the precautions mentioned would have made any difference in the result.

But if we assume that the accident might possibly have been avoided in the contingencies mentioned, the negligence of the fellow-servant in the one case, and the contributory negligence of the deceased in the other, being clearly shown, and directly conducing to the accident, the mere possibility that it might or might not have been avoided in a certain contingency is but slight evidence; and the provision of the Code is that slight evidence will not support a verdict. Code Civil Proc. § 1835.

We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

72 Cal. 448

GREENWADE *v.* DE CAMP. (No. 11,835.)

(*Supreme Court of California.* June 3, 1887.)

PUBLIC LANDS—RIGHT TO PURCHASE—SUCCESSIVE APPLICATIONS.

Section 3417, Pol. Code Cal., relating to contests for the privilege of purchasing state land, provides that, after an order of reference to a court, by the surveyor general, unless the contestant bring his action within 60 days, "his rights in the premises and under his application cease." Plaintiff, having once failed to bring his action under such reference, filed another application, obtained a second reference, and brought his action. *Held*, that he was not debarred from bringing such action by his first default, and that the second reference conferred jurisdiction on the court to try such action.

Department 1. Appeal from superior court, San Bernardino county.

Plaintiff filed with the surveyor general his application to purchase certain state lands, and his intention to contest the title of defendant, who was then holding said lands under a certificate of purchase, in the manner prescribed by sections 3414, 3415, Pol. Code Cal. A reference was made to the superior court of San Bernardino county, but plaintiff neglected to bring his action within the 60 days prescribed by section 3417, Id. Thereafter he made a second application, obtained another reference, and brought his action. The court held that, by his former default, he had forfeited his right to contest defendant's title, and that the second order of reference conferred no jurisdiction to try the case. Judgment for defendant. Plaintiff appeals.

Byron Waters, for appellant. *Paris & Goodcell*, for respondent.

TEMPLE, J. This is a contest for the privilege of purchasing state land. The defendant first made application for the right to purchase June 21, 1884. The plaintiff afterwards made application to purchase the same land, and initiated a contest with the defendant under sections 3414 and 3415, Pol. Code. The order of reference was made, but the plaintiff did not commence his action in the proper court within 60 days, and no action was ever brought to determine such contest. November 8, 1885, after the lapse of the 60 days, the plaintiff made another application to purchase the land, and procured another order in due form, referring the case to the superior court to try the contest. Section 3417, Pol. Code, is as follows: "Unless the party contestant commences his action within sixty days after the order of reference is made, his rights in the premises and under his application cease."

It is contended that, not having brought suit on the contest inaugurated on the first application within 60 days, the plaintiff was barred from contesting the validity of the defendant's certificate of purchase, and that the second order of reference did not confer jurisdiction upon the court. We see no ground whatever for such contention. Even if the effect of the failure to bring suit on the first reference would have the effect of depriving plaintiff of the right to make a second application to purchase, still the last order of reference gave the court jurisdiction to try the contest. The court might have determined the case for the defendant on the ground that plaintiff had failed to bring his suit within 60 days. But we do not think such failure to bring suit could have that effect. No doubt the effect was to work a forfeiture of all rights of plaintiff, both in the application and in the premises. But he then stood just like any other person. If there was any way in which he could afterwards acquire a right, there is nothing in this statute to prevent. If he had no right in the premises, he was in no worse position with reference to the land than any other person who had no right. His last application cannot in any way be helped out by the first, for his rights to the premises ceased when he was in default. This section goes no further.

Judgment reversed, and cause remanded.

We concur: MCKINSTRY, J.; PATERSON, J.

72 Cal. 442

DEAN *v.* GRIMES. (No. 11,638.)

(*Supreme Court of California.* June 3, 1887.)

1. INSOLVENCY—NOTICE TO CREDITORS—COMPUTATION OF TIME.
Under an amendment to the California insolvent act of 1852, (St. 1863, p. 750,) the county court, on the filing of the insolvent's petition, is required to issue notice to the creditors calling them to meet on a day not less than 30 days thereafter. *Held*, that such a notice issued on December 7th, and returnable January 6th following, was sufficient.

2. SAME—VALIDITY OF DISCHARGE—COURT AND JURY.
Where, in an action on a promissory note, a discharge in insolvency, under the California insolvent act of 1852, was pleaded, and the court, after reading to the jury certain sections of that act, and of the amending act of 1876, relating, not only to fraud and misconduct on the part of the insolvent as avoiding the discharge, but also to the form of the proceedings, instructed them that any failure to comply with said sections would avoid the discharge, *held* error, as not only submitting the question of fraud or misconduct, but also of literal compliance with the formal requirements of the statute, which was a matter of record to be passed on by the court.

3. SAME—INSTRUCTIONS.
If such instructions mean that the jury should scrutinize the petition, schedule, and affidavit in the insolvency proceedings for any false statement of the insolvent, they are erroneous as omitting to charge on the fraud necessary to avoid the proceedings.

4. SAME—JURISDICTION OF COURT.
An instruction that, the statute being novel and extraordinary, and in derogation of common law, everything bearing on the question of jurisdiction must appear affirmatively, *held* error, as the jurisdiction of a county court is a question for the court; and, if the record shows want of jurisdiction, it should not have been admitted in evidence.

5. SAME—FRAUDULENT PREFERENCES.
Under section 8 of the California insolvent act of 1876, forbidding preferences, and declaring void all assignments of parts of the insolvent's estate within two months of the filing of his petition, an instruction that a failure to comply with said section would avoid the insolvent's discharge is erroneous, since the only penalty prescribed by the statute for attempting to prefer a creditor within the two months is a recovery of the property by the assignee. To constitute a fraud which will avoid the discharge, the transfer must have been made out of the usual course of business.

6. SAME—ACTS AVOIDING DISCHARGE.
In such case the sole question for the jury is whether the defendant, having had the benefit of the insolvent act, "had concealed any part of his property or estate, or given (knowingly) a false schedule, or committed any fraud under the provisions of the act" of 1852, and its amendments.

Department 1. Appeal from superior court, Merced county.

Schell & Bond and *R. H. Ward*, for appellant. *Wigginton, Creed & Hawes*, for respondent.

MCKINSTRY, J. The action was brought on a promissory note, the defense being a discharge under the insolvency act of 1852. It is urged by plaintiff (respondent) that the county court never acquired jurisdiction of the estate of the defendant, alleged insolvent, because there was no sufficient publication of a notice for the appearance of his creditors. By an amendment of the insolvent act of 1852, the county judge, on the filing of the insolvent's petition, was required to order the clerk to issue notice calling the creditors to appear on a specified day, not less than 30 days from the first publication of the notice. St. 1863, p. 750. In *Grimes* v. *His Creditors*, the first publication was on December 7, 1878. The return-day was January 6, 1879. The order of the judge, and the publication thereunder, were sufficient to bind the creditors of the insolvent. *Wilson* v. *His Creditors*, 55 Cal. 476.

The court below, as portion of its charge, read to the jury sections 2, 3, 4, 7, 27, 28, 29, and 32 of the insolvent law of 1852, and section 8 of the act of March 31, 1876, (St. 1875–76, p. 582;) and then instructed the jury: "If you

believe from the evidence that the defendant, I. C. Grimes, violated *any of this law*, or failed in *any manner to fully comply* with all provisions and requirements of said law, your verdict must be for the plaintiff. These insolvency proceedings are novel and extraordinary,—created by statute in derogation of the common law,—and should be strictly enforced. The proceedings in insolvency are special, and no intendments can be made in favor of the jurisdiction. Everything bearing upon *that question* must appear affirmatively." The defendant duly excepted.

The instructions were erroneous and misleading. They did not alone submit to the jury the issue whether the defendant had committed any of the frauds, or been guilty of the misconduct mentioned in section 32 of the act of 1852, and in section 8 of the act of 1876, but they also left to the jury to decide, and apparently informed them that their verdict should turn on the decision, whether the defendant had literally complied with the requirements of sections 2, 3, and 4 of the act of 1852, which treat of the form and contents of the insolvent's petition, his schedule, and his oath. But the petition, schedule, and affidavit were introduced as evidence in the present action, and were proved by record. Whether they were defective "in any manner" was a question of law for the court, and ought not to have been submitted to the jury. If such was not the intention of the instructions, but one other meaning can reasonably be given them. They must have been intended to inform the jury it was their duty to inquire whether the petition or schedule or oath contained any statement which was false, and, if they found such false statement, to render a verdict for the plaintiff. But, if that interpretation can be given the instructions, they were clearly erroneous, since they eliminated from the conditions which would justify a verdict for plaintiff the element of fraud. *Tevis* v. *Hicks*, 41 Cal. 128; *Dean* v. *Baker*, 64 Cal. 232. Thus, for instance, the jury were told that the insolvency proceedings were "novel and extraordinary," in derogation of common law, and "special;" and, if the defendant had failed in any manner to comply with section *four*, their verdict must be for the plaintiff.

The clause of the instructions given, that everything bearing on the question of "jurisdiction" must appear affirmatively, is, like the rest, somewhat ambiguous. If by "jurisdiction" was meant the power of the county court to enter the judgment of discharge, no question as to its power could arise except such as were presented in the record of the proceedings in *Grimes* v. *His Creditors*. Every such question was one of law, which it was the duty of the court in this action to decide. If the record in *Grimes* v. *His Creditors* showed want of jurisdiction, the court below should not have admitted it in evidence. No other objection to the jurisdiction has been argued than the one considered at the beginning of this opinion. It was not for the jury to inquire whether the judgment discharging defendant, Grimes, from his debts was or was not valid, as they should deem the publication of notice to creditors was or was not sufficient. The question for the jury to determine was whether the defendant, having had the benefit of the insolvent act, "had *concealed* any part of his property or estate, or given (knowingly) a false schedule, or committed any fraud under the provisions of the act" of 1852 and its amendments. St. 1852, p. 75, § 32.

The court below told the jury that, if defendant violated or in any manner failed to comply with section 8 of the supplemental act of 1876, (St. 1875–76, p. 582,) the verdict must be for the plaintiff. This was error. The mere giving of a preference to one creditor, without intent to delay or defraud others, is not in itself, and independent of the statute, a fraud. Section 8 of the act of 1876 provides that the assignment of any part of an insolvent's estate, within two months prior to his filing his petition, is void, and that the assignee may recover the property attempted to be assigned. The penalty imposed upon an attempt to prefer a creditor within the two months is the re-

covery by the assignee in insolvency of the property which the insolvent has sought to transfer. If section 32 of the act of 1852 refers at all to section 8 of the act of 1876, still to constitute a fraud as against a creditor, which can be asserted after the discharge, it must at least be made to appear that the assignment was not made "in the usual and ordinary course of business of the debtor."

Judgment and order reversed, and cause remanded for a new trial.

We concur: PATERSON, J.; TEMPLE, J.

72 Cal. 535

HEGARD *v.* CALIFORNIA INS. CO. (No. 11,073.)

(*Supreme Court of California.* June 14, 1887.)

1. FIRE INSURANCE—POLICY—DEPRECIATION CLAUSE—EVIDENCE.
 The material question under the "depreciation" clause in a policy of fire insurance is, what was the actual condition and value of the property insured at the time of the fire? And, where there is no evidence for the company upon that point, it is harmless error to refuse to admit testimony as to the probable depreciation prior to the issuance of the policy.
2. APPEAL—WHAT OPEN—PROCEEDINGS BELOW.
 A motion, on appeal, to consider the judgment roll only, on the ground that the proceedings in the court below for a new trial were not had within the time allowed by law therefor, should be overruled, where no objection was made in the court below to the proposed bill of exceptions, or to the hearing of the motion for a new trial.

In bank. Appeal from superior court, Plumas county.

Action on a policy of fire insurance. On rehearing. See 11 Pac. Rep. 594.

E. W. McGraw, for appellant. *W. W. Kellogg* and *R. H. F. Variel*, for respondent.

PATERSON, J. It is urged by respondent that the proceedings in the court below for a new trial were not within the time allowed by law therefor, and that in consequence thereof we should consider only the judgment roll on this appeal. It is sufficient to say, in answer to this proposition, that no objection was made in the court below to the proposed bill of exceptions, or to the hearing of the motion for a new trial. The appellant prepared and served its proposed bill of exceptions. The respondent, without objection, proposed amendments thereto. The court, without objection, settled the bill, fixed a time for argument, heard and decided the motion for a new trial, without any suggestion from respondent that the proceedings had not been commenced in time or prosecuted with diligence. Under these circumstances, we think that the respondent's objections ought not to be heard in this court. The record is silent upon the question whether any extension of time was given by order or stipulation. *Gray* v. *Nunan*, 63 Cal. 220. The plaintiff recovered a judgment of $1,950, and from that judgment, and an order denying a motion for a new trial, the defendant appealed.

It is contended by appellant that the plaintiff ought not to recover because he overvalued the property, and because he falsely represented that he was the sole owner of the property insured. The policy contained stipulations that, in the event of false representations in regard to any of these matters, the policy should be void. Upon these issues the court found in favor of the plaintiff, and the findings are supported by the evidence.

In the policy upon which the plaintiff founded his right to recover, there is this provision as to the measure and mode of computing the damages: "In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire. * * * The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and,

in case of the depreciation of such property from use or otherwise, a suitable deduction from the cash cost of replacing the same shall be made to ascertain the actual cash value." Upon these provisions in the policy, and the rulings of the court on the evidence offered on this topic, the appellant places its chief reliance for a reversal of the judgment. The record is as follows:

"William Kinzie, witness for plaintiff, testified: 'Am a carpenter and mechanic. Know the cost of building in Quincy for many years past. Was well acquainted with Hegard's saloon that was burned. At the time of the fire it would have cost $1,264 to replace that building. In October, 1883, materials were a little higher than at the time of the fire, and then it would have cost $1,334. *Cross-examination.* What is a reasonable deduction from your cost of replacing the building for depreciation in the value of the original building, which was built in 1856 or 1857? [Objected to as not cross-examination; that the question was irrelevant and immaterial. Objection sustained, and defendant excepted.]'

"G. B. Somner, called for plaintiff, testified same as witness Kinzie.

"DEFENDANT'S TESTIMONY.

"G. B. Somner, recalled for defendant, testified: 'Of the $1,264, cost of replacing that building, $809 would be for the original building, and the rest for the additions. *Question.* What would be a reasonable deduction, from your estimate of the cost of replacing the building, for depreciations in the value of the original building, which was built in 1856 or 1857? [Objected to by plaintiff as immaterial, irrelevant, and incompetent.] *The Court to Counsel for Defendant.* Depreciation from what time? *Mr. McGraw.* From the time the building was built. *The Court.* That is not proper. I will allow you to prove depreciation since the policy was issued, but not before. [Objection sustained. Defendant excepted to the ruling.]'"

This point of contention raised between counsel and the court as to the period of depreciation, it seems to us, is one of form and theory, and without merit or application. The age of the building is not an essential element of the criterion for damages which is prescribed by the contract. The material questions—the ultimate facts to be determined—are, what was the actual condition of the building immediately before the fire? To what extent was it worn or dilapidated by use or by the elements? How much worse was its condition than a new building of the same plan, form, and execution, and what is a reasonable deduction for the depreciation? The time when the building was erected is immaterial. The house may have been built at one time, painted at another, decorated still later, improved at intervals, and the exact time when it reached its best finish be forgotten. How, then, shall we apply the rule contended for by defendant? The facts in this case illustrate its inapplicability. Many and great changes had been wrought in the form and substance of the building. After a quarter of a century the original building was transferred to another lot. A part of the sills had been removed, and new ones put in their places, portions of the floor were treated in like maner, new lathing was substituted, the ceiling was plastered, the walls were "patched," and papered, the wainscoting repaired, and a brick chimney added. In January, 1882, a new wing was attached, and in August, 1883, an addition was erected, which appears to have been fully half as large as the original building. To enable a witness to apply intelligently the rule contended for in this case he must have watched for nearly 30 years the changes which had occurred in the building by use thereof, and by action of the elements. But, as stated before, the period of time through which the building had passed is immaterial; the material question being what was its actual condition and value at the time of the fire? The word "depreciation"

seems to have been used by the parties to the contract rather in the sense of deterioration than in its strict signification.

No other effort was made by defendant to show the condition or value of the building than as shown in the above copy of the record. We think, therefore, that the failure of the defendant to show the actual detriment, if any, for which a deduction should be allowed, was due to its adherence to an immaterial matter. The fact that the court erroneously proposed another and more limited period of "depreciation" was not, under the circumstances, such an error as could have operated to the prejudice of the defendant.

The witnesses Kinzie and Somner were experts, knew the building, and could have stated, no doubt, how much less the old building was worth than the new one, the value of which they had fixed in the sum of $1,264. The evidence is sufficient to justify the findings of the court as to the value of the building. Mr. Dorsch, agent for defendant, testified that he examined the whole property insured, including the building, and thought the values were fair. It is conceded by respondent that the judgment is excessive to the amount of $185, the value of certain articles which the court below considered under the description of "bar-room fixtures."

The cause is remanded, with directions to the superior court to modify the judgment by substituting the figures "$1,765," for the figures "$1,950." In all other respects the judgment and order are affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.

(72 Cal. 528)

THOMPSON and others *v.* SPRAY. (No. 11,791.)

(*Supreme Court of California.* June 14, 1887.)

1. PUBLIC LANDS—MINING CLAIMS—RIGHT TO LOCATE—MINORS.
 Minors, who are citizens of the United States, may locate placer mining claims.

2. SAME—EVIDENCE OF CITIZENSHIP.
 The uncontradicted testimony of a father that his children were born in California is sufficient proof that they are citizens of the United States for the purposes of the mining law. The provision in Rev. St. U. S. § 2321, for proof of citizenship by affidavit, is not exclusive of other modes of proof.

3. SAME.
 Proof of birth within the United States is sufficient to establish the citizenship of one setting up a claim to mineral lands, in the absence of a showing of subjection to a foreign power.

4. SAME—NOTICE OF LOCATION.
 The fact that the notice of location was recorded before it was posted, does not render the location invalid.

5. SAME—PRINCIPAL AND AGENT—RATIFICATION.
 The bringing of a suit by the principal to quiet title to a placer mining claim located for him by his agent, without his knowledge, is a sufficient ratification of the agent's location.

6. QUIETING TITLE—COMPLAINT—NECESSARY ALLEGATIONS.
 A complaint in a suit to quiet title to a placer mining claim is not defective for failing to allege that the plaintiff is a citizen of the United States.

7. SAME—EVIDENCE—AMENDED NOTICE.
 In a suit, by a father and his five children, to quiet title to a placer mining claim, an "amended" notice of location is admissible in evidence although it omits the names of two of the children on the first notice, and inserts the names of two of the others in their place.

Commissioners' decision. Department 1.

Appeal from superior court, Amador county.

Suit to quiet title by appellants, Alex. Thompson, Matilda Thompson, Margaret Thompson, Bedelia Thompson, James Thompson, and Alex. Thompson, Jr., a minor, by his guardian *ad litem*.

The complaint is as follows: "Now come the above-named plaintiffs, by their attorneys, Eagon & Armstrong, and for cause of action allege that on the nineteeth day of June, 1883, by an order of superior court of said Amador county duly made on that day, and before the filing of this complaint, the said James Thompson was appointed guardian *ad litem* for A. Thompson, a minor; that plaintiffs are now, and for a long time hitherto have been, the owners of, in the possession of, and entitled to the possession of, that certain piece or parcel of land situated, lying, and being in the county of Amador, state of California, and bounded and particularly described as follows: The N. ½ of the N. ½ of S. E. ¼ and the N. ½ of the S. ½ of N. E. ¼ of S. E. ¼ of section 17, and the W. ½ of the N. W. ¼ of the S. W. ¼ of section 16, township (5) five north, range ten east, M. D. M., containing 70 acres; that said defendant claims an estate and interest in the above-described tract of land adverse to the said plaintiffs; that the said claim of defendant is without any right whatever, and that the said defendant has not any estate, right, title, or interest whatever in the said land or premises, or any part thereof. Wherefore plaintiffs pray for judgment (1) that defendant may be required to set forth the virtue of his claim, and that all adverse claims of the defendant may be determined by a decree of this court; (2) that, by said decree, it be adjudged that the defendant has no estate or interest whatever in or to said land in this complaint described, and that the right, title, and interest of plaintiffs therein to said land is good and valid; (3) that the defendant be forever enjoined," etc.

J. A. Eagon and *A. C. Brown*, for appellants. *Rust & Caminetti*, for respondent.

HAYNE, C. The action is in relation to a placer mining claim in Amador county, and was brought by Alex. Thompson, Sr., and his five children mentioned below. At the trial a notice of location was introduced in evidence, dated January 20, 1882, and signed with the names Alex. Thompson, James Thompson, Alex. Thompson, Jr., and Matilda Thompson. The plaintiffs then offered what they styled an "amended" notice, which bore the same date, and contained a fuller description of the property, and was signed with the names Alex. Thompson, Matilda Thompson, Margaret Thompson, and Bedelia Thompson. It will be observed that the second notice omits two of the names on the first, and inserts two new names in their place. The defendant objected to the introduction of the second notice, on the ground that it was not an "amended" notice inasmuch as the names were not the same, and that no abandonment of the first notice had been shown. The court sustained the objection, and excluded the evidence.

We think this was error. There does not appear to be any statute of this state providing for amending notices of location as is the case in Colorado. But we see no reason why, if locators have any apprehension as to the sufficiency of their notice, they may not put up another one. Whether the second notice is to be treated as an original notice, or whether it relates back to the posting of the first one, is a question as to its effect which it is not material to consider. In the present case the rights of James Thompson and Alex. Thompson, Jr., whose names were on the first notice, but not on the second, could not be affected by the posting of the second notice. *Morton* v. *Solambo Co.*, 26 Cal. 527; *Gore* v. *McBrayer*, 18 Cal. 588. Margaret and Bedelia Thompson had nothing to do with the first notice. Their rights rested on the second, which, as to them, was an original notice; and they were certainly entitled to have it introduced in evidence. With respect to the two who were on both notices, we think that they also were entitled to have the second introduced in evidence. The second would not operate as an abandonment of the first. *Weill* v. *Lucerne Co.*, 11 Nev. 212, 213. But it was not necessary to show such abandonment to render the second notice admissible.

The question as to the rights of the plaintiffs, as between themselves, does not arise in this action.

Upon the close of the plaintiffs' evidence several motions for nonsuit were made and granted. The first motion was as to Margaret and Bedelia Thompson. Their notice of location having been excluded, the motion was granted; but, as above shown, the exclusion of the notice was erroneous. The defendant then moved for a nonsuit as to James, Matilda, and Alex. Thompson, Jr. This motion was denied as to Matilda, and granted as to the others. It was upon four grounds, viz.: That they were not citizens of the United States; that they were minors at the time of the location; that the use of their names was unauthorized; and that the notice was recorded before it was posted.

Were the plaintiffs citizens of the United States at the time the location was made? We think the evidence shows that they were. The father testified as follows: "I and each of my co-locators were, at the time of location of said mining claim, citizens of the United States. My children were born in the state of California." The testimony that all the locators were "citizens" would perhaps have been excluded, as being a conclusion of the witness, if it had been objected to. But, it having been allowed to go in without objection, we think it was of itself sufficient to prevent a nonsuit upon this ground. With reference to the children, the matter was put beyond cavil by the statement that they were born in California. The provision of the statute is that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Rev. St. § 1992. Here citizenship from birth is the rule. Subjection to a foreign power is the exception. A case will not be presumed to fall within the exception. Hence proof of birth within the United States is sufficient, in the absence of a showing of subjection to a foreign power. See *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 325, 326. The testimony of the father was good evidence of the place of birth. The provision for proof of citizenship by affidavit, if it applies, (Rev. St. U. S. § 2321,) is not exclusive of other modes of proof.

Does the fact that these plaintiffs were minors at the time of the location invalidate the notice as to them? We have not been referred to any decision which holds that it does. The provision of the statute is that mineral deposits in public lands are open to "citizens of the United States, and those who have declared their intention," etc. Section 2319. No requirement that the citizen shall be of any particular age is expressed; and, unless we are prepared to affirm that minors are not citizens, we do not see how we can say that they are not entitled to the benefit of the act. This conclusion is strengthened by the circumstance that in some instances the statute expressly requires that the citizen shall be of age. Thus, in reference to coal lands, the provision is that "every person above the age of twenty-one years who is a citizen of the United States," etc. Section 2347. So with reference to homesteads the provision is that "every person * * * over the age of twenty-one years, and a citizen," etc. Section 2259. The expression of a requirement as to age in some instances, and the omission of it in others, is significant. Nor is there any reason in the nature of things why a minor may not make a valid location. After the preliminary steps are taken, all that is required is that a certain amount of work shall be done. If the minor can do it, or can get any one to do it for him, the condition imposed by the statute is fulfilled. If he cannot, his claim lapses, and the mine is open to location by others. It may be added that, so far as we know, it is the practice, in many mining communities, for minors to locate claims.

Did the father's want of authority from his children invalidate the notice as to them? He testified as follows: "I had no power of attorney to sign the notice for my children, nor to authorize Mr. Price to sign their names. None

of them gave me or him authority to sign their names. * * * I acted for them, but without their knowledge, until after their names were signed, notice recorded and posted." Unless there is an implication from the foregoing that he acted with their knowledge after their names were signed, etc., it does not appear that there was any ratification by all the children, except the bringing of the suit.

It cannot be doubted that the location of a mining claim may be made by agent, (*Gore* v. *McBrayer*, 18 Cal. 587;) and wherever there is a local custom to that effect, it is not necessary that the person in whose name a location is made should be aware that it has been made, (*Morton* v. *Solambo Co.*, 26 Cal. 534.) In the absence of evidence of such a custom, we think that there must be either authority in the first instance or a ratification. Whether a ratification will be presumed, in accordance with what is said in *Gore* v. *McBrayer*, above cited, and whether, if presumed or proven, it will relate back to the posting, so as to cut off intervening rights, (compare *Hibberd* v. *Smith*, 67 Cal. 547, 4 Pac. Rep. 473, 8 Pac. Rep. 46,) need not be decided; for the bringing of the suit, which must be taken to have been by authority, is a sufficient ratification; and, as far as the record goes, we cannot know that there were any intervening rights,—the assertions in the answer being denied by force of the statute, and the defendant not having introduced any evidence.

Does the fact that the notice was recorded before it was posted render it invalid? We think not. No record is necessary in the absence of a custom requiring it. *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 323; *Southern Cross Co.* v. *Europa Co.*, 15 Nev. 384; *Jupiter Co.* v. *Bodie Co.*, 7 Sawy. 114, 11 Fed. Rep. 666. No such custom was proved in this case; and it is clear that the doing of an unnecessary act cannot vitiate the notice. But, if such a custom were shown, we do not think the mere order in which the acts are done of sufficient importance to render them of no effect. See, generally, *North Noonday Co.* v. *Orient Co.*, 6 Sawy. 313, 1 Fed. Rep. 522.

This motion, therefore, was improperly granted. After it had been granted, the defendant moved for a nonsuit as to the two remaining plaintiffs, viz., Matilda and Alex. Thompson, Sr., partly upon grounds already considered, and partly upon the ground that the dismissal of the action as to the other plaintiffs left these two claiming more than they were entitled by law to hold. But in such case the location is good for as much as the party is entitled to hold, and void for the excess only *Richmond Co.* v. *Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055.

It results that the nonsuit as to Matilda and Alex. Thompson, Sr., was improperly granted.

The respondent, however, seeks to uphold the judgment on the ground that the action is under section 2326 of the United States Revised Statutes, and that, so treating it, the complaint is defective in that it does not aver that the plaintiffs are citizens. But there is nothing in the complaint to lead any one to suppose that it was brought under the provision mentioned. It is sufficient as a complaint to quiet title to a mining claim. See *Pralus* v. *Jefferson Co.*, 34 Cal. 559; *Pralus* v. *Pacific Co.*, 35 Cal. 34. The plaintiff's motive in bringing the action, or the use which he may be able to make of the judgment, should he obtain one, cannot affect the question of the sufficiency of the complaint.

In the case of *Lee Doon* v. *Tesh*, 68 Cal. 44, 6 Pac. Rep. 97, and 8 Pac. Rep. 621, the complaint itself showed that it was brought under section 2326, and the question whether it could not have been upheld as a complaint in an ordinary action to quiet title was not made or considered. The court did not hold that, in all actions in relation to mining claims, the complaint must aver the citizenship of the plaintiffs. It guarded its decision from any such inference by saying: "We must not be understood as holding that in all actions in relation to mining claims, it is necessary for plaintiffs to aver citizenship." And we think

that in ordinary actions in relation to mining claims the general allegation that the plaintiff is "the owner," etc., covers all the essential elements of ownership.

We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial.

(72 Cal. 451)

BEAL *v.* STEVENS and others. (No. 11,819.)

(*Supreme Court of California.* June 4, 1887.)

1. MORTGAGE—ASSIGNMENT—RELEASE—BONA FIDE PURCHASE.
 A mortgage, as recorded, secured five notes. When the first note was paid, the mortgagee, who had assigned the mortgage, by the direction of the assignee entered the following satisfaction on the margin, signing and acknowledging it himself: "Full payment and satisfaction of the within *note* and mortgage hereby acknowledged." The assignment of the mortgage was not put on record. *Held*, that the satisfaction was not notice to subsequent *bona fide* purchasers for value and mortgagees that the remaining four notes were unpaid.
2. SAME—SERIES OF NOTES—DEFAULT IN ONE—SATISFACTION—PERSONAL DECREE.
 The right given in the mortgage to the mortgagee to declare all the five notes secured to be due upon default in any, is not taken away by a satisfaction put on record by direction of the mortgagee, upon payment of the first note; and, although not entitled to a decree against the property, the mortgagee may yet have, if he elects to use his option, a personal decree against the mortgagor upon the last three notes, on his failure to pay the second.
3. WITNESS—PARTY—FEES.
 A party not subpœnaed by his adversary, who appears and testifies in his own behalf is not entitled to fees and mileage.

Department 1. Appeal from superior court, San Bernardino county.

Hargrave & Gray, for appellant. *Harris & Allen, Curtis & Otis*, and *H. C. Rolfe*, for respondents.

MCKINSTRY, J. The action is to foreclose a mortgage on certain real estate, given January 18, 1883, by defendants Stevens and Seymour, to secure their five promissory notes of even date with the mortgage, payable to J. S. Loveland or order, one, two, three, four, and five years from date, with interest specified. The defendants Curtis, Soule, and Stacy are charged in the complaint with having or claiming some interest in the premises, which, if any, is subject to the Loveland mortgage. With respect to every matter, except a certain question of costs, as to which there is a bill of exceptions in the record, the cause has come to this court on the judgment roll, including the findings of fact and law. The court below found that, on the day of their date, the notes were indorsed for value, and delivered to the plaintiff, and the pleadings admit that the plaintiff has ever since been the owner and holder of the five notes, except the first, which matured in January, 1884, and was paid. There is also a finding that no part of the four last notes has been paid except one year's interest on each of them. On the day of its date the mortgage was duly recorded. The defendants Stevens and Seymour failed to pay the second of the promissory notes when it became due, or any part thereof, or any part of the interest, making default therein. The mortgage sought to be foreclosed contained a stipulation by which it was covenanted that, in case default should be had in the payment of the principal of any note, or any installment of interest, as the same should become due, then the whole sum of all the notes unpaid, principal and interest, should become at once due and

payable, at the option of the mortgagee or his assigns, and that suit could be immediately brought for the foreclosure of said mortgage, etc. On default occurring in the payment of the second note, the plaintiff exercised her option to treat as due the whole amount of the unpaid notes, and commenced this action to foreclose for the whole, on the third day of December, 1885.

The court found that on the nineteenth day of February, 1884, the "plaintiff caused J. S. Loveland, the mortgagee, to discharge the mortgage; and the said Loveland thereupon, with his own consent and the consent of the plaintiff and the defendants Stevens and Seymour, discharged the said mortgage by an entry in the margin of the record thereof, signed by the said mortgagee, J. S. Loveland, acknowledging the satisfaction of said mortgage, in the presence of the recorder, who certified said acknowledgment; which entry of satisfaction and certificate of acknowledgment are in the words and figures following, to-wit: 'Full payment and satisfaction of the within note and mortgage hereby acknowledged. J. S. LOVELAND. Signed and acknowledged before me this nineteenth day of February, 1884. W. F. HOLCOMB, County Recorder, by E. A. NISBET, Deputy.' "

On the nineteenth of February, 1884, and after said mortgage was discharged, the defendant Curtis loaned to the defendants Stevens and Seymour $1,200, and took a note therefor, with interest, payable one year after date, to secure the payment whereof Stevens and Seymour executed and delivered to Curtis their mortgage on all the real property described in the complaint, which mortgage was duly recorded on the day of its date. And on the thirtieth of July, 1884, the defendants, Soule and Stacy, purchased the property of Stevens and Seymour in good faith, and for a valuable consideration; and on the day last mentioned Stevens and Seymour executed and delivered to Soule and Stacy a deed of conveyance of the property aforesaid, which deed was duly recorded on the same day. The court found that neither the defendant Curtis, nor the defendants Soule and Stacy, or either of them, when they parted with their money, respectively, had any notice or knowledge that any of the notes set forth in the complaint had been indorsed to plaintiff, or that plaintiff had any interest in the same, or any part thereof, or in said mortgage.

The court declared, as conclusions of law, that plaintiff was entitled to a personal judgment against defendants, Stevens and Seymour, in the amount of the second of the promissory notes only; but that the third, fourth, and fifth of the notes described in the complaint had not matured when the action was commenced, because the mortgage mentioned in the complaint was, on the nineteenth of February, 1884, completely canceled as to all its conditions and covenants. Further, that the plaintiff recover nothing as against the defendants Curtis, Soule, and Stacy, and that they recover their costs, and that the real property described in the complaint is free from the Loveland mortgage.

The court erred in refusing the plaintiff a personal judgment against the defendants Stevens and Seymour for the last three notes set forth in the complaint. The contract between the plaintiff's assignor and those defendants is contained in the notes and mortgage. All those instruments are to be read together, and, in case of the default mentioned in the contract, the plaintiff, at her option, was entitled to treat all the notes as due. The court, as a court of equity, having acquired jurisdiction by reason of the issues with respect to the existence or non-existence of a mortgage lien, the equity which authorized and required a personal judgment for the amount of the second note authorized and required a personal judgment for all the unpaid notes, since the court finds that no part of the last three notes had been paid. The satisfaction in the margin of the record of the mortgage, if it operated a discharge of the mortgage lien, did not extinguish the mortgage in so far as, with the notes, it constituted the contract of loan. The plaintiff was not estopped from assert-

ing her right to have the last three notes paid, according to the terms of her contract, by a marginal entry the scope and purpose of which was to release the lien. Even if the acknowledgment of payment of "the note" is evidence of a receipt of the sum due on all the notes, such evidence was entirely overcome, to the satisfaction of the court below, as appears from the finding that no part of the last three notes had been paid, except one year's interest.

The question remains to be decided, what was the effect of the marginal entry upon the rights of the subsequent mortgagee and subsequent purchasers? In effect, the second defense of the fourth amended answer of the defendants Stevens and Seymour is that on February 12, 1884, they agreed to pay, and Loveland, the payee named in the notes, agreed to accept, in extinguishment of their obligation to pay the principal and accrued interest of all the notes, the sum of $303; that in pursuance thereof, and on the nineteenth of the same February, they paid him $303; and that thereupon Loveland did in writing release them from all liability and obligation on said mortgage, "and satisfied the same by an entry in the margin of the record of said mortgage." Further the defense alleges, "on information and belief, that at the time of the agreement mentioned Loveland had the notes and mortgage in his possession. Further, that the plaintiff knew of all the transactions of Loveland with the said defendants, and was fully aware of said agreement, and consented and agreed thereto, and was fully aware of the release of these defendants, and of the satisfaction of said mortgage, and consented thereto at the time of the * * * satisfaction of said mortgage."

It is urged by counsel for the plaintiff that the finding of the court below that the plaintiff "caused J. S. Loveland, the mortgagee, to discharge the mortgage," and that Loveland, "with the consent of the plaintiff," discharged the same, is without the issues, because no one of the defendants avers in his answer that plaintiff caused Loveland to discharge the mortgage. But, as we have seen, defendants Stevens and Seymour aver that the discharge was with the consent of the plaintiff, and the court found that the discharge was with her consent, given at the time. It is not necessary to decide whether the plaintiff's demurrer to the above-stated second count of the fourth amended answer was well taken, inasmuch as, so far as such defense or count was a plea in the nature of accord and satisfaction, the court below found upon it adversely to the defendants Stevens and Seymour, in the finding that no part of the four last notes had been paid except one year's interest on each.

It is contended by appellants that an assignment of negotiable notes before maturity carries with them the security, and a satisfaction of a mortgage entered on the record by the original creditor, after he has sold and delivered the notes, is a mere nullity; that the party buying mortgaged premises must at his peril ascertain who then owns the notes accompanying the mortgage, and whether the same have been actually paid. Even if it should be conceded (in the absence of an assignment of the mortgage and its registration) that a subsequent purchaser is bound to know, notwithstanding a discharge of record executed by the mortgagee, that he has transferred the notes the mortgage was given to secure, and the mortgage itself as an incident to the notes,—and we do not concede it or decide the question,—yet if the indorsee or transferee of the notes consented to and approved of the discharge of the mortgage by the mortgagee, how stand the equities of the respective parties?

In the case at bar the plaintiff comes into equity to assert the continuance of the lien, as against the mortgagors, a subsequent mortgagee, and subsequent purchasers. Clearly she ought not to be permitted to do this in the face of her established consent to its discharge.

Section 2938 of the Civil Code provides: "A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the

acknowledgment in form substantially as follows: 'Signed and acknowledged before me this ——— day of ———, in the year ———. A. B., Recorder.'"

It is not required by the statute that the entry in the margin of the record shall state anything with respect to the indebtedness to secure which the mortgage was given. It is manifest that an acknowledgment of satisfaction of the *mortgage*, signed by plaintiff, would have been sufficient, and that the words "full payment" and "note" are surplusage. The entry, signed by Loveland with plaintiff's consent, must be construed in like manner. When the mortgage was discharged the lien ceased, and unless the marginal satisfaction was induced by fraud, or was a mistake, with the knowledge of defendants Curtis, Soule, or Stacy, they were not bound to inquire what, if any, was the consideration for the discharge of the lien. A mortgagee may voluntarily discharge his mortgage, relying upon the general credit and responsibility of the mortgagor, or he may do so in consideration of receiving other security, or for any other reason satisfactory to himself. If the marginal discharge expressly recited that it was executed in consideration of the payment of the first of the five promissory notes, the lien would have ended.

It is insisted that defendants Curtis, Soule, and Stacy were not "in good faith," because the marginal entry informed them that only one note had been paid. But, in the first place, the matter with respect to payment of "the note" was not properly of record as part of the marginal entry; therefore no constructive notice. In the second place, the discharge was complete if made in consideration of the payment of one note. If it be said the insertion of the words, "full payment of the note is acknowledged," was evidence to put the subsequent parties on inquiry that Loveland (acting with the consent and approval of plaintiff) was induced by the fraud of the defendants Stevens and Seymour to sign the marginal entry, or that it was done under a mistake, the matter unnecessarily inserted in the marginal entry was, at most, evidence tending to prove notice of fraud or mistake, if any existed, and no such fraud or mistake was pleaded, proved, or found. The court below denied the plaintiff's motion to retax by striking from defendants' cost-bill two items, one being a charge for mileage as to witness of E. E. Stacy, party to the suit, taxed at $16, and the other his fees for two days' attendance as a witness, $4. Stacy was not subpœnaed as a witness.

The parties to a suit are competent witnesses. Code Civil Proc. § 1879. The statute in force in San Bernardino county gives to witnesses fees for attendance and mileage. Hitt. Code, 2720. In the present case the court below could have allowed or refused to allow costs to the defendants other than the mortgagors named in the complaint, or could have apportioned costs between them and the plaintiff. Code Civil Proc. §§ 1022, 1024, 1025. The object of section 1879 of the Code of Civil Procedure, so far as it relates to parties to an action, is to change the common-law rule, and to render such parties competent to testify. Fairly construed, the statute which allows fees and mileage to witnesses relates, in ordinary cases, only to witnesses who may be compelled by subpœna to attend the trial, or to give their deposition, and, in case of a party, to one who has been subpœnaed by the opposite party. It may be that a witness not a party, who is subject to subpœna, may ordinarily be allowed, not only his attendance, but mileage, although not actually subpœnaed. But it appears from the bill of exceptions that Stacy, who was a party, was not subpœnaed. If he testified on his own behalf, it must be presumed he supposed his attendance was necessary for that purpose, even if, in support of the action of the court below, we assume that he was called to the stand by the plaintiff or a co-defendant. We think it is not intended by the statute that he should be allowed compensation for his voluntary attendance on the trial, or mileage. His presence must be referred to his natural interest as a party to the litigation. We are informed it has been the practice of the superior courts almost uniformly to refuse to allow such charges.

Judgment reversed, with direction to the court below to enter a judgment in accordance with the views expressed in the foregoing opinion.

We concur: TEMPLE, J.; PATERSON, J.

72 Cal. 498

COBURN *v.* GOODALL and others. (No. 9,592.)

(*Supreme Court of California.* June 10, 1887.)

1. COVENANTS—IN LEASE—RUNNING WITH THE LAND.
A covenant in a lease to surrender, at the expiration of the term, with such improvements as shall have been erected, runs with the land, and binds the assignees of the lessee, although they are not mentioned in the lease.

2. LEASE—ASSIGNMENT—JOINT LIABILITY OF ASSIGNEES.
Assignees of the whole of the demised premises, though in unequal proportions, are jointly and severally liable for the entire damages sustained by the lessor by reason of a breach by them of a covenant in the lease to surrender possession at the expiration of the term.

3. ESTOPPEL BY JUDGMENT—EJECTMENT—OUSTER.
In ejectment when the claim for mesne profits has been withdrawn, there are but two *material* questions left, viz., right of entry by the plaintiff, and wrongful possession of the defendant on the day the action was brought. The judgment in the suit is therefore not an estoppel as to the time of ouster.[1]

4. SAME—ELECTION OF REMEDIES—COVENANT.
A landlord is not estopped to proceed against the assignees of his lessee for a breach of covenant to deliver possession, on the ground that he has elected to treat them as *trespassers*, by reason of the fact that he has successfully maintained ejectment against them, when in the ejectment suit he expressly withdrew all claim for damages.

5. EVIDENCE—WRIT AND RETURN.
In a suit by the lessor for damages for a breach of covenant to surrender, against the assignees of the lessee, a return of "executed" by the sheriff on a writ of restitution issued in another suit to which the assignees were not parties, is only *prima facie* evidence that the lessor was so put in possession.

6. INTEREST—RIGHT TO—UNLIQUIDATED DEMAND.
When the plaintiff's claim is an uncertain and unliquidated demand, and the amount due cannot be ascertained from the face of the contract in suit, but has to be settled by process of law, he is not entitled to interest, *eo nomine*, under Civil Code Cal. § 3287, providing that "every person who is entitled to recover damages, certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover interest thereon from that day," etc.

7. SAME—CONTRACT.
Interest can be had under Civil Code Cal. § 3288, only for the breach of an obligation *not arising from contract*. Where, therefore, the court finds that the plaintiff's case is for a breach of an obligation arising from contract, he is not entitled to interest under that section.

8. DAMAGES—EVIDENCE.
The court is entitled to be put in possession of all pertinent facts and circumstances from the consideration of all of which the ultimate fact of the *quantum* of damages is to be deduced.

9. APPEAL—QUESTION OF FACT.
It is not for the appellate court to say that the court below ought to have believed certain witnesses rather than the one on whose testimony the findings is based.

Department 1. Appeal from superior court, San Francisco.

Action by Coburn, respondent, against Goodall and others, appellants, to recover damages for failure to deliver certain premises on the sea-shore, to which a wharf and chute were attached, leased by him (Coburn) to one Brennan, and by him assigned to the appellants.

[1] As to when a judgment is not an estoppel, see Haley v. Haley, (Cal.) 14 Pac. Rep. 92; Bigley v. Jones, (Pa.) 7 Atl. Rep. 54; Dicken v. Hays, Id. 58; Riverside Co. v. Townsend, (Ill.) 9 N. E. Rep. 65, and note; Weiss v. Guerinean, (Ind.) Id. 399; Richardson v. Richards, (Minn.) 30 N. W. Rep. 457; Elgin Nat. Watch Co. v. Meyer, 29 Fed. Rep. 225.

Fox & Kellogg and *McAllister & Bergin*, for appellants.

The conclusion of law and the judgment are in conflict with each other; the one does not support the other, and neither is supported by the findings of fact.

The findings of fact are: (1) That the defendants entered under lease. (2) That the following named persons are the defendants who so entered, and that they held in the following proportions, to-wit: The defendant Sudden one undivided fourth; the defendant Fake one undivided fourth; the defendant Goodall one undivided eighth; the defendant Nelson one undivided eighth; the defendant Wensinger one undivided eighth; and the defendant O'Farrell one undivided eighth. (3) That these defendants so named continued in possession (of the five acres here demanded) until the commencement of this suit. (4) That said defendants oppressively withheld the possession (although there is no such allegation in the complaint.) (5) That the value of the use and occupation is $10,000, and that that is the measure of plaintiff's damage, by reason of all the acts of all these defendants. There is nothing in all the findings to show that any of the defendants have succeeded to any of the interests or liabilities of any of their co-defendants, or that for any cause any of the defendants have ceased to be liable; and yet the conclusion of law is that plaintiff is entitled to judgment against four of the defendants only,—Goodall, Nelson, Wensinger, and Sudden, representing five-eighths of the interest found, and five-eighths of the wrong,—for the full amount of all the rents and profits and damages found, $10,000, and that that amount shall bear interest from November 24, 1875; and the judgment is entered against the said four defendants, not for $10,000, or for that sum, with interest from November 24, 1875, as ordered, nor for any sum which is equal to the said $10,000, with interest added for the time mentioned, but for $16,520, a sum which is more than $1,700 in excess of the damage found, with the interest added.

It thus appears (1) that the judgment is erroneous, even if it ran against all the defendants, because it is in conflict with and is not supported by the findings; (2) that it is erroneous because it does not run against the defendants found liable; (3) that it is erroneous because the conclusion of law is not supported by the findings of fact; (4) that it is erroneous because it is not in conformity with the conclusion of law.

If the defendants against whom the findings ran are jointly, or jointly and severally, liable, then the defendants against whom the judgment runs are injured by the judgment, for that it cuts them off from the right to enforce contribution. On the other hand, if five defendants against whom the findings run are only severally liable, and each for his proportion as found, as the findings imply, then the judgment is against law, in that it makes the judgment defendants liable for a large sum of money, for which the court found that others, and not these, were liable. So that, looking at this judgment in any aspect that we may, it is erroneous and against law. It therefore becomes unnecessary to consider the question whether the liability of the defendants named in the findings is joint, joint and several, or several only.

Plaintiff is estopped by the judgment in the former suit of *Coburn* v. *Ames, Templeton, Goodall, and Nelson.*

This action was commenced November 24, 1875. The case of *Coburn* v. *Ames, Templeton, Goodall, and Nelson*, commenced January 16, 1875, was an action of ejectment to recover possession of about six acres of land, and $5,000 damages for the detention of the same. Judgment was rendered against said defendants, June 15, 1876, for the possession of the demanded premises, *but without damages*. That judgment was affirmed by this court in October, 1877, and *remittitur* filed January 14, 1878. The evidence of plaintiff himself in this case shows that, before the commencement of this suit, he was in possession of all of the 40-acre tract mentioned in the com-

plaint in this action, except the 6 acres described in said former complaint. And the plaintiff himself introduced the judgment roll in said former case in evidence, and argued that it was conclusive of the fact of detention by these defendants of the 6 acres, part of the said 40 acres; and all the evidence in this case, as to the damage sustained, is directed to this 6-acre tract, and the findings themselves say that the adverse holding was of 5 acres. This judgment roll was offered by plaintiff generally, and admitted without objection. It is evidence for all the purposes to which it is applicable in the case. It was claimed by the plaintiff to be conclusive, as between these parties, as to the legal condition or relation of the parties to that six acres of land; and it was so conclusive, at least as between the plaintiff and the defendants Goodall and Nelson, under section 1908, sub. 1, and section 1962, sub. 6, of the Code of Civil Procedure. Under the same sections, it was equally conclusive on the question of the damages sustained by the plaintiff, and of his right to recover damages for the detention of said lands.

A judgment is conclusive, and operates as an estoppel, as between the parties and their privies, not only as to the matters expressly determined, but also as to all matters which might have been given in evidence under the issues. *Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436; *Gray* v. *Dougherty*, 25 Cal. 272; *Garwood* v. *Garwood*, 29 Cal. 521; *Phelan* v. *Gardner*, 43 Cal. 306; *Estate of Pico*, 56 Cal. 413; *Parnell* v. *Hahn*, 61 Cal. 131; *M'Creery* v. *Fuller*, 63 Cal. 30.

This question of damages was directly within the issues of that former case, being alleged in the complaint, and denied in all the answers. Under the authorities cited, it is no answer to say that it was not adjudicated; it might have been. Complaint in ejectment; damages alleged, and issue thereon; judgment for possession, but no judgment for damages. That judgment will be a bar to any further action to recover the same damages. *Belcher Con. G. M. Co.* v. *Deferrari*, 62 Cal. 163.

The evidence is insufficient to support finding 9, and the same is against both fact and law.

This finding is directly responsive to an issue tendered by all the answers, and is directly in conflict with *all* the evidence on the point. The lease under which defendants entered expired October 1, 1872. The evidence shows that on the nineteenth of June, 1872, an action was commenced in the Twelfth district court, San Mateo county, by the Pacific Lumber & Mill Company and J. P. Ames, against this plaintiff and his co-tenant, and their lessees, these defendants, to acquire the said five acres of land by condemnation, under the statute as it then stood. On the twenty-seventh day of September, 1872, in that cause, an order was made and given, signed by his honor, Judge McKinstry, then judge of said court, authorizing the plaintiffs in that cause, to take possession of the said five acres, and hold and use it for the public uses named in said order, and staying all proceeding against the plaintiffs therein on account thereof. This order was fully authorized by the terms of the statute as it then stood. Code Civil Proc. 1872, § 1254.

On granting this order, the undertaking required by said section was duly given and approved by the court. Under this order, which ran as well against the plaintiff as against the defendants herein, these defendants were ousted, before the expiration of the term of their lease, and at the expiration of said term, as to these five acres, it was impossible for them to put plaintiff in possession; and these defendants were never afterwards restored to that possession. On the contrary, the tract was surrendered by the parties who held under the order, not to these defendants, but *to this plaintiff*, in October, 1873. Whatever scramble for possession occurred after that was between this plaintiff and other parties, not with these defendants, for they never in any manner interfered with it. In further proof of this, it appears from the record in this case that afterwards, in another action brought by Ames and Templeton

(the latter of whom had succeeded to the interest of the Pacific Lumber & Mill Company) against this plaintiff and his co-tenant, Clarke, and to which these defendants were not parties, those plaintiffs were put in possession of the land, first under an order dated May 26, 1873, which order was vacated June 9, 1873, and another order of possession made March 14, 1874, the court having first, however, by its writ of restitution, executed by the sheriff of the county, put this plaintiff into full possession of the property on the twenty-fourth of January, 1874. Thus these defendants were put out in September, 1872, and the court itself authorized another to take possession. In October, 1873, the plaintiff was put in possession by the parties then holding it. Not satisfied with that, he applied to the court, and its officer put him in possession in January, 1874. And still the court finds in this case that these defendants remained in possession and kept the plaintiff out until the commencement of this suit, November, 1875.

Garber, Thornton & Bishop and *Craig & Meredith*, for respondents.

PATERSON, J. It was decided in *Coburn* v. *Ames*, 52 Cal. 395, that the wharf and chute were not on the demised premises, were not affixed or appurtenant thereto, and therefore were not "improvements," within the meaning of that term as used in the lease. The court held that the plaintiff had no such right to the possession of the land below the line of high water as to enable him to maintain ejectment, and the judgment of the lower court was modified accordingly. Pending the appeal in that case a receiver was appointed in the trial court to take possession of the property, collect tolls, and manage the wharf and chute. After judgment was modified in accordance with the order of this court, the receiver, under directions from the court in which he was appointed, paid over all the money in his hands to the plaintiff. The defendants, among whom were Goodall and Nelson, defendants herein, again appealed to this court, and it was held that, as the plaintiff was not entitled to the possession of the wharf and chute, he was not entitled to all of the profits derived from the use of them pending the litigation. The cause was accordingly again remanded for the adjustment of the accounts. *Coburn* v. *Ames*, 57 Cal. 204.

This action was commenced on November 25, 1875. The lease which is made the basis of this suit contained a covenant that Brennan, the lessee, at the expiration of said lease would surrender to Coburn and Clark (the lessors or their assigns) with such improvements as shall have been erected or made thereon, but there was nothing in the covenant providing in terms that the lease should be binding upon the assigns of the lessees. The defendants are all assignees of undivided parts, amounting to five-eighths of the whole interest in the lease, viz., Sudden, one-quarter; Goodall, one-eighth; Nelson, one-eighth; and Wensinger, one-eighth.

The action as to defendant Fake, who owned one-quarter, was dismissed. The other defendant, O'Farrell, who owned one-eighth, died pending the action, and his representative has never been substituted. Judgment was rendered against the defendants Sudden, Goodall, Nelson, and Wensinger for $10,000, with interest thereon from commencement of suit, $6,520; total, $16,520; and costs of suit.

It is claimed that these four defendants, if liable at all under the covenant to surrender, (which is denied,) are liable only in respect of their privity of estate, and that such liability is several and proportionate to the interest acquired by each of them. To this proposition we cannot assent. There are some authorities to that effect, but the weight of opinion, we believe, is contrary thereto; and with better reason it is held that, while assignees of a leasehold are tenants in common, they are jointly and severally liable on covenants to repair and to deliver up at the end of the term. These covenants which are connected with the estate run with the land, and vest in point of benefit

and liability in the assignee, while the personal privity of contract between the lessor and lessee remains unaffected by the transfer. 1 Washb. Real Prop. 435, 329; 2 Platt, Leases, 351; Tayl. Landl. & Ten. (7th Ed.) § 530, note; *Hayes* v. *Morrison*, 38 N. H. 95; *Fitch* v. *Johnson*, 104 Ill. 117.

The authorities cited which relate to questions concerning the apportionment of rent, are not applicable, as payment of rent is an exception to the rule. Freem. Co-Tenancy, § 346.

The demurrer was properly overruled, if our view of the liability of tenants in common, assignees of the whole of the demised premises, though in unequal proportions, is correct, *i. e.*, that they are jointly and severally liable on all covenants and obligations of the assignors, except, perhaps, the payment of rent. The possession of one of the tenants is the possession of all. There is no unity of interest, title, or time as in joint tenancy, but as to unity of possession they are identical. So far as enjoyment of possession goes, they are all equal, whatever may be the difference in shares held by each. If they are not jointly and severally liable, one tenant in common owning a small undivided interest might prevent the delivery of the property in its entirety which the lessor is entitled to under his contract with or without an express covenant therefor. We see no hardship in this rule, for the assignees in possession, upon authority and in reason, stand in the shoes of the lessee; and so long as they occupy such relation to the lessor and his property they are bound by the terms of the contract with the lessee, and the obligations implied therefrom by law. While one of the tenants in common remains, the unity of possession is undivided, and as to those at least who continue in possession by themselves or by agents the unity of obligation flows from unity of possession. There is nothing in the judgment which will prevent the four defendants against whom it was entered from enforcing contribution from Fake and the representatives of O'Farrell, if the right to contribute exist.

The evidence is sufficient, we think, to sustain the finding that the defendants continued in possession of the five-acre tract from the expiration of the lease to the time this action was commenced. This tract or parcel, as described by the court in its findings, is "commonly known as 'Pigeon Point' shipping point, and used for the purpose of handling and shipping freight, and lying above and bounded on one side by ordinary high-water mark." As between these defendants and this plaintiff, the grant of the wharf franchise by the board of supervisors to Templeton and Moore, in 1870, is immaterial. It was the duty of the defendants to deliver to plaintiff the possession of the five-acre tract. We think there was evidence sufficient to warrant the court below in finding that Ames did not deprive the defendants of possession. There was evidence tending to show that defendants were using the name of Ames as a disguise for their own possession. Furthermore, there seems to be no longer any doubt that orders like that of the district judge, made in the case referred to September 27, 1872, putting plaintiffs in the possession of the land during the pendency of the action for condemnation, are void. *Sanborn* v. *Belden*, 51 Cal. 266; *San Mateo Water-Works* v. *Sharpstein*, 50 Cal. 284. With respect to the possession which it is claimed Coburn secured by virtue of the writs of restitution served in the case of *Templeton and Ames* v. *Coburn and Clark*, it is sufficient to say that the evidence is conflicting as to the *fact of possession*. The return of the officer upon the writ was only *prima facie* evidence of the fact stated. Pol. Code, § 4178. Plaintiff testified that he had no actual possession; that the moment the sheriff left "they just jumped right in, and took possession again."

It is claimed by appellant that the ejectment suit of Loren Coburn, as plaintiff, against Josiah P. Ames, Ellen Templeton, administratrix of the estate of Horace Templeton, Charles Goodall, Christopher Nelson, and George C. Perkins, defendants, commenced on the sixteenth day of January, 1875, and the findings and judgment therein, establishes an election by Coburn to treat

Goodall and Nelson as trespassers, dissolves all their relations with him as assignees of said lease, and adjudicates facts which are inconsistent with the claim of plaintiff in this action. In that case all claim for damages the findings therein show was expressly withdrawn by plaintiff. If this had not been done, there is no question that the judgment would be conclusive on the question of damages, as it was made an issue in the case. "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated, and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense." Freem. Judgm. § 249. When, however, the record on its face shows that the issue was withdrawn from the consideration of the court, the presumption that it was adjudicated no longer applies. The right to recover possession, and the right to recover mesne profits, were not necessarily united in the action in ejectment. The right to join causes of action for both is a mere privilege granted by statute. That the record in that case is not an estoppel as to the time of ouster is equally clear, (*Yount* v. *Howell*, 14 Cal. 465;) for if the question of mesne profits may be considered out of the case by virtue of the finding of a withdrawal thereof, then there were but two other questions which could have been material in that action of ejectment, viz., right of entry by plaintiff, and wrongful possession of defendant on the day suit was commenced.

Appellant, claims, further, that the bringing of the suit in ejectment was an election of a remedy inconsistent with this action, and concludes him from maintaining the latter. The rule stated in the syllabus, taken from *Jones* v. *Carter*, 15 Mees. & W. 718, is doubtless correct: "The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due, or covenants broken, after the service of the declaration." That was an action of covenant in a mining lease in which breaches were alleged, the first for non-payment of rent, and others for violation of covenants requiring defendants during the continuance of the demise to keep six men searching for mineral for certain periods in each year, for keeping legible accounts of ore extracted, etc., but the principal question related to rent. The case before us, however, is not for rent, or for damages caused by a breach of covenant subsequent to the commencement of the ejectment suit. The plaintiff's right to recover both possession and damages arose immediately upon the failure of the defendants to deliver at the expiration of the lease, and in both actions the defendants are treated as wrongfully in possession and charged with a continuous wrongful withholding from the time the covenant was broken down to the commencement of the action.

There was evidence to support the finding of the court that Wensinger and Sudden continued in possession of the tract from the expiration of the lease to the commencement of the action. It is not for the appellate court to say that the court below ought to have believed certain witnesses rather than the one on whose testimony the finding is based. There are circumstances tending to corroborate plaintiff's testimony and claim that Scotty held possession for and as agent of Wensinger and Sudden. Coburn failed to obtain possession under the written surrender executed by Sudden to him, and, of course, if such failure was due in any degree to the act or neglect of Sudden, it was inoperative. *Kower* v. *Gluck*, 33 Cal. 406.

It is claimed that the court erred in allowing, against the objection of defendants, evidence as to profits derived from the wharf and chute; that such was improper *data* for the assessment of damages; and it will be presumed that injury resulted from the admission of such evidence. The court evidently did not hold that the defendants were bound to deliver the wharf, nor

was the amount of profits derived from the wharf and chute taken as the measure of damage; otherwise a much larger sum would have been fixed by the court as the damage suffered by plaintiff. In determining the amount of damage sustained by plaintiff, we think that the question of profits derived from the wharf was a proper subject of inquiry, providing it was not taken as the measure of damage. If it be true that the defendants were wrong-doers in refusing to deliver possession to plaintiff, the question is, how much was Coburn damaged by the failure of the defendants to do what it was their duty to do? If it be assumed that those profits would necessarily have been less, if they had delivered to him the portion above high-water, retaining the part below themselves, it was easy to arrive at and deduct the difference. All he had to do was to complete it, and the cost of completion was capable of demonstration. He was not allowed to recover, as such, the profits of the whole property. But in this, as in similar cases, it was proper and necessary to put the court in possession of all pertinent facts and circumstances from the consideration of all of which the ultimate fact of the *quantum* of damage was to be deduced. The court below allowed damages for the detention only of that part of the demised premises which it found was actually and exclusively detained, used, and possessed by the defendants from the expiration of the lease, October 1, 1872, to the commencement of this action, November 24, 1875; and whether we take into consideration the results flowing from the acts of defendants under the doctrine of encroachment contended for by plaintiff or not, $10,000, the principal amount of damages allowed is reasonable and just.

We think, however, that the court erred in allowing interest on the $10,000. Section 3287; Civil Code, reads as follows: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." But the damages were unliquidated and uncertain, and could only be made certain by proof and adjudication. Where the plaintiff's claim was an uncertain and unliquidated demand, and the amount due could not be ascertained from the face of the contract, but was to be settled by process of law, this court has held that interest *eo nomine* cannot be allowed. *Brady* v. *Wilcoxson*, 44 Cal. 245. Nor could interest be allowed under section 3288, Civil Code; for interest under this section can only be allowed for the breach of an obligation *not arising from contract*, and in case of oppression, fraud, or malice. If plaintiff shows any case at all, it is for breach of an obligation which *does arise from contract*, and the court so finds.

It is therefore ordered that the judgment be and it is hereby modified by striking therefrom the sum of $6,520, and, as so modified, the judgment shall stand.

We concur: TEMPLE, J.; MCKINSTRY, J.

(72 Cal. 459)

PEOPLE *v.* KRAKER. (No. 20,285.)

(*Supreme Court of California.* June 4, 1887.)

CORROBORATION OF ACCOMPLICE—RECEIVING STOLEN GOODS.

In a prosecution for receiving stolen goods, it is error to allow the jury to convict on the uncorroborated testimony of the thief, without leaving to them to find whether such witness was not in fact an accomplice of defendant, so as to require his testimony to be corroborated.

In bank. Appeal from superior court, San Francisco.

Chas. B. Darwin, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

PATERSON, J. Defendant was convicted of the crime of receiving stolen goods knowing them to have been stolen. At the trial, one H. G. Matthewson, who was charged in the information with the stealing of the goods, was a witness against the defendant, evidently the principal witness. At the conclusion of the testimony and argument the defendant asked the court to instruct the jury substantially in the language of section 1111 of the Penal Code, which reads as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof."

The court refused to give the instruction asked, and, in the charge to the jury referring to the claim of defendant's counsel that Matthewson was an accomplice, said: "I charge you, in plain terms, that if you believe the testimony of Horace G. Matthewson, and from that testimony you are satisfied to a moral certainty that the defendant did receive the property mentioned in the information from him, and that, at the time of the receipt thereof by the defendant, he knew and was informed that it was stolen property, and he so received it for his own gain, or to prevent the owner from again possessing it, then you are authorized to convict the defendant on the testimony of said Matthewson." Subsequently, on motion for new trial, the learned judge had some doubt as to the correctness of his instruction, but, deeming it best to have the question settled, denied the motion, giving the defendant the benefit of a certificate of good cause.

We think the instruction given by the court was erroneous. The proposition has never been directly passed upon in this state, but in *People* v. *Levison*, 19 Cal. 99, the court, in commenting upon certain rulings, said: "It also leaves the inference that the *unsupported testimony of the thief* is sufficient to establish the defendant's guilt." An accomplice includes all persons who have been concerned in the commission of an offense, and the grade of guilt of the witness is not important. Abb. Law Dict.; *Cross* v. *People*, 47 Ill. 152.

In England, where there is no statutory provision against a conviction on the uncorroborated testimony of an accomplice, the judges always instruct the jury that the uncorroborated testimony of the *thief*, in cases of this kind, is not sufficient. *Reg.* v. *Robinson*, 4 Fost. & F. 43; *Reg.* v. *Pratt*, Id. 315.

In that portion of the charge quoted above the court took from the jury the question whether, as a matter of fact, Matthewson was an accomplice, considering, it seems, only the abstract proposition of law as to whether the mere fact that the witness was the thief made him an accomplice of the one who received the goods. But the question as to whether the witness was an accomplice in the commission of the offense is a question of fact for the jury. *State* v. *Schlagel*, 19 Iowa, 169.

In Texas, under a statute like section 1111, *supra*, the court held that, if the witness was *an accomplice in any material fact*, the jury should have been instructed as to the value of his evidence without corroboration. *Miller* v. *State*, 4 Tex. App. 251. And in Massachusetts it is held that "the court should instruct the jury as to what constitutes an accomplice, and leave it for them to determine whether the witness was in fact an accomplice." *Com.* v. *Elliot*, 110 Mass. 106; *Com.* v. *Ford*, 111 Mass. 394.

Judgment and order reversed, and cause remanded for new trial.

We concur: SEARLS, C. J.; MCKINSTRY, J.; MCFARLAND, J.; TEMPLE, J.; SHARPSTEIN, J.

72 Cal. 477

FITZELL *v.* LEAKY. (No. 11,424.)

(*Supreme Court of California.* June 7, 1887.)

1. HOMESTEAD—EXEMPTION—APPURTENANCES—DITCH.
 Plaintiff made an agreement to give a right of way over his homestead for a ditch, and to pay one-fourth of the expense of constructing it, in return for one-fourth of the whole ditch, and of the water flowing through. Such part of the water was to be used in irrigating said homestead, which would be valueless without the use of water; the remainder to be used by the other party to the agreement, to irrigate his lands, through which the ditch ran. *Held*, that plaintiff's interest in the ditch and water is part of his land,—the right of the other party being merely an easement to have the water flow down to his land; and said interest, being part of plaintiff's homestead, is exempt from sale to the full extent to which homesteads are exempt.
2. SAME—DECLARATION OF—PENDING SUIT.
 A declaration of homestead, regular in form, filed by the defendant in an action after the findings of the court have adjudged a debt to be due from him to the plaintiff therein, but before judgment entered, is not in fraud of creditors, but is valid, for such is the very purpose of the homestead law. Civil Code Cal. §§ 1240, 1241.
3. VENDOR'S LIEN—GENERAL JUDGMENT—WAIVER.
 A vendor's lien on real property can be enforced only in a suit brought for that purpose, and is waived by taking a general judgment, which, if docketed, is a lien upon all the debtor's real property.

In bank. Appeal from superior court, Lassen county.

C. G. Kelley, for appellant. *E. V. Spencer*, for respondent.

MCKINSTRY, J. The action is to enjoin the defendant from selling, as sheriff, one-fourth of a water ditch, and of the water flowing through it, claimed by plaintiff as appurtenant to and part of his homestead. The court below decreed an injunction. At the trial the defendant introduced in evidence the judgment roll in an action wherein one G. F. Kelly was plaintiff, and the plaintiff herein was defendant. That action was brought by the plaintiff to quiet his title to a tract of four and one-half acres of land, described by metes and bounds, so as to include the land occupied by a ditch, in part the ditch above mentioned, and in part the continuation of the same through and within the general limits of the lands owned by one George Riddle. The tract, the title to which was sought to be quieted, was further described: "The westerly one-half of the same being the same lands heretofore purchased by the plaintiff [Kelly] from one George Riddle, by deed of date June 28, 1880, and the easterly one-half, or remainder, being the same lands purchased by said plaintiff of H. G. Fitzell [plaintiff herein, and defendant in said action,] by deed of date June 28, 1880, and was all purchased for the purpose of constructing a ditch thereon for irrigating purposes."

The defendant in that action (plaintiff in this) answered, and such proceedings were had thereinafter that on July 28, 1883, a judgment was entered, whereby it was adjudged and decreed that the plaintiff therein was the owner of an undivided three-fourths interest, and the defendant therein of an undivided one-fourth interest, in the right of way and irrigating ditch situate and being on the lands described in the complaint therein, and barring each of the parties from asserting any claim to the interest adjudged to the other; and, further, that the plaintiff therein have and recover from the defendant therein the sum of $275.

In its findings in the action aforesaid, the court found that the plaintiff therein was not the owner of the lands described in the complaint, nor of any interest in the same, except as specified; that on the twenty-eighth June, 1880, the plaintiff therein procured a right of way from the defendant therein across the latter's land for the purpose of constructing an irrigating ditch, and on the same day granted to the defendant therein one-fourth interest in said easement or right of way, upon condition that said defendant would bear his proportionate part of the cost and expenses of constructing the irrigating

ditch; that thereafter the said plaintiff and defendant jointly constructed the ditch upon and across the strips of land described in the complaint, and have since jointly maintained the same; that plaintiff is the owner of three-fourths interest in such right of way, ditch, and water-right, and the defendant of one-fourth; that since the twenty-eighth June, 1880, the plaintiff in said action had claimed to be the sole proprietor, etc.; that the defendant therein did not, on the twenty-eighth June, 1880, convey the described land by deed to the plaintiff therein, but only granted a right of way; that the plaintiff therein had paid out $275 more than three-fourths of the cost of construction of the ditch; and that the defendant therein had paid $275 less than one-fourth of the cost of such construction. For this sum, as we have seen, a money judgment was entered in favor of the plaintiff in such action.

The present plaintiff's declaration of homestead was regular in form, and was filed after the findings of the court in the action above described, but (considerable delay intervening between the findings and judgment) before the judgment was entered. It is by virtue of an execution issued upon the money judgment in favor of Kelly that the present defendant, as sheriff, has advertised and threatens to sell the plaintiff's interest in the ditch and water therein flowing.

Can the plaintiff's interest in the ditch and water be said to be a portion of the homestead created upon a tract of land through which the ditch flows? The plaintiff here agreed to give the right of way through his land, and to pay one-fourth of the expenses of constructing the ditch, in return for one-fourth of the whole ditch, and of the water flowing through it. Looking below the form, this was the real nature of the contract.

And in the findings in the present action the court below found that the interest of this plaintiff in said water-ditch was acquired for the purpose of irrigating the land of plaintiff embraced in his homestead declaration; that the ditch crosses said lands before coming to the lands of said Kelly; and that plaintiff takes one-fourth of the water out of said ditch upon the homestead lands for the purpose of irrigating the same, which is necessary for the production of the staple crops of the country, and that said land would be actually valueless without the use of the water. The case, as a whole, clearly shows that the object of the plaintiff and defendant in jointly constructing the ditch was to secure water for the purpose of irrigating their respective tracts of land. Under these circumstances, we think the flow of the water through plaintiff's land, to the extent of his interest therein, was part of his land inseparably connected with it until he should part with it voluntarily, or until it should be sold under a judgment which could be enforced against the homestead.

This is not the case of a partnership formed for the purpose of appropriating water, and vending it to third persons. There is nothing in the nature of the transaction which made the ditch, as a mere *conduit*, or the water flowing in it as such, assets of a copartnership, or which created a lien upon them in favor of one of the partners advancing more than his proportion of the capital. The plaintiff and Kelly diverted a stream from its natural course to give value to their lands by irrigating them. As to third persons, creditors of either, they should be treated, with reference to the flowing water, like riparian proprietors upon the same natural stream; both being bound, *inter sese*, by their contract for the distribution. If the water had been brought to his land by the plaintiff alone, it would have become annexed to the land; and it would be difficult to apply a different rule, because, by convention between him and a lower proprietor, he is entitled to one-fourth, or any definite proportion, of it. The owners of adjacent tracts of land led the water to their tracts, and their rights are substantially the same as if the channel were a natural channel. The statute, and decisions under it, which seem to require that, in case of the declaration of a homestead upon property held in common

with another, the declarant must have the exclusive possession of the land, do not affect the rights of the parties hereto. The statute none the less operates to exempt from forced sale the land embraced in the homestead, and all its incidents, in a case where a lower proprietor may own an easement to have the water flow down to his land.

The adjacent proprietors were not tenants in common in the water in any other sense than as all the riparian proprietors are entitled to the common use of a stream. Each had exclusive possession of his own land, and of the water flowing over it as a part of his land. As to Riddle, occupant above, they might perhaps assert he had no right to use the water, because he had granted the right of way for a ditch carrying it all; but, as to the creditors of plaintiff or Kelly, the flow of the water over the tract of each was, in legal contemplation, part of his land. Kelly was entitled to have the water flow from plaintiff's land to his own, subject to reasonable use by the plaintiff, but this did not make him tenant in common in any part of the land embraced in the homestead. The owner of an easement upon land has no right of entry, nor has he any right to possess the land as such. *San Francisco* v. *Calderwood*, 31 Cal. 585. One who owns an easement upon the land of another has a right to enter on the land to keep the easement in repair; but, aside from this and analogous purposes, he has no right of entry. *Pico* v. *Colimas*, 32 Cal. 578.

By virtue of the contract between plaintiff and Kelly, the former was authorized to use one-fourth of the water, and could not deprive the latter of any part of three-fourths of it. But, whatever his contract with the lower proprietor as to the use of a specific share, the water flowing over the plaintiff's homestead was a portion of his homestead. It is possible that, independent of their relation as owners of the dominant and servient estates, Kelly had such an interest in the ditch, as a mere artificial *conduit*, as would authorize him to enter upon the homestead to repair the ditch; or that, in case plaintiff should advance moneys to keep the ditch in condition to conduct the water to Kelly, he would have a right of contribution, to be enforced by the equitable action for money paid, laid out, and expended for Kelly's benefit. But, if such rights exist, they grow out of the contract under which the water was originally brought to the lands, or are referable to the easement. Their existence does not depend upon, nor is it connected with, any right of possession in Kelly to plaintiff's land, or in the water as part of the land. The existence of such rights would not separate the water from the land, nor carve out of it a distinct property or estate, to be treated as entirely disconnected from the land.

As a judgment creditor of the plaintiff, having no specific lien which antedates the declaration of homestead, Kelly occupies precisely the same position as if he were not the owner of the land below, and had no interest in the flow of the stream. It follows that, whatever the share of the water which plaintiff may be entitled to use as against Kelly, the water flowing over his land is part of the land. Being an appurtenant to and legally incorporated with his homestead, it is exempt from forced sale to the full extent that homesteads are exempt.

On this appeal the defendant and appellant urges that the homestead was declared by plaintiff in fraud of his creditors, and especially in fraud of Kelly, the judgment creditor. It was declared, as we have seen, before the Kelly judgment was entered. The homestead is exempt from forced sale except as provided in the Civil Code. Civil Code, § 1240. The very purpose of the homestead law is to give to one—except as against an indebtedness already merged in a judgment, and as against a judgment of peculiar character subsequently entered—the right to preserve and protect a homestead from forced sale. It has never been held that a homestead was invalid because the declarant was in debt, or declared the homestead to protect it from existing debts.

It is not invalid because made during the progress of litigation which subsequently results in an ordinary money judgment against the homesteader, or because made at any time before the entry and docketing of such a judgment. The law authorizes a debtor to erect a barrier around the *home*, over which the sheriff, although armed with final process under such a judgment, cannot pass. With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead. If any doubt remained as to the intention of the legislature, it ought to be set at rest by the language of sections 1240 and 1241 of the Civil Code, which, after declaring generally that the homestead is exempt, enumerates as an exception that it is subject to sale in satisfaction of judgments obtained before the declaration of homestead was filed, "and which constituted liens upon the premises." A judgment obtained after a declaration of homestead, unless secured by a mortgage, or mechanic's, laborer's, or vendor's lien, cannot be enforced against the homestead, even although an attachment was levied upon the premises before the filing of the declaration. *McCracken* v. *Harris*, 54 Cal. 81; *Sullivan* v. *Hendrickson*, Id. 258.

The homestead is subject to sale in satisfaction of judgments obtained on debts secured by mechanics', laborers', or vendors' liens. Civil Code, § 1241. There is no pretense here of any mechanic's or laborer's lien.

It is contended, however, that Kelly's judgment was "on" a debt secured by a vendor's lien. We pass the question as to whether a vendor's lien ever existed in favor of Kelly. The lien which the vendor of real property retains, after an actual conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the land, but a mere equitable right to resort to it upon failure of payment by the vendee. *Sparks* v. *Hess*, 15 Cal. 186. It is in its nature a personal privilege, unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and enforced. If Kelly ever had the right to have a vendor's lien adjudicated and declared by a court of equity, he has never commenced proceedings to that end, but has waived his lien by taking a general judgment, which, if docketed, was a lien on all the real property of the plaintiff. His right, as against the real property granted, (supposing any such grant,) was a mere equity, which, to become of any force or effect, was to be established by the decree of a court of equity. *Baum* v. *Grigsby*, 21 Cal. 178. The judgment on a debt secured by vendor's lien, mentioned in section 1241 of the Civil Code, is a judgment in a suit brought to have a vendor's lien and its amount declared and enforced upon the real property sold and conveyed by the vendor claiming the lien. Such a judgment relates back to the date when the conveyance was made, or when the court of equity decrees the equity of the vendor attached; and, if the homestead declaration was filed after that date, declarant cannot avail himself of his homestead protection against the lien of his vendor. But the existence of the vendor's lien in favor of Kelly was never asserted in the action wherein the judgment for $275 was rendered in his favor, and we think that the defendant in the present action, who relies upon an execution issued on the general judgment for damages, ought not to be permitted to disregard that judgment, and to try herein the question whether, if Kelly had so elected, he might have obtained a decree establishing a vendor's lien.

The appellant having claimed in argument that the title to one-fourth of the ditch and water passed from Kelly to the plaintiff herein, and therefore a vendor's lien for a portion of the purchase price unpaid, proceeds to assert that the title never passed; that the sale from Kelly to the plaintiff was not absolute, but conditional upon full payment. Again, putting aside the question whether the plaintiff bought any property of Kelly, it is enough to say that if he did the sale was absolute, since it clearly appears Kelly relied upon plaintiff's personal promise to pay one-fourth of the cost of constructing the

ditch, and took a judgment against plaintiff for the part of the one-fourth of the cost which he failed to pay.

Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.

72 Cal. 490

PEOPLE *v.* BRADY. (No. 20,288.)

(*Supreme Court of California.* June 9, 1887.)

1. MURDER—VERDICT—QUESTION OF FACT.

In a trial under an information for murder, when the evidence is contradictory, and there is some testimony which, if credited by the jury, demands from them a verdict of guilty of murder in the first degree, a verdict to that effect will not be disturbed, because the jury are the sole judges of the degree of credit to be given to the testimony.

2. CRIMINAL PRACTICE—DISCHARGE OF JUROR—SUBSTITUTION OF ANOTHER.

When, during a trial for murder, and before any evidence was taken, one of the jurors became sick, and was discharged, and the court refused to comply with the request of the defendant to discharge the other jurors, and impanel a new jury, but granting to each party the right to challenge any of said other jurors, swore in another in place of the one discharged, and there appeared to be no good reason for discharging all the jurors, *held*, that the course pursued by the court was eminently proper, under Pen. Code Cal. § 1123, which provides that, if a juror becomes sick during a trial, so as to be unable to perform his duties, "the court may order him to be discharged. In that case a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled."

3. EVIDENCE—DYING DECLARATION.

On the day after the deceased was cut, when a physician had stated in his hearing that his wound was mortal, and that he was going to die, and he had announced repeatedly that he had no hope of recovery, he made a statement before a justice of the peace, in the presence of several persons, which was taken down by a reporter in short-hand, written out, read and assented to by the deceased, who signed and swore to it, and died soon after. *Held*, that the statement was admissible in evidence on a trial for murder as a dying declaration, it not appearing that there were any questions put or answers given after the statement had commenced which did not appear in it as presented, or that anything was said by the deceased previous to the formal dying declaration which conflicted with it.[1]

In bank. Appeal from superior court, Colusa county.

William Frazier, for appellant. *G. A. Johnson*, Atty. Gen., for respondent.

SEARLS, C. J. The defendant was charged by information with the crime of murder, alleged to have been committed in the county of Colusa, on the twenty-first day of June, 1885, by the killing of one W. A. Bristow. He entered a plea of not guilty, and upon a trial had was found guilty of murder in the first degree, and the punishment fixed at imprisonment for life in the state prison.

The first point made by the appellant is that the verdict is contrary to and not warranted by the evidence; that, at most, it only made a case of manslaughter, and was lacking in the elements from which malice is presumed. The testimony was, as is usual in such cases, more or less contradictory, and it only need be said that there was testimony which, if credited by the jury, demanded from them the verdict rendered. As they were the sole judges of the degree of credit to be given to the testimony, the verdict cannot be disturbed for the cause indicated in the error assigned.

[1] Dying declarations are admissible in evidence in homicide cases, if made under a sense of impending death. State v. Mathes, (Mo.) 2 S. W. Rep. 800, and note; State v. Partlow, (Mo.) 4 S. W. Rep. 14; Cook v. State, (Tex.) 3 S. W. Rep. 749; State v. Leeper, (Iowa,) 30 N. W. Rep. 503, and note; Puryear v. Com., (Va.) 1 S. E. Rep. 512; State v. Johnson, (S. C.) 1 S. E. Rep. 510; State v. Saunders, (Or.) 12 Pac. Rep. 441; Jordan v. State, (Ala.) 1 South. Rep. 577; Hill v. State, (Miss.) Id. 494.

It is further urged that the court erred in refusing a new trial upon the ground of error committed in discharging a juror, and in refusing to discharge the remainder of the panel, and to commence *de novo* and impanel a jury. It appears from the record that after the jury was sworn to try the cause, and before any evidence was taken, Henry Gurnsey, one of the jurors, was taken sick; and, being unable to continue on the jury, was discharged by the court. Counsel for defendant excepted to this action of the court, and requested that the remaining eleven jurors be discharged, and that their names, in common with all others summoned, be placed in the jury-box, and that the jury be impaneled anew to try the cause. The court declined to pursue this course, and retained the 11 jurors, subject to the right of counsel to challenge said jurors. Defendant interposed no challenge. The prosecution challenged one of the 11 peremptorily, and thereupon the jury was filled and sworn in the usual manner.

Section 1123 of the Penal Code provides: "If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled." The course pursued by the court was eminently proper under the Code. There appeared no good reason for discharging all of the jurors, as the court might have done, and, as the right of the defendant to challenge the jurors retained was expressly accorded to him, there was no error committed. *People* v. *Stewart*, 64 Cal. 60.

The only other error urged upon our attention relates to the admission of the dying declarations of the deceased, and to the refusal of the court to strike out such declarations. The testimony shows that the deceased was cut by defendant on the evening of the twenty-first day of June, 1885, so severely that his bowels protruded, and he held them with his hands while walking from the scene of the difficulty to his cabin. A physician was called, who, upon an examination of the wounds, of which there were several, pronounced the injuries mortal, and stated in the hearing of the patient that there was no hope for him. On the following day (June 22, 1885) deceased announced repeatedly that he had no hope of recovery, and that he was going to die, and expressed a desire to make a statement of the circumstances attending the conflict with defendant. His statement was then made to a justice of the peace, in the presence of several persons, taken down by a reporter in short-hand, written out at length, read and assented to by deceased, who signed and swore to it. He died the same night or the following morning.

Counsel for defendant based a motion to strike out the dying statement on the ground that the written statement, as introduced, did "not contain all of the statements made by the deceased at the time, and does not contain all the questions and all the answers put to and answered by the declarant with reference to this homicide at that time." The motion was denied because it failed to appear that any questions were put or answers given which did not appear in the statement as presented. The record shows: *First*, that before the statement was commenced there were several persons present who put questions to deceased touching the affray, which were answered by him; *second*, that, having expressed a desire to make a formal statement, it was taken down by question and answer literally, and every word of it written out and assented to as hereinbefore stated.

If there was any statement made by deceased which conflicted with his formal dying declaration, it might have been competent to prove it; but nothing of this kind was attempted or, so far as we can see, claimed. It was neither necessary nor proper to include in the dying statement all the deceased said from the time he received the mortal wound. The parties met him, and after an informal interview, directed, so far as appears, mainly to his condition and expectation of speedy death, proceeded in a formal manner to take

and read his dying statement. The court below was satisfied that this statement was made in such immediate and certain expectancy of speedy death, as entitled it to admission as a dying statement, and in this view we think there was no error.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; McKINSTRY, J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.

72 Cal. 544

WISE and others *v.* WILLIAMS and others. (No. 9,829.)

(*Supreme Court of California.* June 16, 1887.)

1. PARTNERSHIP—PROOF OF RELATIONSHIP—ESTOPPEL.
 Where a man and his wife, who had dealt with, as a partnership, and were indebted to, J. H. Wise and Thomas Denigan, composing the firm of Christy & Wise, have executed to said partnership a note and mortgage, neither they, nor their personal representatives, can be heard to dispute the firm relationship.
2. SAME—PLEADING.
 In a suit by a partnership on a note and mortgage executed to the firm, the showing of the copartnership relation of the plaintiffs is not indispensable in the caption, if in the body of the complaint it be specifically averred that the plaintiffs are in fact copartners, and it appears, from the facts alleged, that the obligation relied upon is one that has been created in favor of such copartnership.
3. EXECUTORS AND ADMINISTRATORS—ACTION AGAINST—PLEADING.
 In a suit against an administrator, it is sufficient to allege that defendant is sued as administrator, and it is not necessary to allege matters showing his appointment as such.
4. SAME—CLAIM AGAINST ESTATE—LIMITATION OF ACTIONS.
 Under Code Civil Proc. Cal. § 1569, which provides that "no claim against any estate, which has been presented and allowed, is affected by the statute of limitations pending the proceedings for the settlement of the estate," the statute does not run against a note, the estate of the maker of which was not closed when the suit was brought, and the claim under which note had then been allowed.
5. SAME.
 In a suit against the administrator of decedent the burden is upon the defendant to show that plaintiff's cause of action is barred by the statute of limitations. Hence, unless such fact clearly appears on the face of the complaint, from the date of defendant's appointment as executor, a demurrer thereto is bad, and the objection must be made by answer.

Department 1. Appeal from superior court, Merced county.

Edward P. Cole and *E. Jackman*, for appellants. *J. K. Law*, for respondents.

PATERSON, J. The demurrer of the defendants Hallinan, administrator of the estate of Sarah Connell, deceased, and J. B. Connell, a minor, by Hallinan, his guardian, was sustained, and, plaintiff having refused to amend, judgment was entered in favor of said defendants for costs of the action. The grounds of demurrer are that the complaint does not state facts sufficient to constitute a cause of action; that the cause of action is barred by the provisions of section 337 of the Code of Civil Procedure; and that there is a defect or misjoinder of parties plaintiff, in this: that said note and mortgage were executed to Christy & Wise, and John H. Wise and Thomas Denigan have brought this action as individuals, and have shown no assignment from Christy & Wise to them.

The amended complaint was filed August 22, 1883. The note and mortgage were made May 2, 1877, and became due May 2, 1878. The note was executed by John, and the mortgage by him and his wife, Sarah Connell. On October 24, 1877, John and his wife filed a declaration of homestead on the land mortgaged to plaintiffs. Thereafter John died, and on July 19, 1880, Sarah, his widow, qualified as administratrix. December 21, 1880, the claim of plaintiffs, which had been presented to the administratrix and the judge,

was allowed and filed. December 27, 1880, the court set aside to Sarah Connell the land in suit as a homestead. February 17, 1882, Sarah Connell died. February 20, 1883, Williams was appointed administrator of the estate of John Connell. Hallinan was appointed administrator of Sarah Connell's estate, but the date of his appointment is not stated. The other defendants are heirs of said John and Sarah Connell.

1. The complaint sets forth a copy of the note signed by John Connell, which is made payable to the order of Christy & Wise. It is then alleged "that, in order to secure the payment of said note, the said John Connell and his wife did execute and deliver to John H. Wise and Thomas Denigan, *composing the firm of Christy & Wise*, a mortgage on those pieces of land," etc., describing them. The complaint further avers that on the second day of May, 1877, said John H. W. and T. D. were copartners doing business under the firm name of C. & W., and that said J. C., being indebted to said firm, executed and delivered to them his said promissory note. Having thus dealt with plaintiffs *as a firm*, neither John nor Sarah could be heard to dispute the firm relationship, and their representatives stand in no better position to contest the same.

While a pleading should show, in cases of this kind, the copartnership relation of the plaintiffs in the caption of the complaint, such a showing is not an indispensable matter if in the body of the complaint it be specifically averred that the plaintiffs are in fact copartners, and it appears from the facts alleged that the obligation relied upon is one that has been created in favor of such copartnership. Thus it is said in Bliss on Code Pleading, (section 145:) "It is not absolutely necessary that the title describe the parties as partners, and give the partnership names, provided the fact appears in the body of the complaint." And in New York it is held that, if the names are intelligibly given in the body of the complaint, it is sufficient. *Hill* v. *Thacter*, 3 How. Pr. 407. See, also, *Shear* v. *Ward*, 20 Cal. 660; *Hallock* v. *Jaudin*, 34 Cal. 174.

The case of *McCord* v. *Seale*, 56 Cal. 262, was decided upon the evidence introduced showing a copartnership transaction; the plaintiffs insisting upon a liability to them as individuals. The intimation made therein to the effect that the allegation of a copartnership might be treated as surplusage is, as matter of pleading, mere *dictum*.

2. It was sufficient to allege that the defendant J. H. is the administrator of the estate of Sarah C., deceased. Where a plaintiff sues in a representative capacity, he must allege matters showing his appointment, but such is not the case as to defendants, who are sued as executors or administrators. "In actions against executors or administrators, it is not necessary to allege in the complaint facts showing how the defendants became invested with this representative character, but simply that they are such executors or administrators." 2 Wait, Pr. 374.

3. As to the statute of limitations. The Code (section 1475, Code Civil Proc.) requires all claims against a homestead to be presented to the administrator. *Camp* v. *Grider*, 62 Cal. 21. It does not appear that the estate of John Connell was closed when suit was brought; and the note and mortgage having been presented to his administratrix on the twentieth day of December, 1880, and allowed, the statute ceased to run. "No claim against any estate which has been presented and allowed is affected by the statute of limitations pending the proceedings for the settlement of the estate." Section 1569, Code Civil Proc.; *Estate of Schroeder*, 46 Cal. 317; *Dohs* v. *Dohs*, 60 Cal. 255; *Savings & Loan Soc.* v. *Hutchinson*, 68 Cal. 53, 8 Pac. Rep. 627.

4. It is claimed by respondent that as to Sarah Connell, unless the complaint contains some averment showing that the statute had not run against her, the action is barred. The burden, however, is upon defendant to show that plaintiff's cause of action is barred. Unless it clearly appears from the face of the

complaint that plaintiff's cause of action is barred, the issue must be raised by answer. It does not appear from the complaint when the administrator of Sarah Connell was appointed. Hence the question cannot be raised upon demurrer. *Harmon* v. *Page*, 62 Cal. 449; *Willis* v. *Farley*, 24 Cal. 491; *Savings & Loan Soc.* v. *Hutchinson*, 8 Pac. Rep. 638; *Cameron* v. *San Francisco*, 68 Cal. 390, 9 Pac. Rep. 430.

Judgment reversed, with directions to the court below to overrule the demurrer.

We concur: TEMPLE, J.; MCKINSTRY, J.

72 Cal. 555

GASSEN *v.* BOWER. (No. 11,817.)

(*Supreme Court of California.* June 21, 1887.)

PLEADING—DEFECTS—CODE CIVIL PROC. CAL. § 475.

When the cross-complaint, in an action to quiet title to a certain parcel of land, prays for the correction of the certificate of acknowledgment of the deed of a married woman, which constitutes one link in the chain of title, but fails to state that said land was the separate property of said married woman, and the court decreed that the correction be made, *held*, that said omission is not such a defect in the pleading as to mislead appellant, and hence, under Code Civil Proc. Cal. § 475, which provides that no judgment shall be reversed by reason of any defect which does not "affect the substantial rights of the parties," is no ground for reversing the judgment.

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

W. J. Hunsaker, for appellant. *John R. Jones* and *E. W. Hendrick*, for respondent.

HAYNE, C. Action to quit title. The defendant put in a cross-complaint praying for the correction of the certificate of acknowledgment of a deed of a married woman, which deed constituted one link in the chain of title. The court found that the property was the separate property of the married woman, and that the acknowledgment had in fact been made, but that, by a blunder of the officer, the certificate was defective, and decreed that it be corrected. It is not contended that the evidence was insufficient to support the finding, or that upon the facts found the judgment was improper. The single point made is that the cross-complaint did not aver that the property was the separate property of the married woman, and that, therefore, there was no cloud, and consequently that the court erred in overruling the plaintiff's demurrer for ambiguity. While we think the pleading was obnoxious to criticism, it does not seem to us that it is so radically defective as to fail to support the judgment; and the provision of the Code is that "the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Code Civil Proc. § 475. Where a pleading is demurred to for ambiguity, we think that, if the party was not misled to his prejudice, the ambiguity cannot be said to "affect the substantial rights of the parties." And we do not think that in this case the appellant was misled. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

72 Cal. 576

BAUGHMAN *v.* SUPERIOR COURT. (No. 12,140.)

(*Supreme Court of California.* June 22, 1887.)

APPEAL—EFFECT AS A STAY—REMOVAL OF RECEIVER.

Where the appointment of the receiver is a matter ancillary to the main proceedings in the action, the fact that the plaintiff, at whose instigation he was appointed, has appealed from an order of the court sustaining a demurrer to the complaint and entering judgment for the defendant, does not prevent the discharge of the receiver on motion.

In bank. On application for writ of prohibition.

Lindley & Spagnoli and *Reddick & Solinsky*, for petitioner. *Blanchard & Swisler* and *Eagon & Rust*, for respondent.

MCKINSTRY, J. Petitioner, as surviving partner of the firm of Ruoff & Baughman, prosecuted an action in the superior court against one R. B. Reed, and in the prayer of his complaint, among other demands, asked that a receiver be named to take charge, "pending the action," of certain grain, in which, in said complaint, he claimed an interest. Upon the complaint the superior judge appointed one A. J. Wilson receiver "to take charge of and hold, preserve, and keep" the grain, "and for that purpose to take such measures and employ such help as may be requisite." Wilson qualified as receiver, and took possession of the property. Afterwards the defendant in the action demurred to the complaint on the ground that it stated no cause. The demurrer was sustained, and, the plaintiff neglecting and refusing to amend, final judgment in favor of the defendant was entered in the superior court. Subsequently the defendant moved said court to set aside the order appointing the receiver, and that the receiver be discharged. The prayer of the complaint did not give such character to the appointment as that, in case of an appeal, the receiver could not be discharged until the final determination of the cause in this court. The defendant has an undoubted right to move for the discharge of a receiver *pendente lite*. High, Rec. 846.

The present application is that the superior court be prohibited from hearing or determining the motion of defendant in the action aforesaid for the discharge of the receiver. It is claimed the superior court has no jurisdiction to determine the motion, inasmuch as the plaintiff in the action had appealed from the final judgment. Section 564 of the Code of Civil Procedure provides that a receiver may be appointed "by the court in which an action is pending, or the judge thereof." The action above mentioned was not brought to procure a judgment appointing a receiver. The appointment by the court or *judge* is a matter ancillary to the main proceedings in an action, and is for the purpose of protecting property or a fund until the judgment in the superior court, and to secure its application as, in express terms or by implication, may be required by such judgment. Section 946 of the same Code provides that whenever an appeal is perfected it stays all further proceedings in the court below "upon the judgment or order appealed from, or upon the matters embraced therein," and the appeal releases property levied on, "but the court below may proceed upon any other matter embraced in the action," etc.

In *Ireland* v. *Nichols*, 40 How. Pr. 85, 9 Abb. (N. S.) 71, the supreme court of New York said: "In the present case the appointment of the receiver was a provisional remedy in the action, and ancillary to it. It was made by the court in the exercise of its discretionary powers, not as a matter of strict right, but purely as a matter of favor to the plaintiff, and is entirely independent of the judgment from which plaintiff appealed." Commenting upon section 339 of the New York Code,—which is like section 946 of our Code,—the court remarked that the proceedings stayed by the appeal "must be construed to be such proceedings as may be instituted by the respondent

for the purpose of enforcing the provisions of the judgment," especially as the same section reserves to the court below "the power to proceed upon any other matter included in the action," etc. And the court concludes: "According to the current authorities, the entry of the judgment in favor of the defendant has the effect of ending the functions of the receiver, but the receiver is not discharged thereby. The court, may, according to the exigencies of the case, upon good cause shown, either continue or discharge him by further order."

Where a bill upon which the appointment of a receiver is made is afterwards dismissed on demurrer, the duties of the receiver cease, as between the parties to the action. And so, where the defendant finally obtains judgment, the entry of judgment would seem to have the effect of terminating the receiver's functions, although plaintiff perfects his appeal to the appellate court. But the abatement of the action, or entry of final judgment, does not discharge the receiver *ipso facto*. Although, as between the parties, his functions terminate with the determination of the suit, he is still amenable to the court as its officer until he has complied with its direction as to the disposition of the funds he has received as receiver. And when the bill is dismissed on demurrer it is the plain duty of the court to direct the receiver to restore the fund or property to the person from whom it was taken. High, Rec. 833; *Field* v. *Jones*, 11 Ga. 413; *Beverley* v. *Brooke*, 4 Grat. 220; *Ireland* v. *Nichols, supra*. It would seem that where the decree, in terms, provided that one of the parties should take certain property from the receiver, the late receiver did not hold the property after decree as receiver, but as trustee of the party, although there had been no formal order of discharge. *Very* v. *Watkins*, 23 How. 475. It has been said a receiver will be "discharged" by a decree in the cause in which he is appointed, unless he is expressly continued. Daniel, Ch. Pr. 1601. But the discharge spoken of evidently refers to the surcease of his functions as receiver proper, leaving on him the duty of properly accounting under the order of the court. But whether, when his office is not expressly continued by decree, he should afterwards be called receiver or not, he is subject to the orders of the court with respect to the winding up of his affairs as receiver,—as to accounting and application of funds. In these respects he continues liable until he is discharged of his responsibilities as trustee, and we see no impropriety in his being designated "receiver" up to the date of such discharge.

The adoption of the foregoing views will not deprive petitioner of any substantial right, since the statute authorizes the court, in a proper case, to appoint a receiver for the preservation of property during the pendency of an appeal. Code Civil Proc. § 564. It may be said that the superior court will, unless prohibited, not only discharge the receiver, but attempt to set aside the order by which he was originally appointed. It is at least doubtful whether the motion is to be construed as anything more than a motion to discharge. At all events, the motion would authorize the court to discharge the receiver, and the petitioner avers that on the twenty-ninth of April, 1887, and after the appeal from the judgment was perfected, "the superior court, at the application of the defendant, made and gave its order that said motion to discharge said receiver be heard, considered, and determined by said superior court on Friday, May 13, 1887." It is the hearing and determination of the motion, as a motion to discharge, which the petitioner claims will be beyond or in excess of the jurisdiction. It may be added that the petition does not distinctly show that objection was made to the proposed action of the superior court, on the ground that it would be beyond its jurisdiction. It has been repeatedly held here that prohibition will not go from this court unless the attention of the court whose proceedings are sought to be arrested has been called to the alleged excess of jurisdiction. *Southern P. R. Co.* v. *Superior Court*, 59 Cal. 475.

Writ denied, and proceedings dismissed.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; TEMPLE, J.

72 Cal. 576

In re Estate of POTEN, Deceased. (No. 11,827.)

(*Supreme Court of California.* June 24, 1887.)

APPEALABLE ORDER—MONEY IN COURT—MOTION TO PAY OVER.

An order refusing to direct the clerk of court to pay over to a special administrator a sum of money, allowed him as compensation for his services, *held* not appealable.

Department 1. Appeal from superior court, Yolo county.

G. P. Harding and *R. Clark*, for respondent.

One Jerry Desmond gave to R. Clark an order on the county clerk of Yolo county for $320, which he claimed was due to him from Poten's estate. The claim had not yet been allowed; the administrator of Poten's estate having filed objections to it. Desmond and one Frees, the executor or administrator, made a settlement, whereby Frees withdrew his objections to the allowance of the claim. After such withdrawal, the clerk of the court paid the $320 to Clark on the written order of Desmond. Some months afterwards an attorney appeared for Desmond in the superior court of Yolo county, *ex parte*, and asked that the clerk be compelled to turn over the money to Desmond. The superior court took proof in the matter on such application, and denied the motion on the ground that the clerk had properly turned the money over to Clark.

The order is not appealable. It does not come within any of the provisions of section 963, Code Civil Proc., or any of the sections of that chapter. Neither does it fall within the provisions of section 933, Code Civil Proc. There are no other provisions of the Code that we know of that allow appeals from the superior court to this court in cases of this kind.

P. M. Sullivan, for appellant.

BY THE COURT. The order of the probate court complained of is clearly not an appealable order. The motion to dismiss the appeal must therefore be granted. So ordered.

73 Cal. 459

BOWDEN *v.* PIERCE. (No. 11,004.)

(*Supreme Court of California.* June 17, 1887.)

1. EXECUTORS AND ADMINISTRATORS—EXECUTOR DE SON TORT—CALIFORNIA PROBATE PRACTICE.

There is no such officer as executor *de son tort* recognized under the California probate practice.

2. SAME—EXECUTOR DE SON TORT—REFUSAL TO ACT.

The fact that one who was named in a will as executor applied for letters, which the court granted, does not make him a trustee of the estate when he refused or neglected to qualify; and contracts made by him with the executrix, if fair and just, are not void, although they redounded to his benefit.

Department 1. Appeal from superior court, San Francisco.

McAllester & Bergen and *Jas. L. Crittenden*, for Bowden, appellant. *Robinson, Olney & Byrne, W. N. Cope*, and *A. L. Rhodes*, for Pierce, respondent.

PATERSON, J. Plaintiff, who is an heir and devisee of A. H. Houston, deceased, commenced this action February 9, 1881, to have certain contracts of sale from the executrix to defendant Pierce declared fraudulent and void; to have defendant adjudged to be a trustee for the devisees as to all moneys realized under the sea-wall contracts so purchased by him, and to require him to account therefor. The answer denies all charges of fraud and undue influence upon the executrix, and, as a separate defense, pleads the statute of limitations. It appears from the findings that Houston, on July 23, 1867, entered into two contracts with the board of state harbor commissioners for the construction of certain sections of the sea-wall; that on December 8, 1868, said A. H. Houston, being in failing health, departed for the Sandwich islands, the work being still incomplete; that said Houston prior to his departure, and on the eighth day of December, 1868, executed a general power of attorney to said Pierce, which was duly accepted and recorded by Pierce, and Pierce, acting under this power of attorney, thereafter collected all moneys paid under said contracts; he first heard of the death of Houston on March 28, 1869; that Pierce, on April 2, 1869, received $29,952.22 from said board on contract for section 3, and immediately applied the same to the use of said estate; that on April 3, 1869, an attorney, at the request of Pierce and said Caroline, (named in the will as executor and executrix,) filed Houston's will for probate, and Pierce's and Mrs. Houston's joint petition for letters testamentary to Pierce and Mrs. Houston; and that on April 14, 1869, the will was admitted to probate in the probate court of the city and county of San Francisco, and letters testamentary ordered to be issued to Mrs. Houston and Pierce; that Pierce did not qualify and did not file at any time any written renunciation of his executorship, and that Mrs. Houston alone qualified as executrix, (April 20, 1869;) that an inventory of the property of the estate was prepared, verified on April 23, 1869, by Mrs. Houston, and filed on May 5, 1869; that on April 7, 1869, said board advertised for bids for the construction of section 4 of the

sea-wall; that negotiations thereupon commenced for the sale of said contracts and of the plant to Pierce, which resulted in an agreement of sale before April 21, 1869; and that the agreement was "subject to the condition that it was to be executed only in case Pierce obtained from the state board of harbor commissioners the contract for section 4." After the contract for construction of section 4 of the sea-wall had been awarded to Pierce, the agreement made previously between him and the estate of said deceased was reduced to writing, and signed by Pierce on May 6, 1869.

Mrs. Houston and said board and Pierce executed on June 24, 1869, an agreement of release and discharge, showing that the work on Nos. 1 and 2 had been completed, and that Pierce had become the successor in interest of said Houston. No report was made to or order made by the probate court of San Francisco respecting said sales to Pierce, except a statement on August 21, 1871, in the account of Caroline L. Houston as executrix, in these words: "To sale of contracts with state harbor commissioners, horses, carts, tools, dredging machinery, etc., used about sea-wall, office furniture, 30 cords of wood, and 30,000 feet of old lumber, and claim due for grading McHenry lot, $90,000;" and a statement in the report that "your petitioner has, as directed by the will of said deceased, sold * * * certain contracts in the inventory mentioned, and the horses, carts, tools, etc., used in the construction of the sea-wall, the subject of said contracts, all of which will fully appear by said account;" and thereafter, to-wit, on December 12, 1871, the referee to whom said account was referred reported in favor of its approval. An attorney appointed by the court for the minor heirs appeared before the referee on the hearing of said final account. On December 13, 1871, the probate court adjudged and decreed that the report of the referee be confirmed and allowed and approved, and declared settled, and a decree of final distribution was made on the twenty-second day of March, 1872.

The executrix and defendant were advised by their attorney (Clarke) that she, as executrix, had the power to make the sale referred to, and that no confirmation by the court was necessary. The court also found that the contract with Pierce was fair and just, and that no advantage was taken of Mrs. Houston, and that defendant did not in any manner cheat, injure, or defraud the estate, or any devisee, but, on the contrary, that the sale was an advantageous one to the estate, and to its best interests in all respects. The court further found, and the evidence sustains the finding, "that the superstructure required by the Houston contracts to be erected upon said embankments could not have been erected except after great delay, and at a loss to the estate of said deceased."

The defendant made large profits out of his contracts with the harbor commissioners, but we think the fact is made quite clear that those profits were all made out of the work on section 4, for which the estate could not bid or contract. All the executrix could do was to complete the contracts on hand at the time of the death of Houston. We can find nothing improper in the refusal or failure of Pierce to qualify as executor. He was advised by his attorney "that he could better serve his sister-in-law—Mrs. Houston—by buying the plant and the contracts than by qualifying as executor."

If the findings of the court to which we have referred are supported by the evidence, and we think they are, it becomes unnecessary to determine whether there is a sufficient finding upon the issue raised by the plea of the statute of limitations. The defendant was a trustee by implication for a brief period after the death of Houston, but the estate was in no way injured by his acts during that time. The fact that he was named in the will as executor, and actually applied for letters, did not constitute him a trustee for the estate at the time the contract of sale was made. There is no such officer recognized under our probate practice as *executor de son tort*. *Pryor* v. *Downey*, 50 Cal. 400; *Valencia* v. *Bernal*, 26 Cal. 335; *Estate of Hamilton*, 34 Cal.

468. The refusal or neglect to qualify was a disclaimer of the trust. 1 Perry, Trusts, 262.

The estate of Houston could not bid for a contract to do the work on section 4. No profit could have been realized from the McHenry contract. There was no place in which the estate could have used the rock, and the court was justified in its finding that the sale to Pierce "was fair and just, and upon sufficient consideration to the estate, and to its best interests." The profits derived by Pierce came from his contract for the construction of section 4, and his purchase of the estate contract and stock was made upon condition that the board of harbor commissioners should award him the contract for section 4. Even if it be assumed that the sale to Pierce by the executrix was void, and that Pierce was enabled to secure the contract for section 4 because he had secured the Houston contracts, we do not think that he can be held as a trustee of the estate with respect to the contract for section 4. The estate did not and could not have any interest in that part of the work. If Pierce had not paid full consideration for the property purchased by him, or if he had made any profit from the work done under the contract, which the estate could have completed, he could be compelled, perhaps, to account therefor, notwithstanding the good faith of the parties; but such, as we have seen, are not the facts in this case. Order affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

72 Cal. 553

WINTERS *v.* PEARSON. (No. 9,646.)

(*Supreme Court of California.* June 17, 1887.)

1. ATTACHMENT—AFFIDAVIT—ALTERNATIVE FORM.
 An affidavit for attachment, framed or stated in the alternative, is fatally defective; following *Wilke* v. *Cohn*, 54 Cal. 212.
2. SAME—AFFIDAVIT—AMENDMENT.
 On a motion to discharge a writ of attachment on the ground that it was improperly or irregularly issued, the affidavit on which the writ was issued is not amendable, under section 473, Code Civil Proc. Cal., but must be discharged under section 558, which provides for the discharge of the writ if improperly granted.
3. SAME—DISCHARGE.
 The release of property attached, provided for by sections 554, 555, Code Civil Proc. Cal., by the execution of an undertaking, is not a waiver by the defendant of his right under section 556 to apply to discharge the writ of attachment.

Department 2. Appeal from superior court, San Francisco county.

Wm. M. Pierson, for appellant. *Neuman & Eickhoff* and *Edward Lynch*, for respondent.

THORNTON, J. The attachment was improperly and irregularly issued within the ruling of this court in *Wilke* v. *Cohn*, 54 Cal. 212. On a motion to discharge a writ of attachment on the ground that it was improperly or irregularly issued, the affidavit on which the writ was issued is not amendable. This, in our opinion, is in accordance with section 558, Code Civil Proc., which provides that if, on such an application, it satisfactorily appears that the writ was improperly or irregularly issued, it must be discharged. To allow the affidavit to be made good by amendment, and upon such action refuse to discharge the writ, would, in our judgment, violate the requirements of the section just above cited. The defendant in the action did not waive his right to apply to discharge the writ under section 556, Code Civil Proc., because he had previously released the property from the operation of the writ under sections 554, 555, Id. The right to make the application under section 556 is expressly given, though the defendant has previously proceeded under sections 554 and 555.

The orders of the court must be affirmed. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

72 Cal. 565

HITCHCOCK *v.* MCELRATH. (No. 9,595.)

(*Supreme Court of California.* June 21, 1887.)

1. TROVER AND CONVERSION—PLEADING—VARIANCE.

In an action to recover for the wrongful conversion of certain shares of capital stock of a corporation, the complaint averred generally that plaintiff loaned the stock to defendant, and that he converted it to his own use. The proofs showed that it was loaned for the special purpose of being used by defendant to raise money to pay and take up a certain promissory note of which defendant was maker and plaintiff accommodation indorser; and, further, that defendant did *not* use it for that purpose, but converted it to his own use. The answer denied the borrowing of the stock at all, and that the plaintiff owned it, and averred that he had bought it of the plaintiff. *Held* that, under the pleadings, the variance was not one that "actually misled the defendant to his prejudice in maintaining his * * * defense upon the merits." Code Civil Proc. Cal. § 469.

2. SAME—DAMAGES—PROVINCE OF JURY.

The ascertainment of the *value* of the property in controversy in an action to recover for the wrongful conversion of shares of capital stock of a corporation is for the jury, and their determination will not be reviewed on appeal, when there is a conflict in the evidence, and there is some testimony on the part of the appellant to sustain it.

Department 2. Appeal from superior court, San Francisco.

Wm. H. Fifield, for McElrath, appellant. *Clement, Osment & Clement*, for Hitchcock, respondent.

MCFARLAND, J. This is an action to recover for the wrongful conversion of certain shares of capital stock of the Saucelito Land & Ferry Company, a corporation. Judgment went for plaintiff, and defendant appeals therefrom, and from an order denying his motion for a new trial. Appellant relies mainly—*First*, upon a variance between the averments of the complaint and the proofs; and, *second*, upon errors committed in overruling his objections to certain testimony touching the value of the property alleged to have been converted.

1. The complaint avers, generally, that plaintiff loaned the stock to defendant, and that he converted it to his own use. The proofs show that it was loaned for the special purpose of being used by defendant to raise money to pay and take up a certain promissory note of which defendant was maker and plaintiff was the accommodation indorser, and, further, that defendant did *not* use it for that purpose, but converted it to his own use. This is claimed by appellant to have been a fatal variance. But appellant, in his answer, denied that he borrowed the stock at all; denied that respondent owned it at the time of the alleged conversion; and averred that appellant had bought the stock of respondent, and was the owner of it. Under these circumstances it is impossible to see how the variance was one which "actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Code Civil Proc. § 469. We think, therefore, that the position taken by appellant on this branch of the case is not tenable.

2. There was great difficulty in determining the value of the property converted. As there had been no movements of sale and purchase of the stock of the corporation, it had not that kind of market value which attaches to stock frequently dealt in. Recourse was had, therefore, to the value of the property owned by the corporation. This consisted, in part, of wharves and ferry franchises, but mainly in land lying in and near the town of Saucelito, on the water front of the bay, and running back into the hills. The corporation was a *land* company, and a main branch of its business was to sell its land at Saucelito in small lots for residences, as purchasers could be found. Under these circumstances, the purpose of counsel for respondent at the trial, seemed to be to induce the court, as far as possible, to allow testimony tending to show what the land was worth if sold in small quantities, and in the

usual course of business, and supposing the affairs of the company to be properly managed. On the other hand, the effort of counsel for appellant seemed to be to confine the testimony strictly to the question: How much would the land sell for as a whole, at forced sale, upon 20 days' notice? The court did not fully adopt the theory of respondent. It went, however, too far in that direction, and, if it appeared at all that the value found by the jury rested upon answers of some of respondent's witnesses to one or two questions improperly admitted, there might be ground for a reversal of the judgment. There was, however, ample evidence—and considerable of it coming from appellant's own witnesses—to support the verdict, which was for $4,050, even upon the extreme theory of value contended for by appellant. And, then, the court, on the motion for new trial, reduced the amount of the judgment to $983, which respondent accepted. We are satisfied, therefore, that no injustice was done the appellant.

If we have not here noticed in detail all of the many points specially made by appellant, it is not because we have not considered them.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

72 Cal. 556

CONNER *v.* STANLEY, Adm'r, etc. (No. 11,648.)

(*Supreme Court of California.* June 21, 1887.)

1. FRAUD—UNDUE INFLUENCE—SPIRITUALISM.

In an action on a contract, evidence that the defendant's intestate was 72 years old, and feeble both bodily and mentally; that he had long been a firm believer in spiritualism; that he relied upon supposed spiritual advice in his business and financial relations; that he was a mental wreck after the death of his only child; and that a medium could do anything with him, is sufficient to support a finding that a relation of personal confidence existed between him and plaintiff, who was a medium, within the meaning of Civil Code Cal. § 2219, declaring persons voluntarily assuming a relation of personal confidence trustees; and by § 2235, which, in cases of contract between such persons, raises a presumption of undue influence, there is a presumption that all transactions between such persons, by which the person trusted obtains an advantage, are entered into under undue influence.[1]

2. SAME—UNDUE INFLUENCE—PROOF.

In an action on a contract impeached for fraud, evidence that plaintiff told witness that she (plaintiff) and defendant's intestate had words when the contract in suit was executed; that she locked the door of the room, and kept it locked for two hours; that he had a contract drawn, and the next day had forgotten that he had done so; and that he acted as if he were drugged or crazy,—tends to prove undue influence and adverse pressure.[1]

Department 1. Appeal from superior court, Sacramento county.

This action was brought on an antenuptial contract, by which defendant's intestate promised, in consideration of the mutual affection and agreement to marry existing between him and the plaintiff, to deliver to her, on or before marriage, $10,000 worth of bonds. Plaintiff averred herself as having been always ready to consummate the marriage, but defendant's intestate refused, and so continued to refuse until his death. Plaintiff seeks to recover the value of the bonds.

Robt. T. Devlin, W. H. Beatty, and *A. P. Catlin,* for appellant. *Freeman & Bates,* for respondent.

[1] As to what constitutes undue influence, and its effects, see June v. Willis, 30 Fed. Rep. 11, and note; Kerrigan v. Leonard, (N. J.) 8 Atl. Rep. 503; Conover v. Conover, Id. 500; Osthaus v. McAndrew, (Pa.) 8 Atl. Rep. 436; Clutter v. Clutter, (Ky.) 4 S. W. Rep. 182; McHarry v. Irvins Ex'rs, (Ky.) 4 S. W. Rep. —, and 3 S. W. Rep. 374; Carter v. Tice, (Ill.) 11 N. E. Rep. 529, and note

TEMPLE, J. The contract on which this action is founded is set out in full on the former appeal. 65 Cal. 183, 3 Pac. Rep. 668. It is there said to be valid as an antenuptial contract. The defendant set up as a defense that at the time the alleged contract was made his intestate was insane, and incapable of entering into a contract, and that it was procured by the use of undue influence by the plaintiff. The court found that all the allegations of the complaint were true, except as to the capacity of Jarvis to contract; and that all the affirmative matters set up in the answer were true, except that plaintiff and P. B. Nagle did not, nor did either of them, coerce Jarvis otherwise than by taking advantage of his weak and unsound mind. The findings, therefore, plainly cover all the issues in the case, and the only question for our consideration is whether there is any evidence which could justify the conclusion. Upon this proposition there can be no doubt.

1. There was evidence tending to prove insanity generally, and not merely that he was insane on the subject of spiritualism. J. Miller, an intimate acquaintance, thought he was insane. To the same effect is the testimony of Mrs. A. Walker, J. W. Houston, S. B. Lusk, and Lee Stanley, and it is shown that plaintiff herself stated that she believed him insane. And then there is much testimony as to facts which would tend to show an unsound mind.

2. There is much testimony tending to prove that Jarvis was insane on the subject of spiritualism. That there is such evidence is not controverted, but counsel indulge in a long argument, and cite many authorities, to the point that a belief in spiritualism does not prove insanity. As an abstract proposition, no doubt this is so. The law pronounces no one insane for mere religious belief, no matter how unreasonable it may appear to the judge. But this does not meet the case made. A belief in the doctrines maintained by the Methodists, Presbyterians, or the Catholics would not establish insanity. Still one might be a monomaniac as to either form of religion, and so as to spiritualism. And that is precisely the effect of the great mass of testimony in this case.

3. There is much evidence tending to show undue influence. It is established that the relation between the parties was confidential, in consequence of her claim to power as a medium, through which she had great control over him. This being established, the burden was cast upon her of showing that there was no undue influence. The rule applies with peculiar force to the relation of one and his priest, confessor, clergyman, or spiritual adviser, and certainly with no less force to the relation between one who is a firm believer in, not to say a monomaniac upon, the subject of spiritualism, and the medium in whom he has confidence, and upon whom he habitually relies. The cases upon the subject are numerous, but the law, so far as necessary here, is crystallized in the Civil Code. Section 2219 provides that every one who voluntarily assumes a relation of personal confidence with another is a trustee, and section 2235 raises the presumption that all transactions between such persons, by which the person trusted obtains an advantage, are entered into under undue influence. In becomes important, then, to inquire whether the relation did exist.

Jarvis was 72 years old, feeble both mentally and physically. He was a widower, his wife having died in August, 1881, a few months before the contract questioned here was entered into. He had lived for a great many years at Folsom, a quiet life, with no family except his wife. They had had one child, a daughter, who married the defendant, and died 20 years ago, leaving two children. Jarvis had been a music-teacher, and had accumulated some property. He was for many years a firm believer in spiritualism. The belief had grown upon him until, in the opinion of the witnesses, it had become a monomania. His mind would drift to the subject upon all occasions. He relied upon supposed spiritual advice in his business transactions. When

warned against trusting certain persons, he said: "It will be all right in the next world; they are spiritualists." He sold a farm for $2,000 to be paid for in installments of $200 a year, without interest. He had been offered $250 a year rent. He said the spirits told him he must sell; that he was governed entirely by the spirits. The purchaser was a spiritualist. He invested several thousand dollars in mines, under the supposed advice of spirits. Most of this money was lost. He offered a lady $1,500 to attend seances, and become a medium. To another lady he offered to convey a piece of land if she would become a medium. He believed he could reform all the convicts if he could get them to read a spiritualistic paper. He said he had got the right idea of spiritualism, and was going to publish a work which would astonish the world. He admitted that he was controlled by mediums.

One witness said he was a mental wreck from the time he lost his daughter, and there is much evidence that he became still worse after the death of his wife. His conduct was very strange during her last illness. He did not believe in giving her medicine or nourishment. The medium said she would die, and the spirits would keep her until then. He did not wish a doctor, as the spirits would do nothing if he had one. He objected to cooking being done in the house, the smell would keep the spirits out. The doors and windows must be left open so they could come in. He was angry when they gave her stimulant, because if she were to die intoxicated she would remain so in the spirit land. He knew of one man who was killed while drunk, and who was still drunk, 15 years after his death.

In this condition of health, mental and physical, Jarvis met the plaintiff. She is said by her counsel to be an artist, who has a studio in San Francisco; a highly educated, refined, and accomplished lady. When Jarvis first made her acquaintance does not definitely appear, but it was evidently shortly after the death of his wife, when he went to consult her as a medium to find out how much money he should give his granddaughter to use. In February, after Mrs. Jarvis' death, plaintiff was giving seances at Folsom. Jarvis had induced her to go there to be developed as a medium, and gave her $50 per month to come. She remained on these terms for some three months, giving seances, which were attended by Jarvis, and to which he invited his friends. The evidence shows that he had the most exalted opinion of her powers as a medium, and that he was much under her control. He said himself that she had great influence over him when she was around. There is evidence that plaintiff herself said that she believed that Jarvis was crazy, and a medium could do anything in the world with him.

We think this is sufficient to show that there was evidence upon which the court could find the existence of a relation of a peculiar trust and confidence between them, similar to that between a religious devotee and his spiritual adviser and the proof of which would throw upon the plaintiff the burden of showing fair dealing.

But the record contains evidence of undue influence and adverse pressure. Mrs. Walker testified: "Speaking of the time when the contract that is in suit here was executed, she said that they had had trouble and had words. She said that she wished him to settle something on her, and he asked her if she was afraid that he would not leave her anything, or would not leave her as well off as her other husband had left her, and she said that she locked the door, and kept him in the room for about two hours, and that she put the key in her pocket. * * * They talked about the matter in my presence, and they both told me that which I have stated. She said that they finally came to a settlement, and he agreed to settle something on her, and she opened the door, and got a boy, and sent him down to Nagle's office, and he came up and drew a draft of the contract that day, and the next day she told me that Jarvis came in, and she asked him if he would have a chair, and she said he acted queerly. Then she said that she told him he would not have time to

sit down if he was going down to keep his word, and sign that contract. He asked her what contract, and he said I have made no contract. * * * She said that at that time he acted as if he was either drugged or crazy, and that he did not act as if he knew what he was about, and did not seem to know that he had ever drawn up a contract. * * * She expressed herself as believing that he was an old fool, and did not know what he was about. She said at that time she believed that he was crazy."

There was evidence on the part of plaintiff contradicting some of this evidence, but this only creates a conflict. If we could consider the testimony, however, as a trial court, we could not say that the evidence does not sustain the finding.

Judgment and order affirmed.

We concur: McKINSTRY, J.; PATERSON, J.

72 Cal. 562

ALLISON *v.* THOMAS and others. (No. 11,847.)

(*Supreme Court of California.* June 21, 1887.)

1. JUDGMENT—VALIDITY OF PROCEEDINGS—MISNOMER.
 The designation in an action in a justice's court of the defendant, "John C. McDonald," as "John McDonald," does not affect the validity of those proceedings.
2. COURTS—JURISDICTION—AMENDMENT OF RECORD.
 When the court had in fact jurisdiction of the defendant, but the return of the constable failed to show that fact, the record may be amended after judgment so as to show jurisdiction, if there are no intervening rights to be affected.
3. JUDGMENT—LIEN—PURCHASE FROM JUDGMENT DEBTOR.
 The purchaser from the judgment debtor of all his right, title, and interest in the land attached in such action takes subject to the judgment rendered in such action.

Department 1. Appeal from superior court, San Bernardino county.

Appeal by defendants from a judgment of the superior court of San Bernardino county. Defendants claim title to the land in question by virtue of a sale under a judgment rendered in a justice's court in their favor against one John C. McDonald, on whom process was served, but who was designated in the proceedings as "John McDonald."

Harris & Allen, for appellants. *Curtis & Otis*, for respondents.

TEMPLE, J. The omission of the initial letter of the middle name of McDonald, in the proceedings in the justice's court, is a matter of no consequence, and does not in any way affect the validity of those proceedings. The rule undoubtedly is that the record in the justice's court must show affirmatively jurisdiction of the person, or the judgment will not be valid. Here there was in fact jurisdiction, but the return of the constable failed to show due service. After the judgment was entered, this record was amended, and as amended did show jurisdiction. In the mean time, however, the land attached had been sold. The judgment debtor had also conveyed to plaintiff all his right, title, and interest in the land. As against the judgment debtor there was no impropriety in allowing an amendment to the record according to the fact. The officer may always amend his return if there are no intervening rights which would be affected. And we think it plain there was no error in allowing it as to the purchaser. He purchased the right, title, and interest of the judgment debtor, and took subject to all equities and secret defects.

We do not overlook the case of *Graff* v. *Middleton*, 43 Cal. 341, in which it was held that under the twenty-sixth section of the recording act, then in force, a quitclaim deed received in good faith, and for a valuable consideration, would prevail over a prior unrecorded deed. That decision is made to turn upon the language of that statute defining the word "conveyance."

This ruling was followed in *Frey* v. *Clifford*, 44 Cal. 343, where the description of the estate conveyed was "all my right, title, and interest" of the grantor. Unless these cases are justified by the peculiar wording of the statute, they seem to be against the decisions elsewhere upon the subject. It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described. *Coe* v. *Persons Unknown*, 43 Me. 432; *Blanchard* v. *Brooks*, 12 Pick. 47; *Brown* v. *Jackson*, 3 Wheat. 449; *Adams* v. *Cuddy*, 13 Pick. 460; *Allen* v. *Holton*, 20 Pick. 458; *Sweet* v. *Brown*, 12 Metc. 175; *Pike* v. *Galvin*, 29 Me. 183.

This construction is in accord with the obvious meaning of the language. The grantee in such a deed necessarily takes only what the grantor then had, and subject to all defects and equities which could then have been asserted against the grantor. To this rule this court has made an exception founded upon the recording act, and still another has been recognized in reference to sales made by the sheriff under execution. There the statute provides that the purchaser acquires all the right, title, and interest of the judgment debtor. It has been held that such deed is good as against a prior unrecorded deed. *Roberts* v. *Bourne*, 23 Me. 165.

These are both exceptions to the general rule, founded upon special statutory provisions, and rather tend to confirm the rule than to overthrow it.

Judgment reversed, and cause remanded.

We concur: McKINSTRY, J.; PATERSON, J.

WALLACE *v.* MAPLES. (No. 11,539.)

(*Supreme Court of California.* June 24, 1887.)

In bank. For the opinion in department 2, see *ante*, 19.

McFARLAND, J., (*dissenting.*) I dissent from the order of a majority of the court denying appellant's petition for a hearing in bank. Although I wrote the opinion in department affirming the judgment, on reading the petition for hearing in bank, and upon a more thorough consideration of the case, I am dissatisfied with that opinion, and with the conclusion therein reached, and think that there should be a hearing of the case in bank.

72 Cal. 623

PEOPLE *v.* LEE SARE BO. (No. 20,256.)

(*Supreme Court of California.* June 28, 1887.)

1. EVIDENCE—DYING DECLARATION.

A declaration by a dying man as to the manner in which he came by his death, made within three or four minutes before his death, and about the same time as a statement by him that he was going to die, is admissible in evidence as a dying declaration, whether it was made before or after the statement that he knew he was going to die, as all the circumstances showed in him at the time a knowledge of impending death.[1]

2. CRIMINAL PRACTICE—EVIDENCE—TESTIMONY AT CORONER'S INQUEST.

A paper purporting to contain the testimony of witnesses taken before the coroner, at the inquest upon the body of the murdered man, but not authenticated otherwise than by the statement of counsel, is properly rejected.

[1] Dying declarations are admissible in evidence in homicide cases, if made under a sense of impending death. State v. Partlow, (Mo.) 4 S. W. Rep. 14; Cook v. State, (Tex.) 3 S. W. Rep. 749; State v. Mathes, (Mo.) 2 S. W. Rep. 800; Puryear v. Com., (Va.) 1 S. E. Rep. 512; State v. Johnson, (S. C.) Id. 510; Hill v. State, (Miss.) 1 South. Rep. 494; State v. Leeper, (Iowa,) 30 N. W. Rep. 503; State v. Saunders, (Or.) 12 Pac. Rep. 441; Stephenson v. State, (Ind.) 11 N. E. Rep. 360.

3. SAME—INSTRUCTIONS—REASONABLE DOUBT.
Where the court, in instructing the jury as to the meaning of the words "reasonable doubt," used some expressions which were weak and ambiguous, but others so strong and clear that the jury could not possibly have been misled, an assignment of error, based on the ambiguous portion of the charge, should not be sustained.[2]

4. SAME—ALIBI—BURDEN OF PROOF.
The defendant, in a prosecution for murder, attempted to set up an *alibi*. *Held*, that such a defense, as in the case of every defense resting on extrinsic facts not arising out of the *res gestæ*, must be proved by a preponderance of evidence.[3]

5. JURY—PROVINCE—INSTRUCTION ON WEIGHT OF EVIDENCE.
In order to hold an instruction erroneous on the ground that it is a charge upon the weight of evidence, an invasion of the prerogative of the jury, and violative of the constitutional provision inhibiting charges with respect to matters of fact, it is necessary to show that there was a conflict of evidence upon the question on which the jury were instructed; and in a prosecution for murder the court, in charging the jury, may assume the fact of the killing by the defendant, if such fact as testified to is not contradicted.

6. SAME.
An instruction to the jury that, if they were satisfied that the defendant killed the deceased under the particular circumstances of that case, it would be murder in the first degree, and that if they desired that the defendant should suffer the death penalty they were so to return their verdict, was held not erroneous, as a charge upon matters of fact.

7. CRIMINAL PRACTICE—CONDUCT OF TRIAL—REMARKS OF JUDGE.
The court in instructing the jury remarked: "I do not desire to have any question in this case at all. There are some instructions asked for by the defendant which I will give in addition to those which I have already given." And again: "In this case, gentlemen, I do not deem it necessary to give the instructions which I usually give in homicide cases." *Held*, that although it is possible for the trial court by innuendo, facial expression, or vocal emphasis or slide, to indicate a prejudice against the defendant, yet in this case the expressions must have been merely apologetic, as the court had already given the substance of the instructions asked for by defendant, and more favorably than requested on his behalf.

In bank. Appeal from superior court, San Francisco county.
John D. Whaley, for appellant. *Atty. Gen. G. A. Johnson*, for respondent.

PATERSON, J. Defendant was convicted of murder, and sentenced to be hanged. His counsel presents for our consideration seven assignments of alleged error.

1. Gon Yen, widow of Ah Chuck, whom it is alleged defendant killed, was called as a witness by the prosecution, and testified, against the objection of defendant, to a declaration made by her husband immediately after the shooting, in which he stated that the defendant shot him. The prosecution claimed that the statement was made by Ah Chuck under a sense and belief of impending death, and without any hope of recovery, and was therefore admissible as a dying declaration. Counsel for defendant claimed that there was no foundation laid for its admissibility; that all the evidence shows is a bare fear of

[2] That the guilt of the prisoner must be established beyond a reasonable doubt, and as to what is such reasonable doubt, see State v. Elsham, (Iowa,) 31 N. W. Rep. 66; Heldt v. State, (Neb.) 30 N. W. Rep. 626; People v. Steubenvoll, (Mich.) 28 N. W. Rep. 890, and note; State v. Thurman, (Iowa,) 24 N. W. Rep. 511, and note; Knarr's Appeal, (Pa.) 9 Atl. Rep. 878; State v. Meyer, (Vt.) 3 Atl. Rep. 201, and note; U. S. v. Jackson, 29 Fed. Rep. 503; U. S. v. Searcey, 26 Fed. Rep. 442, and note; Brown v. State, (Ind.) 5 N. E. Rep. 905, and note; Stitz v. State, (Ind.) 4 N. E. Rep. 145, and note; Com. v. Leonard, (Mass.) Id. 96, and note; State v. Roberts, (Or.) 13 Pac. Rep. 896; People v. Guidici, (N. Y.) 3 N. E. Rep. 496; U. S. v. Bassett, (Utah,) 13 Pac. Rep. 237; State v. Jones, (Nev.) 11 Pac. Rep. 318, and note; Clair v. People, (Colo.) 10 Pac. Rep. 799; Minich v. People, (Colo.) 9 Pac. Rep. 4, and note; Leonard v. Territory, (Wash. T.) 7 Pac. Rep. 872, and note; White v. State, (Tex.) 3 S. W. Rep. 710; State v. Payton, (Mo.) 2 S. W. Rep. 394; Humbree v. State, (Ala.) 1 South. Rep. 548.

[3] An *alibi* must be established by a preponderance of evidence. State v. Rowland, (Iowa,) 33 N. W. Rep. 138; State v. Red, (Iowa,) 4 N. W. Rep. 831. As to other questions relating to evidence to establish an *alibi*, see People v. Lee Gam, (Cal.) 11 Pac. Rep. 184, and note. See, also, State v. Fenlason, (Me.) 7 Atl. Rep. 385.

death; and, the declaration having been made before the statement that he would die, it is inadmissible.

There was no evidence concerning the condition of the declarant's mind other than that given by the witness, Gon Yen, who testified through an interpreter, in substance, that immediately after the shooting she ran to Ah Chuck, and had him carried into the house. "He died seven or eight minutes after he was brought in, and quit talking three or four minutes before he died. When he first came in he told me he thought he was dead, or would die. All I can remember is he told me he was afraid he was going to die; afraid of death. He said: 'I will die.' That is among the first things he said. No; first he said he wanted me to be sure to have Ah Po Qui Po,—that means dark-skinned Po,—the defendant there, arrested; that he was the man that shot him. After he had said a few words of that kind he said: 'I think I will die.'"

We think it quite apparent from this testimony that the wounded man felt that the finger of death was upon him, and, in view of the fact that all he said was uttered in the brief period of three or four minutes, it is immaterial whether the declaration was made before or after the statement that he was going to die. An express statement by the declarant that he believes he is about to die is not necessary at any time, provided the circumstances show in him at the time a sense of impending death. *People* v. *Taylor*, 59 Cal. 640; *People* v. *Gray*, 61 Cal. 164.

2. The court did not err in refusing to admit the paper in evidence which counsel for defendant claimed to be testimony of witnesses taken before the coroner at the inquest. Conceding that, if properly authenticated, it would have been admissible for the purpose claimed, it is sufficient to say that there was nothing to show that it was testimony taken before the coroner except the statement of counsel in offering it. Furthermore, there is nothing in the record to show what the paper contained.

3. In the charge to the jury the court, speaking on the subject of reasonable doubt, gave Mr. Chief Justice SHAW's definition thereof, which has been so often approved here, but, unfortunately, threw in this meaningless expression: "But mere probabilities of innocence or doubts, however reasonable, which beset some minds on all occasions should not prevent such a verdict." What the court meant by mere probabilities of innocence or doubts *which beset some minds on all occasions*, in view of the correct and unambiguous language of the charge upon the same matter before and after this expression it is difficult to conjecture; but from the language following it would appear that the court desired to say to the jury that mere chimerical or fanciful doubts should not prevent a verdict if they were satisfied to a moral certainty of the guilt of the defendant. The court went on to say: "In other words, gentlemen, a reasonable doubt, in a legal sense, is a doubt which has some reason for its basis; it is not a doubt arising from mere caprice or groundless conjecture, but it must arise from the facts proven in the case. You have no right to go outside of the evidence to hunt for doubts, nor should you entertain those which are merely chimerical, or based on groundless conjectures. It is that state of the case which, after an entire consideration and comparison of all the evidence, leaves your minds in that condition that you cannot say you feel an abiding conviction, to a moral certainty, of the truth of the charge. * * * The hypothesis contended for by the people must be established to an absolute certainty, to the entire exclusion of any rational probability of any other hypothesis being true, and, if a reasonable doubt is entertained by the jury on any material fact in the case, they should acquit." The language of the sentence to which this objection is addressed is so ambiguous, and the charge in other portions so strong and clear on the question of reasonable doubt, we think the jury could not have been misled.

4. Defendant claims that the court erred in saying to the jury: "If you be-

lieve beyond a reasonable doubt that the party was killed as alleged in the information, at the time and place specified therein,—upon that you will have very little difficulty,—I assume; will be satisfied beyond a reasonable doubt, then the next question for you to determine is whether it was done by the defendant or not." It is said that this is a charge upon the weight of evidence, an invasion of the prerogative of the jury, and violative of the constitutional provision inhibiting charges with respect to matters of fact. So far as the transcript shows, there was no controversy with respect to the killing and death of Ah Chuck. It is stated that there was evidence "tending to show that defendant, on the fifth day of October, 1882, in the city and county of San Francisco, shot the deceased, Ah Chuck, who, in about seven or eight minutes thereafter, died from the effects thereof. Gon Yen testified to the shooting and death of Ah Chuck, and there is no evidence to the contrary. Conceding that the instruction assumes a fact or expresses an opinion on the weight of evidence, in order to hold that it was erroneous we should have to assume that there was a conflict of evidence upon the question of the killing. This we cannot do. There is positive evidence in the bill of exceptions that Ah Chuck was killed at the time and place alleged, and if there was any evidence to the contrary the fact should be stated, or the evidence should be given in the transcript.

5. The court further said: "If I understand the testimony for the defendant, it is simply that he was not there, and did not know anything about it, and, of course, had nothing to do with it; that is what in law is called an *alibi*, and he is not required to establish that beyond a reasonable doubt, but may establish it by a preponderance of testimony; and in this matter, gentlemen, before you can find a verdict against the defendant, of course you must be satisfied beyond a reasonable doubt that he was at the time there." Appellant quotes the first clause of this sentence, and upon that bases an assignment of error upon the ground that it casts upon the defendant the burden of proving his innocence by a preponderance of evidence. The court had told the jury many times that the burden of proof rested upon the prosecution that every material fact must be established by the prosecution to the satisfaction of the jury, beyond a reasonable doubt. The first clause in the sentence quoted was intended to meet circumstances like those referred to in the defendant's instruction No. 4.

At the request of defendant the court instructed the jury, among other matters, as follows: "(4) The policy of the law, as evidenced by the presumption of innocence and the doctrine of reasonable doubt, would require the public prosecutor to introduce such proof as will give a fair account of the transaction. This being done, the defendant may produce in evidence his defense, and he is not required to prove the circumstances thereof beyond a reasonable doubt, or to the extent of satisfactorily establishing his defense. He is only required to prove the same as any other facts are required to be proved, and, if the matters relied on be supported by such proof as would produce a reasonable doubt in the minds of the jury as to the guilt of the defendant, when the whole evidence concerning the transaction comes to be considered by the jury, the rule of law is that there must be an acquittal. But if a defendant enters upon an independent defense, and attempts to prove extrinsic facts, not arising out of the *res gestæ*, the rule is that when the defense set up is, in itself, purely extrinsic, the allegations of the information not being denied, it is necessary that such defense be sustained by a preponderance of proof. (5) It must be established beyond a reasonable doubt that the defendant was present, and committed or participated in the commission of the offense, and, if the proof leaves it doubtful in the minds of the jury whether the defendant was present at or absent from the place at the time the crime was committed, he must be acquitted."

6. Defendant excepted to the following instruction on the ground that it

is a charge as to matter of fact: "If you are satisfied beyond a reasonable doubt that the defendant, at the time and place specified in the information, killed the party alleged to have been killed, under such circumstances as under the testimony as given before you and the law that I have given you, it would be murder in the first degree, and you desire that he shall suffer the death penalty, the form of your verdict will be: 'We, the jury, find the defendant guilty of murder in the first degree." While the instruction is inartificially drawn, it would require a most astute philologer to show wherein the language, with its punctuations, asserts that the killing, if it occurred at the time and place specified, would, under the testimony and the law, be murder in the first degree.

7. The last assignment of error is that the court erred in remarking, while engaged in charging the jury: "I do not desire to have any question in this case at all. There are some instructions asked by the defendant which I will give in addition to those which I have already given." And again in saying: "In this case, gentlemen, I do not deem it necessary to give the instructions which I usually give in homicide cases." The court had already given in its oral charge the substance of the instructions asked by defendant, and the first statement quoted was doubtless apologetic for the repetition. It cannot be fairly assumed that the court intended to prejudice the jury against the defendant by an intimation such as appellant draws from the language used, *i. e.*, that the case was one of unusual enormity, and the instructions favorable to the defendant omitted or given under protest. Of course it is possible for the trial court by innuendo, facial expression, or vocal emphasis or slide, to indicate a prejudice against the defendant on trial for crime, and thus grievously injure his case; but there is nothing in this case to indicate any such feeling or disposition on the part of the judge who presided at the trial. On the contrary, the instructions given by the court of its own motion are replete with expressions more favorable to defendant than any found in those which were asked on his own behalf. We have examined the affidavits used on motion for a new trial, and think the court below correctly held that they were insufficient.

Every point made has been considered, and we find no error.

Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

2 Cal. Unrep. 770

GRANT *v.* DE LAMORI and others. (No. 11,712.)

(*Supreme Court of California.* June 30, 1887.)

DEED—TITLE CONVEYED—LIMITATIONS.

The alienating force of a deed, which by plain terms purports to pass the grantor's entire interest, is not restricted by the fact that it contains an allusion to an executory contract which the grantor has with a third party respecting the land, and from whom he is to get a quitclaim deed, when the allusion is made simply for the purpose of describing more particularly the premises conveyed.

Department 2. Appeal from superior court, Los Angeles county.

Suit by John Grant, respondent, to quiet title in himself to a tract of land, against the administratrix and children of Louis Lamori, deceased. The plaintiff claimed title under a deed to him from Francisca Urquidez de Lamori, the widow of Louis, and a deed made to her by her husband in his life-time. The defendant and appellant Mrs. Plummer claimed title as one of the heirs at law of Louis Lamori. The complaint is as follows:

"That the said plaintiff is the owner in fee-simple of all that certain piece or parcel of land situate in the county of Los Angeles, state of California, forming part of the Rancho Los Feliz, and bounded and more particularly de-

scribed as follows, [describing it;] that the said defendants, Francisca Urquidez de Lamori, administratrix of the estate of Louis Lamori, deceased, Juan Lamori, Miguel Lamori, Alfredo Lamori, Domingo Lamori, Fabio Lamori, Solomon Lamori, Antonio Lamori, Umpara Lamori de Plummer, and Louisa Lamori de Urquidez, claim an interest or interests in said land and premises adverse to the plaintiff; but said claims of said defendants are without any right whatsoever, and that the defendants have not, nor has either of them, any estate, right, title, or interest of, in, or to said land and premises, or any part thereof; that the said Louis Lamori died in the said county of Los Angeles on the eighth day of January, 1881, being at the time of his death a resident of said county; that by an order of the superior court of said county, duly made and given on the seventh day of July, 1881, the said Francisca Urquidez de Lamori was appointed administratrix of the estate of said Louis Lamori, deceased, and thereupon said Francisca Urquidez de Lamori duly qualified as such administratrix, and letters of administration upon said estate were duly issued to her by the clerk of said court, under the seal thereof, which letters have not been revoked; and that said Francisca Urquidez de Lamori thereupon entered upon the discharge of the duties of her trust, and ever since has been, and still is, administratrix of the estate of said Louis Lamori, deceased; that the said Louis Lamori left him surviving, as his sole heirs at law, his widow, the said Francisca Urquidez de Lamori, and his children, [naming them;] that the said Francisca Urquidez de Lamori, as administratrix of the estate of the said Louis Lamori, deceased, and the said surviving children of said deceased, claim that the land and premises above described were owned in fee-simple by the said Louis Lamori at the time of his death, and that the said land and premises now form and are a part of the estate of said deceased, which said claims are without any right whatever, and said land and premises were not, nor was any part thereof, or interest therein, owned by said Louis Lamori at the time of his death, nor do said land and premises, or any part thereof or interest therein, form any part of the estate of said deceased.

"Wherefore plaintiff prays judgment that said defendants claiming interests in said land and premises as aforesaid may be required to set forth the nature of their several claims, and that all adverse claims of the said defendants, or either of them, may be determined by a decree of this court; and that by said decree or judgment it be declared and adjudged that said plaintiff is the owner in fee-simple of said land and premises, and that said defendants claiming interests therein, as aforesaid, have not, nor has either of them, any right, title, interest, or estate whatsoever, of, in, or to the said land and premises, or any part thereof; and also that said defendants, claiming interests therein as aforesaid, and each of them, be forever debarred from asserting any claim whatever in or to said land and premises, or any part thereof, adverse to the plaintiff; and that by said decree it be declared and adjudged that neither the said land and premises, nor any part thereof, nor any interest therein, form any part of the estate of said Louis Lamori, deceased; and also that said estate has no interest in said land and premises, or any part thereof; and for such other and further relief as to equity shall seem meet."

The following was put in evidence by the plaintiff:

"Los Angeles County Tuesday May 31, 1881. Know all men in this presence that I Luis Lamorez of the county of Los Angeles state of California I party of the first part confirm to and give all my interest and right which I may have or can have in a right of 22 acres of land being located and situated in the ranch of Lick or Los Feliz *rancho* a right to Francisca Lamorez party of the second part of the same county and state being all my interest and right Thomas Rowan the representative and agent to arrange and deliver the title at the end of the settlement of the Rancho of Lick in the bargain which I confirm and certainly give to Francisca Lamorez party of

the second part. Our terms are in the certificate or paper security in this paper are stipulated the location and courses for said piece of land above mentioned I say I assign and confirm to and give all right to Francisca Lamorez

his
"LUIS X LAMOREZ.
mark.
"In the presence of the "HENRY B. KATZ.
his
"PEDRO D. X LOPEZ.
mark
"E. R. PLUMMER."

The arrangement referred to with Thomas Rowan was as follows:

"T. E. Rowan & Co., Real Estate and Commission Agents. Office, 75 Downey Block, Los Angeles, Cal.

"DECEMBER 20, 1880.

"In consideration of Louis Lamoreux giving to the James Lick trustees a deed to all his right, title, and interest in the Lick tract of the Los Feliz *rancho*, except 20 acres as reserved by said Lamoreux in said Lick tract of the Los Feliz ranch by said deed, I agree, on the arrival of R. S. Floyd, of the Lick trust, in San Francisco, to get a deed from the Lick trustees to Louis Lamoreux of the 20 acres as reserved by him in his deed to the Lick trustees. THOS. E. FRAZER, Agent for the Lick Trustees."

The deed from the widow to the plaintiff was also put in evidence. The defendant offered in evidence a deed from one Ramon Vejar to Louis Lamori, as tending to prove that Louis Lamori's estate, of which he was so seized in fee-simple on the said thirty-first day of May, 1881, was by a title other than that which was expected to accrue from the Rowan executory contract; and that, although Louis Lamori at that time assigned to his wife all the estate or interest which might accrue from that contract, still the estate or interest which he had *prior* to that time by *another* title remained to him, notwithstanding his assignment of that contract to his wife on the said thirty-first of May; and that he died seized of that prior estate in fee on the following eighth day of June, as alleged in the answer.

The court found that on May 31, 1881, "Louis Lamori, by deed of conveyance, duly conveyed all of said tract of land to the defendant Francisca Urquidez de Lamori, who thereafter, and prior to the commencement of this action, by deed of conveyance, duly conveyed all of said tract of land to the plaintiff, John Grant."

H. Allen, for appellants. *Howard & Scott*, for respondent.

SHARPSTEIN, J. Tested by what we conceive to be now the well-settled rule in this state, the complaint states facts sufficient to constitute a cause of action. The demurrer to it was properly overruled.

As we construe the deed of Louis Lamori, it conveys all his interest in the land to his wife. The contract with the trustees of the Lick estate is clearly referred to in the deed for the purpose of describing more definitely the premises conveyed, and it makes no difference what its legal effect might be. No one connected with this action claims anything under it. The objection to its introduction in evidence was properly overruled. The deed of Louis Lamori to Vejar, of a date subsequent to that made to Mrs. Lamori, was wholly immaterial, and the objection to its introduction in evidence was properly sustained.

We discover no error in the record. Judgment and order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

72 Cal. 579

HERRLICH v. MCDONALD. (No. 12,161.)

(*Supreme Court of California.* June 24, 1887.)

1. APPEAL—BOND—MISTAKE IN TITLE OF CASE.
An undertaking on appeal, in due form of law, is not rendered ineffective by a mistaken indorsement of the title of the case.

2. SAME—NOTICE OF APPEAL—MISNOMER.
The true title of a cause was *Julia Herrlich* v. *Maggie McDonald.* The notice of appeal was entitled *Julia Herrlich* v. *H. M. McDonald. Held* that, the notice being sufficient in other respects, it was not vitiated by the incorrect title.

3. SAME—TRANSCRIPT—CORRECTNESS.
As against the certificate of the clerk, the mere statement of counsel, on a motion to dismiss the appeal, that errors exist in the transcript, does not establish the fact.

In bank. Appeal from superior court, San Francisco county.

On motion to dismiss appeal.

W. B. Tyler, for McDonald, appellant. *Chas. F. Hanlon*, for Herrlich, respondent.

MCKINSTRY, J. The order of the superior court appealed from was made and entered February 18, 1887. Notice of appeal was filed and served April 14th, and the undertaking filed April 18, 1887. A transcript on appeal, duly certified, was delivered by the clerk below to the appellant on the twenty-fifth day of May, served on respondent on the same day, and filed in this court on the twenty-sixth May, 1887, within 40 days after the appeal was perfected. Respondent moved to dismiss the appeal on the ground, among others, that the transcript was *not* filed within the 40 days. On the day of the service on him of the paper purporting to be a copy of the transcript, the attorney for respondent notified appellant that he refused to certify to the transcript as correct, in his notice pointing out certain alleged errors and mistranscriptions of the record or papers on file. But, conceding there is any law or rule which requires the appellant to serve on the adverse party a copy of the transcript to be filed, it has not been made to appear to us, either by additional certificate of the clerk below or otherwise, that the alleged errors or mistranscriptions exist, (unless it be in the *notice of appeal.*) Doubtless the respondent is entitled to have filed here, at the expense primarily of the appellant, a correct transcript of the record below. But it is not our province now to indicate how it can be obtained, proved, and substituted for the transcript actually filed, if the latter is incorrect. As against the certificate of the clerk, the mere statement of counsel that errors exist does not establish the fact. From an examination of the transcript it would seem that some of the papers printed in it are in no manner identified as having been used on the motion. But if the consequence of such omission shall be that the court here will refuse to look at such papers when the appeal is heard on the merits, the want of identification of some of the papers will not justify a dismissal of the appeal. Moreover, the absence of such identification is not urged by counsel for respondent as a reason for dismissing the appeal.

Respondent further contends: *First*, that no appeal has been taken; *second*, that no notice of appeal was filed or served. In the certificate attached to the transcript on file, the clerk certifies that an undertaking on appeal, in due form of law, was properly filed. In the additional certificate, on which the motion to dismiss is based, he certifies that the undertaking filed was indorsed "*Julia Herrlich* v. *H. M. McDonald.*" The undertaking, if in due form of law, (and no other objection has been made to it,) was not rendered ineffective by a mistaken indorsement. The copy of the notice of appeal, as printed in the transcript, is headed "Title of Court and Cause." The certificate of the clerk, presented on hearing of the motion to dismiss, shows that the notice of appeal filed below was entitled *Julia Herrlich* v. *H. M. McDonald.* But the notice was signed by the "attorney for the defendant;" the subscriber being the attorney for the defendant in the action *Julia Herrlich* v. *Maggie McDonald.* It was filed in the court in which that action had been pending, and was served on the attorney for the plaintiff therein, who acknowledged service, "reserving all objections." The notice refers to an order made February 18, 1887, refusing to recall an execution, etc. The transcript

contains a copy of an order entered on the day last named in the action *Julia Herrlich* v. *Maggie McDonald*, denying the motion of defendant, counsel for plaintiff herein being present, to vacate and set aside an execution. The reckless inexactitude displayed in the preparation of the papers connected with this appeal is not to be commended. We cannot say, however, but that the notice described the order in such manner as clearly to identify it, and so to inform the respondent of the particular order appealed from.

Motion to dismiss the appeal denied, without prejudice.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J.; PATERSON, J.; THORNTON, J.

72 Cal. 535

HEGARD v. INSURANCE CO. (No. 11,073.)

(*Supreme Court of California.* June 22, 1887.)

APPEAL—REHEARING.

Under Code Civil Proc. Cal. § 45, providing that "every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments," a rehearing will not be granted in a case decided in department, and afterwards in bank.

In bank. Appeal from superior court, Plumas county.

Action on a policy of fire insurance. On second petition for rehearing. For the decision in department, see 11 Pac. Rep. 594, and for that in bank, 14 Pac. Rep. 180.

E. W. McGraw, for appellant. *W. W. Kellogg* and *R. H. F. Variel*, for respondent.

BY THE COURT. This cause was heard and decided in department, after which a rehearing in bank was ordered, where the cause was again heard and decided. Appellant now files a second petition for a rehearing. The petition is denied for the reasons—*First*, that an examination of the record shows no sufficient cause therefor; and *second*, that the constitution does not provide for a rehearing of causes decided in bank, and the statute (Code Civil Proc. § 45) expressly provides that "every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments," etc. Whatever may be the inherent right of the court, independent of statutory provision, to amend, alter, modify, or set aside its judgments,—a question upon which we express no opinion,—we think it clear that the right to petition for a rehearing should not be recognized in cases decided in department and afterwards in bank.

72 Cal. 582

PEOPLE v. ECKMAN. (No. 20,298.)

(*Supreme Court of California.* June 24, 1887.)

1. CRIMINAL PRACTICE—EVIDENCE.

At a trial for burglary, a witness, in answer to certain preliminary questions as to whether the defendant made certain statements with reference to the burglary voluntarily, stated that defendant, speaking to him, "said he would plead guilty." *Held*, that a refusal to strike out the words quoted is not ground for setting aside a conviction.

2. SAME—EVIDENCE—CHARACTER.

A certificate of the discharge of the defendant from the United States army for disability, which certifies his character to be good, is not admissible in evidence, at a trial for burglary, to show the good character of the defendant.

3. SAME—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.

At a trial for burglary, an instruction which, after directing the jury that circumstantial evidence must exclude to a moral certainty every other hypothesis than that of guilt, states that, "to convict upon circumstantial evidence, it should be such as to produce *nearly* the same degree of certainty as that which arises from direct testimony," is not erroneous; following *People* v. *Cronin*, 34 Cal. 201.

In bank. Appeal from superior court, San Luis Obispo county
Indictment for burglary.
V. A. Gregg, for appellant. *G. A. Johnson*, Atty. Gen., for respondent.

McFARLAND, J. The defendant was convicted of burglary in the second degree, and appeals from an order denying him a new trial, and from the judgment rendered in the case.

1. Appellant contends for a new trial for error in refusing to strike out certain testimony of the witness for the prosecution, McLeod, who was the sheriff of the county. The witness was asked if he had heard the defendant make any statements in reference to the burglary, and, if so, were these statements made voluntarily. He answered that he had, and that they were made voluntarily. Thereupon defendant's attorney "requested the privilege of asking the witness *preliminary* questions, to see if the statement made by the defendant to the witness was voluntary; and the court granted the request." The preliminary question having been asked, the witness replied: "I told him probably, if he was guilty, and pleaded guilty, he would probably get a shorter sentence. Then he told me he wanted to see the district attorney. I went down and brought him up into the office. Mr. Eckman came into the office, and made the statement that he would plead guilty voluntarily." Defendant's attorney then said: "I ask that that be stricken out,—that he said he would plead guilty." The court said, "I deny the motion;" and the attorney for defendant said, "We except." This is all the record shows upon the subject.

Technically, the testimony was not before the jury at all. It was addressed to the court upon the preliminary examination. In the next place, a party moving to strike out the answer of a witness must specify his objection to it in like manner as he is required to specify the grounds of his objections to a question. *People* v. *Frank*, 28 Cal. 519; *Sill* v. *Reese*, 47 Cal. 341. And no grounds of objection were stated here at all; not even the hackneyed one of "irrelevant and incompetent." But if such objections to the point here sought to be made ought to be disregarded in a criminal case, the court did not abuse its discretion or commit a fatal error in denying the motion to strike out. The sheriff had not charged defendant with being guilty; had not claimed to have evidence against him; had not threatened him in any way. He did not tell him, as was told the defendants in *People* v. *Johnson*, 41 Cal. 452, "there was no use in fooling about it; they may as well confess, as there was evidence enough to convict them." Moreover, the statement testified to was not a confession. Under the circumstances we think that it would be going too far to reverse the case for the denial of the motion, even if defendant's counsel had stated the grounds upon which he made it.

2. The second ground of error assigned by appellant is the refusal of the court to allow in evidence, as proof tending to show the good character of the defendant, a certificate of the discharge of the defendant from the United States army for disability, which also certified his character to be good. It does not appear what particular traits of character were certified to in the document excluded; but we do not know of any rule which, upon the general issue of character, allows the introduction of written declarations, official or otherwise, made by third parties out of court. We think, therefore, that this point is not tenable.

3. The appellant makes several objections to parts of the instructions given by the court to the jury. The most serious is the objection to part of instruction No. 3. This instruction is on the subject of circumstantial evidence; and, while stating that the circumstances must exclude to a moral certainty every other hypothesis than that of guilt, it includes this language: "To convict upon circumstantial evidence, it should be such as to produce *nearly* the same degree of certainty as that which arises from direct testimony." This

instruction was given at the request of the district attorney; and it may be remarked that many prosecuting officers seem to be moved by some sort of fascination to travel along the very edge of the precipice of error, when they could go just as effectively, and much more safely, along the center of the beaten road. This hazardous language, probably, had no effect whatever on the jury, and yet its propriety is extremely doubtful. It happens, however, that a good many years ago this court decided that a similar instruction was not erroneous; holding that "it was but another mode of telling the jury that although, as a general rule, circumstantial evidence, in the nature of things, may not be so entirely satisfactory proof of a fact as the positive testimony of credible eye-witnesses, yet they must convict if they were satisfied of the guilt of the defendant to the exclusion of rational probabilities." *People* v. *Cronin*, 34 Cal. 201. We would not be warranted in overruling that case on the point under discussion, and therefore hold that a new trial should not be granted in the case at bar on account of said instruction.

There are some other exceptions to the instructions, but they are not, in our opinion, well taken. The law of the case was, we think, properly and fairly given to the jury.

Judgment and order affirmed.

We concur: PATERSON, J., THORNTON, J.

We concur in the judgment: SEARLS, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

(73 Cal. 61)

TUBBS *v.* WILHOUT and others. (No. 11,735.)

(*Supreme Court of California.* July 1, 1887.)

1. PUBLIC LANDS—SWAMP LANDS—VESTING OF TITLE.
 The act of congress of September 28, 1850, known as the "Swamp-Land Act," is a grant *in præsenti* of the lands determined to be of that character at that date.
2. SAME.
 The fourth section of the act of congress of July 23, 1866, entitled "An act to quiet land titles in California," provides that where township surveys have been made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land-office to certify to the state of California as swamp and overflowed all land represented on such approved plats within one year from the passage of this act, or within one year from the return or approval of such plats. *Held*, that the title to such lands vested upon the approval of the plats, and not from the date of the commissioner's certificate.

Department 2. Appeal from superior court, San Joaquin county.

J. B. Hall, for appellants. *J. H. Budd*, for respondent.

THORNTON, J. This is an action of ejectment. The plaintiff's title is founded on a patent of the United States issued on homestead entry commuted to a cash entry, which entry was made on the eighth of May, 1873. On this last-named day whatever right the plaintiff had, attached. The defendants' title rests on a patent of the state of California, issued to one Joseph Kile on the fifth day of August, 1865, for the land in controversy, purchased by said Kile from the state on an application to purchase made to the proper state authorities in the month of August, 1864. The plaintiff claims that the land is and was dry land on the twenty-eighth of September, 1850, the date of the passage of the swamp-land act, while defendants (who are the executors of Kile) claim that it was swamp and overflowed land at the date just above mentioned, and that it was conclusively determined to be such before any right of plaintiff attached.

It appears from the findings that in April, 1864, a plat of the survey of the township in which the land in controversy is situated was approved by the

United States surveyor general for California. On this approved township plat the land in suit was represented to be swamp and overflowed. On the twenty-third of July, 1866, an act of congress entitled "An act to quiet land titles in California," was passed. The fourth section of that act provides, among other things, as follows: "That in all cases where township surveys have been or shall hereafter be made under the authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land-office to certify over to the state of California as swamp and overflowed all the lands represented as such upon such approved plats within one year from the passage of this act, or within one year from the return and approval of such township plats."

It must be considered as settled law that the first section of the swamp-land act is a grant *in præsenti* to each state of the swamp and overflowed lands within its limits. "The words of the first section of the act," say the supreme court of the United States in *Wright* v. *Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, by FIELD, J., "'shall be and are hereby granted,' import an immediate transfer of interest, not a promise of transfer in the future." The provision made for a patent in the second section is for the purpose of furnishing to the grantee documentary evidence that the land was swamp and overflowed, and a further assurance of title. See *Owens* v. *Jackson*, 9 Cal. 322; *Summers* v. *Dickinson*, Id. 554; *Kernan* v. *Griffith*, 27 Cal. 87; *Sacramento Val. Rec. Co.* v. *Cook*, 61 Cal. 342; *Lux* v. *Haggin*, 10 Pac. Rep. 674; *French* v. *Fyan*, 93 U. S. 169; *Wright* v. *Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, and cases cited.

To make the grant perfect, the lands must be identified as of the character granted. When the land was clearly swamp and overflowed, it could be clearly identified as such by parol evidence. In most cases such identification from the character of the lands could be made without difficulty. In some instances it might not be so easily done, and congress provided in the act of 1850 for a mode of identification by the secretary of the interior. This action by the secretary of the interior, in identifying the land as swamp and overflowed, is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is submitted; and, when the secretary has neglected or failed to make the identification, it is competent for the state or its grantees, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object, as by a resort to parol evidence. *Wright* v. *Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, and cases cited. But congress has furnished other modes of identification, and one of those is set forth in the portion of the fourth section of the act of 1866 above quoted. *Wright* v. *Roseberry*, *supra*.

That the township plat was approved in this case long before any right of the plaintiff attached clearly appears from the findings. A copy of the plat approved by the United States surveyor general for California was filed in the United States district land-office at Stockton, in which district the land in suit was included, on the first of July, 1864. This copy was afterwards, on or about July 15, 1865, withdrawn from the office by the surveyor general, above mentioned, by order of the commissioner of the general land-office, and was never returned to that office, but an exact copy of it was subsequently filed in the United States land-office for the district then embracing, with other lands, the land in controversy. We think it clear from the above that the plat must be considered as approved at least as soon as when first filed in the land-office in Stockton.

From the day of filing an approved township plat in the proper land-office the time for making applications to enter and purchase commences to run. From such date rights may attach in favor of those applying to enter and purchase under the laws of the United States, and certainly such rights would not be allowed to attach unless upon a township plat approved by the proper au-

thority. Under these circumstances the township plat may be considered as approved at latest as of July 1, 1864.

Under such a state of facts, what effect on the title to this land has the above-quoted portion of the act of July 23, 1866? We are of opinion that the plat of the survey of the township, including the lot in controversy approved by the United Stated surveyor general for California, was conclusive between the state and the United States, and vested the title in the state of California as of the twenty-eighth of September, 1850, the date of the passage of the swamp-land act.

This conclusion is, in our opinion, sustained by the recent decision of the supreme court of the United States in *Wright* v. *Roseberry*, above cited. This case went to the court above mentioned by writ of error to this court. The action was ejectment. The plaintiff contended that by virtue of the provisions of section 4 of the act of July 23, 1866, there having been an approved plat of survey, the title to the land in suit, claimed by plaintiff to be swamp and overflowed land, vested in the state, though the commissioner of the general land-office had never certified the land over to the state, as required by the act above mentioned. The defendants, who claimed as pre-emptors under the laws of the United States, and to whom patents had been issued by the United States upon declaratory statements made in 1864, combatted this view, and the state court sustained the contention of defendants, holding that until the commissioner had made the certificate required by the act the title did not vest in the state. The supreme court of the United States held that this was erroneous, and for this error reversed and remanded the cause. Its ruling is that the township plat having been returned to the general land-office after the patents to the defendants were issued, was not conclusive against the United States that the land was swamp and overflowed; but, if the township plat had been approved before the patents were issued, it would have been conclusive that the lands sued for were of that character, and that the certificate of the commissioner is only an official recognition that the lands are of the character designated, and of the completeness of the segregation. We understand this ruling of the highest court of the United States to be that, when the plat of the township representing lands upon it to be swamp and overflowed is approved, the title to such land vests in the state, though the commissioner has not made the certificate required by the act.

Though, in the case of *Wright* v. *Roseberry*, the plat of the township survey was required, under another section of the act of 1866, to be approved both by the United States surveyor general for California and by the commissioner of the general land-office, still, when it was approved, the same effect resulted; that is to say, when the plat of survey with the representation on it required by the act had been approved, the title to the land designated on it as swamp and overflowed vested in the state. In the case before us the approval was only required to be made by the United States surveyor general, and when this was done the result followed as above pointed out. In this view we think the ruling of the supreme court in *Wright* v. *Roseberry* sustains the conclusion here reached. In this cause nothing had occurred by which the plaintiff could have acquired a semblance of right until long after the plat of the township survey had been approved, and the title had vested in the state. Therefore, in accordance with the ruling of the United States supreme court, when the patent herein was issued, the United States had nothing which it could grant to the plaintiff. The patent to the plaintiff was, then, issued without authority of law, and, as against the defendants and their testator, was of no validity whatever.

In the conclusion here reached we have followed the decision of the supreme court in *Wright* v. *Roseberry*, overruling the decision of this court in the same case. As the question involved is a federal one, depending on the construction of an act of congress, we are bound to follow the decision of the

federal court on the points in controversy, and to disregard the decision of this court on the same points.

There is nothing said in *Heath* v. *Wallace*, 11 Pac. Rep. 842, which is not in accord with what is said herein. In that case the land was not represented on the approved township plat as *swamp and overflowed*, but "*subject to periodical overflow.*" We held that this was not representing the land as swamp and overflowed. There are in this state, and it may be presumed in every other state, lands which are subject to periodical overflow, but which are eminently fit for cultivation, and on which valuable crops of cereals are grown. Such lands are not swamp and overflowed, as has been held by this court. See *People* v. *Morrill*, 26 Cal. 336; *Keeran* v. *Griffith*, 31 Cal. 461; *Keeran* v. *Allen*, 33 Cal. 542.

We add here that it appears from the findings herein that a hearing was in 1874 ordered by the commissioner of the general land-office as to whether the land involved in this case was or not swamp and overflowed, and that such hearing was subsequently had, on which it was determined that it was not swamp and overflowed. But the order for a hearing was made after the title had vested in the state, and therefore the decision of the federal land department, that the land was not swamp and overflowed, was of no validity whatever. Had any right been claimed by a pre-emptor prior to the approval of the township map, such hearing might have been ordered and had by the commissioner, but certainly this cannot be so when all right had passed from the United States to its grantee. The title to the land, under such circumstances, had passed entirely beyond the control of the United Stattes land department, and beyond the power of the federal government, unless the title had been procured by fraud, to redress which resort must be had, not to the land department, but to the judicial courts.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment for the land in suit, and the rents and profits, in favor of the defendants. So ordered.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(73 Cal. 68)

CULBERTSON v. KINEVAN. (No. 12,046.)

(*Supreme Court of California.* July 1, 1887.)

1. TURNPIKES—EXCESSIVE TOLL—PENALTY.
 It is only when a toll-gatherer *demands* and receives more than he is authorized to collect that he incurs the penalty prescribed by the California act of May 12, 1853, providing (section 31) that every toll-gatherer who demands and receives from any person more than he is authorized to collect shall forfeit to the person aggrieved $10 for each offense.
2. SAME.
 The California act of April 28, 1857, amending the act of May 12, 1853, which authorizes the formation of corporations for the construction of plank and turnpike roads, provides that the supervisors of the counties through which such roads pass shall fix the rate of tolls from year to year; and that any company which takes toll, "except as may be fixed and prescribed by such * * * supervisors," shall forfeit its corporate rights. *Held*, in a case where the county had not fixed any rates since 1869, that the failure of the supervisors to fix rates for 1883 did not subject a toll-gatherer who then took toll at the rates prescribed in 1869 to the penalty denounced by the act of 1853.

Department 2. Appeal from superior court, Santa Barbara county; JOHN HUNT, Judge *pro tem.*

W. C. Stratton, for plaintiff. *Fernald, Cope & Boyce*, for Kinevan, respondent.

SHARPSTEIN, J. This action is brought under section 31 of "An act to authorize the formation of corporations for the construction of plank and turnpike roads," passed May 12, 1853, which provides that every toll-gath-

ever who demands and receives from any person more than he is authorized to collect, for each offense forfeits the sum of $10 to the person aggrieved.

The case was tried by the court, which found that in 1868 a corporation called the Santa Barbara and Santa Ynez Turnpike Road Company, to continue for 20 years, was formed under the act of the legislature of May 12, 1853, and that said corporation, in 1869, constructed and opened its road to the public for travel, and it has been kept up and used for that purpose ever since; that for more than 15 years the defendant has been and still is the authorized toll-gatherer on said road; that on the thirtieth day of November, 1883, the plaintiff passed over said road with two horses and a wagon, and at the "San Marcos Pass," or "Pat's Station," so called, at the toll-gate on Santa Ynez mountains, on said road and in the county of Santa Barbara, paid to the defendant, as toll-gatherer of said road, $1.50 for toll for passing over said road, without any objection whatever; that plaintiff knew then, and had long known, the toll-road, and had frequently passed over it before, and had paid the accustomed rate of toll according to the rate of toll which he saw posted up at the gate; that defendant then appeared at the toll-gate, and received said toll as toll-gatherer for said corporation, as he had been accustomed to do in all other cases, and in the belief that he had good right to collect and receive the same; that said sum so paid by plaintiff for toll was the exact amount which plaintiff and others had theretofore paid defendant for toll for the same team, to-wit, two horses and a wagon, and the same amount which defendant had collected for such teams during all the time he had been such toll-gatherer on said road, and the exact amount prescribed and fixed by the board of supervisors of Santa Barbara county for toll on said road, by its order made on the fourth day of August, 1869, and entered on the minutes of said board on that day; that no other order relating to any of the matters mentioned in said order, or to the tolls to be charged by said turnpike company, was passed by said board of supervisors before the commencement of this action, to-wit, on the twenty-eighth day of September, 1884. And, as a conclusion of law from the foregoing facts, this court finds, separately, that no action has accrued for a forfeiture, and that plaintiff is not entitled to recover any penalty from defendant in this action, and this cause ought to be dismissed, and that defendant recover his costs and disbursements in this behalf laid out and expended; and it is hereby so ordered and adjudged, and that judgment be entered in this court accordingly. Judgment was so entered, and this appeal is from the judgment.

The appellant insists that the judgment is not justified by the findings, and cites an act to amend the act of 1853 above referred to, approved April 28, 1857, which provides "that such companies as have already organized, or that may hereafter organize, under the provisions of this act, and the act of which this is amendatory, shall only be allowed to put up and keep such toll-gates, demand, collect, and receive such tolls, as may be fixed and prescribed by the board of supervisors of the county or counties through which such road or roads may pass; such gates and tolls to be fixed and prescribed by such board of supervisors as aforesaid from year to year. And if any company or companies shall violate the provisions of this act, by putting up any toll-gate or gates, or by collecting any toll or tolls, except as may be fixed and prescribed by such board of supervisors, as aforesaid, such company or companies shall forfeit all their corporate rights in such road or roads, turnpike or turnpikes, bridge or bridges, ferry or ferries, to the counties in which the same may be situated. Such company or companies may be prosecuted for such violation as aforesaid before any justice of the peace in any township through which said road passes." St. 1857, p. 280. It is claimed that the failure to find that this law in all respects had been complied with, and the finding that, in some respects, it had not been, is fatal to the judgment.

It is apparent at a glance that the penalty prescribed by that act is not the

one sued for in this action. The statute does not make the toll-gatherer liable for acts or omissions of the board of supervisors, or of the corporation which employed him. It is when he demands and receives more than he is authorized by law to collect that he becomes liable to the party aggrieved. In this case it is claimed that the corporation was not entitled to demand and receive anything, and, therefore, that any sum whatever was more than the toll-gatherer was authorized to collect. We think section 31 of the act of 1853 does not apply to such a case, but to a case where the law authorizes the collection of some amount of toll, and the toll-gatherer demands and receives *more* than that amount. If the defendant in this case was authorized to collect anything, he collected no more than he was authorized to collect. If he was not authorized to collect anything, and did collect something, it would not be construing the word "more" according to the context and the approved usuage of the language to say that he collected *more* than he was authorized to collect. It is only when a toll-gatherer demands and receives more than he is authorized to collect that he incurs the penalty prescribed. In this case it is not found that anything was *demanded* by the defendant. The finding is that plaintiff paid, and the defendant received, the amount of the toll, and that the plaintiff paid that amount "*without any objection whatever*," as he had frequently done before. The court does not distinctly find that the defendant made no demand, but the facts found negative the idea that any was made; and, if none was made, no penalty was incurred, for there must be a demand, as well as a receipt, of toll to constitute the offense. Judgment affirmed.

We concur: McFARLAND, J., THORNTON, J.

73 Cal. 3

LUCO *v.* BROWN and others. (No. 11,839.)

(*Supreme Court of California.* June 29, 1887.)

JUDGMENT—VALIDITY—DEFECTIVE SUMMONS.

In California an injunction will not issue to restrain a levy of execution on a justice's judgment docketed in the superior court, when the relief sought is based on the ground that the judgment is void because the summons was fatally defective. Under the law of that state the judgment debtor has ample remedy at law, by motion in the justice's court, to arrest the execution.

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

Thos. J. Arnold, for Luco, appellant. *Edward J. Linforth*, for respondents.

BELCHER, C. C. This action was commenced in the superior court of San Diego county to obtain an injunction restraining the defendants "from levying upon or attaching plaintiff's property, or any part thereof," under an execution issued upon a judgment rendered against plaintiff in a justice's court in Tuolumne county.

The facts set up in the complaint may be briefly stated as follows: On the fourteenth day of August, 1885, the defendant Brown filed a complaint in a justice's court in the county of Tuolumne against the plaintiff here and two other persons, in which he alleged that the defendants were indebted to him in a certain sum of money for labor and services done and performed by plaintiff for defendants at their special instance and request. On the twenty-sixth of September following, Brown caused a summons to be issued by the justice upon his complaint, which was served upon plaintiff in the city and county of San Francisco, where he then, and has ever since, resided, and was never served upon him in the county of Tuolumne. The summons so served was defective and void, because there was not attached to it a certificate under seal by the county clerk of the county of Tuolumne, to the effect that the person issuing

the same was an acting justice of the peace at the date of the summons, as required by section 849 of the Code of Civil Procedure. On the ——— day of November, 1885, Brown caused the default of plaintiff for not answering to be entered in the cause, and thereupon judgment was made and entered against him for the sum of $252.74. Thereafter Brown caused an abstract of the judgment to be filed in the office of the county clerk of the county, and an execution thereon, under the seal of the superior court, to be issued to the sheriff of San Diego county. The defendant Bushyhead is the sheriff of San Diego county, and the execution so issued has been placed in his hands, and under it he is about to levy upon, advertise, and sell the plaintiff's property, situate in his county. It is then alleged that all the allegations in the complaint filed in the justice's court, so far as the plaintiff here is concerned, are untrue; that Brown never at any time performed any work or labor for plaintiff, at his instance or request or otherwise, and that plaintiff is not and was not, either individually, or in connection with his co-defendants, indebted to Brown in the sum named in his complaint, or in any sum of money whatever, and that he never agreed to pay him the sum alleged in his complaint, or any other sum whatever; that plaintiff never had any notice or knowledge of the commencement of the action in the justice's court, (except from the service of said void summons upon him;) or of the default taken, or of the judgment rendered therein, or of the issuance of the execution, until demand was made upon him by defendant Bushyhead, for payment and satisfaction of the same; and that the levy upon and sale of the plaintiff's property, under the execution, will cloud his title and do him irreparable injury. This action was commenced on the ninth day of February, 1886, and on the same day a temporary injunction was granted. The defendants demurred to the complaint, and, on coming on to be heard, their demurrer was sustained and the injunction dissolved. The plaintiff excepted to the rulings of the court, and now prosecutes this appeal therefrom.

Assuming, as claimed by the appellant, that the judgment rendered against him in the justice's court was void, for the reason that the court never acquired any jurisdiction of his person, still it does not follow that he can maintain this action. The same question was involved in *Comstock* v. *Clemens*, 19 Cal. 77, in which the court, by FIELD, C. J., said: "The plaintiff seeks to enjoin the sale of certain personal property under an execution issued upon a judgment recovered against him in a justice's court, and bases his claim for relief upon the ground that the court never acquired any jurisdiction of his person. He avers that the summons issued in the action, in which the judgment was entered, was never served upon him. If this averment be true, he has an effectual remedy by motion to the court to set the execution aside. The justice possesses the power at all times to arrest process issued upon judgments entered in his docket which are void." And in that case the judgment in favor of the defendants was affirmed.

The same question was again presented in *Gates* v. *Lane*, 49 Cal. 266. There the plaintiffs sought to enjoin the enforcement of an execution issued on a judgment rendered against them in a justice's court, upon the ground that the summons had never been properly served upon them. The defendants demurred to the complaint, and this court said: "The demurrer was properly sustained. If the judgment obtained against the plaintiffs was void on the face of the proceedings in the justice's court for want of jurisdiction, as the complaint avers it to have been, these plaintiffs had an adequate remedy by motion in that court, to arrest the execution and stay further process on the judgment; citing cases. Nor did the fact that the execution was issued by the county clerk, on a transcript of the justice's docket filed in his office, obstruct the remedy by motion in the justice's court. Though issued by the clerk, the execution was subject to be recalled by the justice who rendered the judgment."

In *Ede* v. *Hazen*, 61 Cal. 360, it is said: "As appears upon the face of their complaint, the plaintiffs discovered within forty days after the entry of the judgment, and within six months after the entry of their default, all the facts upon which they now base their right to have it set aside; and if it be conceded that, upon those facts, they are entitled to the relief they now claim, it is clear that they had a speedy, complete, adequate, summary remedy in the same proceeding, and that the complaint shows no circumstances which entitle them to maintain a separate and distinct equitable action."

Upon the authority of the foregoing cases we think the demurrer was properly sustained, and that the order dissolving the injunction should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

LUCO *v.* BUSHYHEAD and others. (No. 11,840.)

(*Supreme Court of California.* June 29, 1887.)

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

Thos. J. Arnold, for Luco, appellant. *Edward J. Lin*, for respondents.

BELCHER, C. C. There is no material difference between this case and the case of *Luco* v. *Brown*, *ante*, 366. Upon the authority of that case the order dissolving the injunction should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

73 Cal. 9

ROSENTHAL and others *v.* LEVY, Assignee. (No. 12,016.)

(*Supreme Court of California.* June 29, 1887.)

APPEAL—FINAL ORDER—INSOLVENCY.

An order directing an accounting by the assignee of an insolvent debtor, who has qualified, but who has failed to render an account within the three months prescribed by section 29 of the California insolvent act, is not a final order, and is not appealable.

Department 1. Appeal from superior court, Nevada county.

Complaint by Rosenthal, Feder & Co. and B. Blumenthal & Co., respondents, to compel Marcus Levy, assignee of L. Hyman, to file his account. There was a decree for the complainants, ordering the account to be filed, and Levy appealed.

Thornton & Merzbach and *A. Burrows*, for appellant. *John Caldwell* and *A. D. Mason*, for respondents.

TEMPLE, J. The order appealed from in this case is in no sense a final order, and is not appealable. Furthermore, it is one the court should have made of its own motion, upon mere suggestion. The assignee was apparently in default, as he had not complied with section 29 of the insolvent act, which required him to render an account at the expiration of three months. The assignee cannot at any time be heard to object to an order requiring him to render an account. The court may require it as often as occasion seems to require. Appeal dismissed.

We concur: PATERSON, J.; MCKINSTRY, J.

72 Cal. 577

ROSE'S ESTATE. (No. 12,160.)

(*Supreme Court of California.* June 24, 1887.)

APPEAL—TIME OF TAKING.

Code Civil Proc. Cal. § 1704, provides that in probate cases "all orders and decrees of the court or judge must be entered at length in the minute-book of the court;" and section 1715, that "the appeal must be taken within 60 days *after* the order * * * is entered." *Held*, that an appeal from an order settling the account of an administrator, taken before the order had been so entered, was premature, and should be dismissed.

In bank. Appeal from superior court, Tulare county.

Wal. J. Tuska, for appellant. *Stetson & Houghton*, for respondent.

SEARLS, C. J. This is a motion to dismiss an appeal upon the ground that it was prematurely taken. It appears from the affidavits on file that on the twelfth of March, 1887, findings of fact and an order or decree were signed and filed with the clerk, settling the account of H. Hirshfield, the administrator of the estate of Rose, deceased. Afterwards, and on the twenty-seventh day of April, 1887, the administrator perfected an appeal to this court from such order or decree. At the time of taking such appeal the decree appealed from had not been entered in the minute-book of the superior court of Tulare county, where the proceedings were had where the cause was pending. In probate cases it is provided by section 1704 of the Code of Civil Procedure that "all orders and decrees of the court or judge must be entered at length in the minute-book of the court." If an appeal is taken in such a case, it "must be taken within sixty days *after* the order, decree, or judgment is entered." The appeal in this case was premature. *People* v. *Center*, 66 Cal. 570, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *McLaughlin* v. *Doherty*, 54 Cal. 519; *Thomas* v. *Anderson*, 55 Cal. 43.

The motion is granted, and the appeal dismissed.

We concur: MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.; TEMPLE, J.; MCFARLAND, J.; PATERSON, J.

74 Cal. 250

LOUGHBOROUGH, Adm'r, etc., *v.* MCNEVIN and others. (No. 9,520.)

(*Supreme Court of California.* June 27, 1887.)

1. PLEDGE—LIEN—EXTINGUISHMENT—TENDER.

The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law, and is refused by the pledgee.

2. SAME—REFUSAL TO DELIVER—CONVERSION.

A refusal by a pledgee to deliver up the pledge to an assignee of the pledge, upon a sufficient tender being made by the assignee of the amount due him, is conversion, and the fact that the property pledged had been attached by a third person, with whom the assignee had no privity, is no justification.

3. SAME.

In an action of trover to enforce the redemption of a pledge, the pledgee will be held responsible for any depreciation in the value of the pledge, after the tender of the amount due, and refusal by the pledgee.

4. SAME—INTERVENING CLAIMANT.

One to whom a pledge has been assigned pending litigation concerning it, may file a complaint in intervention, under section 386, Code Civil Proc. Cal., which provides for order of substitution.

5. TENDER—SUFFICIENCY.

Where one who held certain shares of stock as security for money loaned, demanded payment of the debtor, which was refused, and afterwards an assignee of the stock tendered to the pledgee the whole amount due him, with interest, held a sufficient tender, under section 1492, Civil Code Cal., which provides that where delay in the performance of an obligation is capable of exact and entire compensa-

tion, and time has not been declared to be of the essence of the contract, an offer of performance, accompanied by an offer of such compensation, may be made at any time after the obligation is due.

6. SAME.

A tender to a pledgee of the amount secured by the pledge is not vitiated by a condition that the pledge be delivered to the one tendering payment.

7. SAME.

A tender of the amount due a pledgee by an assignee of the pledge is sufficient, without bringing the money into court.

Department 2. Appeal from superior court, San Francisco.

Wilson & Wilson, for appellant. *D. L. Smoot, Ogden Hiles, M. N. Stone*, and *B. B. Newman*, for respondents.

THORNTON, J. The plaintiff's intestate, some time prior to October, 1876, lent defendant Henry P. McNevin a sum of money for which he received as security some shares of stock. On the nineteenth of July, 1877, McNevin assigned to defendant L. P. Drexler his interest in the stock above mentioned, in consideration that Drexler would assume the payment of his debts due to Casserly on said stock. This assignment Drexler accepted, and on the twenty-first of the same month informed Casserly of such assignment. On receiving this notice, Casserly, on same day, declared his willingness to deliver the stock to Drexler upon receiving the money secured by it. On the twenty-second of September, 1877, Drexler made a legal tender to Casserly of the amount due to him on the stock, and demanded a delivery of it. Casserly made no objection to the tender, admitted that it was correct and sufficient, but refused to accept the money and deliver the stock, on the ground that process of garnishment in the matter of an order for money against Henry P. McNevin in favor of defendant Teresa E. McNevin had been served on him on September 1, 1877. On the twenty-eighth of September, 1877, six days after the tender was made and refused, this action was commenced by Casserly. Henry P. McNevin, Teresa E. McNevin, and Drexler were made defendants to the action. The object of the action was to have an account taken of the amount due by McNevin to him; that the money found due him be adjudged to be paid him by Teresa E. McNevin or Drexler, as either shall be found entitled thereto; and in default of payment that the defendants be foreclosed of all right of redemption, etc., for a sale, etc. H. P. McNevin answered, stating that he had, on the nineteenth of July, 1877, sold and assigned the stock to Drexler in good faith, for the consideration of $11,000 paid him by his vendee. T. E. McNevin answered, denying that Drexler ever purchased the stock of Henry P. McNevin; denied that there was due to Casserly from H. P. McNevin any sum greater than $9,837.27, secured as above mentioned; and stated that she claimed a lien upon the stock under executions issued in the action brought by her against Henry P. McNevin, by means of which the stock was attached. The executions mentioned were issued on orders made in the action just above mentioned. In the same action an order was made, which was served on Casserly on the sixteenth day of September, 1877, directing him not to pay over or transfer any property held by him belonging to H. P. McNevin. Drexler in his answer set up the assignment to him; the notification to Casserly of this assignment; the tender to Casserly, and its refusal by him, as they are set forth herein; and averred his willingness and readiness to pay, and then offered to pay, into court the amount due Casserly, as the court should direct, upon Casserly's delivering to him the stock held by him as security.

J. F. Eagan, on the eighteenth of February, 1879, filed a complaint in intervention, in which he averred an assignment to him by Drexler of the stock held by Casserly as security, and also of all claim for damages by Drexler for the conversion of the stock thereinafter mentioned. He then goes on to aver the facts showing a conversion by Casserly, which are the facts above set

forth by Drexler in his answer, and the further fact that Casserly refused, upon the tender made him in September, 1877, to accept the said amount tendered, and deliver the stock to Drexler. Casserly demurred to the complaint of Eagan, which was overruled. He then answered the complaint last mentioned, denying the conversion averred. The cause was tried and judgment rendered against Casserly in favor of Eagan for the sum of $15,225 and costs. Casserly moved for a new trial, which was denied. This appeal is prosecuted from the judgment and order above mentioned.

Casserly held the stock as a pledge. He so states in his complaint, and under section 2924, Civil Code, having it in his possession, as it was personal property, it was a pledge whether the title passed to him or not. The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law, and its refusal by the pledgee. *McCalla* v. *Clark*, 55 Ga. 53; *Ratcliff* v. *Vance*, 2 Const. (S. C.) 239. Upon such tender being made and refused, the pledgeor is entitled to the property pledged, and certainly, when on or after such tender a demand is made for the pledge, which is refused, a conversion takes place. See cases just above cited. The refusal to deliver the pledged property on demand is an exercise of dominion over the property of another in defiance of the other's right, which is a conversion. *Dodge* v. *Meyer*, 61 Cal. 420, 421. Such conversion is wrongful, and extinguishes the lien under section 2910, Civil Code. See *Rodgers* v. *Grothe*, 58 Pa. St. 414; *Davis* v. *Bigler*, 62 Pa. St. 242; *Lawrence* v. *Maxwell*, 53 N. Y. 19.

Was the tender in this case made in accordance with law? It was of the whole amount, principal and interest, due to Casserly. The demand made at the same time that the stock pledged be delivered to him, conceding it to be a condition, was one which he had a right to impose, as it was concurrent with the payment of the money in accordance with Casserly's promise in his letter of July 21, 1877, to Latham & King, the agents of Drexler, that on payment of the money he would transfer the stock, which latter was communicated by Latham & King to Drexler. The announcing of such condition did not vitiate his tender. It is so declared in section 1498, Civil Code. See *Wheelock* v. *Tanner*, 39 N. Y. 481.

The tender was made in time. The Code (section 1490, Civil Code) provides that, where an obligation fixes the time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards. But, where an obligation does not fix the time of performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform. Section 1491, Civil Code. The obligation of McNevin was to repay the advances after a reasonable time, whenever he should be thereunto requested by the plaintiff. This was averred in the complaint, and not denied in the answer. The time of performance was not then fixed by the obligation. A request to pay, which is tantamount to a demand, was made by Casserly of McNevin on or about the twenty-sixth of June, 1877, and refused. The tender could not have then been made after this demand, except for section 1492, Civil Code, which provides as follows: "Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditors, or by any other person in the meantime."

We are of opinion that the tender is good under this last section, as the interest offered was compensation for the delay. It is said that the plea of tender by Drexler is insufficient, for the reason that he did not bring the money into court. We think the plea is sufficient without bringing the money into court. This is so held in *Kortright* v. *Cady*, 21 N. Y. 343, 354, 366. The authorities referred to in the cases just cited in the opinions of DAVIES, J., and COM-

STOCK, C. J., sustain this rule. The plea here is in accordance with section 1495, Civil Code, and it is expressly provided by section 1504, Civil Code, that an offer of payment, duly made, though the title to the thing offered be not transfered to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof. One of these incidents is the discharge or extinction of the lien. The rule laid down in *Kortright* v. *Cady* is the same. 21 N. Y. 353, 366.

The tender was not objected to by Casserly when made. The lien having been extinguished, Drexler was entitled to the possession of the stock. Casserly then had no right to withhold it from Drexler. We cannot see how an attachment by Teresa McNevin, a third person, with whom Drexler had no connection or privity, could justify the plaintiff's intestate in his detention of the stock. The stock was the property of Drexler when it was attached, subject to the lien for the debt due to Casserly, and the attachment of it, as the property of H. P. McNevin, gave him no right to detain it from Drexler, when a proper tender had been made and refused.

The answer of Drexler was, in effect, an action to redeem. In such action, whether the right is enforced by an action of trover or by a bill pure and simple to redeem, the pledgee will be responsible to the pledgeor for depreciation in the value of the pledged property, after a tender of the amount due and the refusal by the pledgee. *Griswold* v. *Jackson*, 2 Edw. Ch. 461, 4 Hill, 522; *Hathaway* v. *Fall River Nat. Bank*, 131 Mass. 14; *Hancock* v. *Franklin Ins. Co.*, 114 Mass. 155. Eagan's complaint in intervention set forth the right to redeem, as well as did the answer of Drexler, and in fact more fully, by stating a case of conversion. The action of trover is a very usual mode of enforcing a redemption of a pledge. See Jones, Pledges, § 561.

We are of opinion that the complaint in intervention by Eagan was regular, and within the statute. Code Civil Proc. § 386.

We find no error in the record, and the judgment and order are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

73 Cal. 1

PEOPLE *v.* BITANCOURT. (No. 20,324.)

(*Supreme Court of California.* June 28, 1887.)

EXCEPTIONS, BILL OF—SERVICE OF NOTICE.

Under Pen. Code Cal. § 1174, which provides that if the trial court, in settling a bill of exceptions, refuses to allow an exception in accordance with the facts, application by petition may be made to the supreme court for leave to prove exceptions, notice of such application must be served on the court below and on the adverse party.

In bank. Appeal from superior court, San Francisco.

Geo. H. Perry, for appellant. *Geo. A. Johnson,* Atty. Gen., for the People.

MCKINSTRY, J. A petition on behalf of defendant was presented to this court on the seventh day of June, 1887, for leave to prove exceptions, which the petitioner alleged the learned judge of the court below had refused to allow. Pen. Code, 1174. Notice of the application to prove the exceptions was not served on the judge below, nor was it served on the district attorney. The provision in section 1174 of the Penal Code is like that in section 652 of the Code of Civil Procedure.

In *Re Estate of Hawes*, 68 Cal. 413, 9 Pac. Rep. 456, this court was of opinion that notice of the application should be given the judge, and that the petition should set forth the exceptions taken, and the evidence in support thereof. We understand this only requires a general statement of the *tendency* of the evidence, so that the materiality of the ruling alleged to have been excepted to may appear. The attorney for the adverse party to the action should also be notified of the intended proceeding.

On the presentation of the petition of the seventh of June this court appointed the Hon. W. T. WALLACE, superior judge, to take proofs, and settle a bill of exceptions in accordance with the facts. June 13, 1887, a bill of exceptions, duly certified by the judge who tried the cause, was filed in this court. On the fifteenth of June, 1887, a supplemental petition was filed by counsel for defendant herein, setting forth the filing of a settled bill on the thirteenth of June as aforesaid, averring that the bill, as settled, "does not conform to the truth," and praying that the Hon. W. T. WALLACE be directed to proceed to the taking of proofs and settlement of a bill of exceptions. The last petition is clearly insufficient.

The order of the seventh June, 1887, is set aside and annulled, and the application based on the petition filed in this court on the fifteenth June, 1887, is denied without prejudice.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

73 Cal. 7

PEOPLE *v.* MONTEITH. (No. 20,271.)

(*Supreme Court of California.* June 29, 1887.)

1. LARCENY—INDICTMENT.
 An indictment, in California, first charged clearly and specifically that one A. M., the defendant, committed the crime of grand larceny in stealing a horse of the value of $200, together with a saddle, bridle, and blanket of the value of $25. That all of said personal property was the property of Gardner F. Williams, and was stolen, taken, and carried away, as aforesaid, *by the said Gardner F. Williams*, etc. *Held*, that such indictment clearly charged the offense against defendant, and the insertion of the name of Gardner F. Williams in the last clause was evidently a mere clerical error, and at most only a defect of form which could not be taken advantage of after verdict.
2. SAME—VARIANCE.
 An indictment charged the stealing of a *horse*. *Held*, evidence of the stealing of a *gelding* is not a variance.
3. EVIDENCE—EXPERTS.
 A witness need not be an expert to testify as to a person's intoxication.

Commissioners' decision. Department 1.

Appeal from superior court, Alameda county.

Geo. A. Johnson, Atty. Gen., for the People. *A. P. Hall* and *Wells, Whitman & Havens*, for appellant.

HAYNE, C. The appellant, Albert Monteith, was convicted of the crime of grand larceny and sentenced to four years in the state prison. Several points are made on the appeal.

1. It is contended that the information is not sufficient to support the judgment. The information first charges, clearly, specifically, and in formal phrase, that Albert Monteith committed the crime of grand larceny in stealing a horse of the value of $200, together with a saddle, bridle, and blanket of the value of $25. It then proceeds as follows: "All of said personal property was then and there the personal property of Gardner F. Williams, and was of the aggregate value of $225, and was stolen, taken, and carried away as aforesaid *by the said Gardner F. Williams*, contrary to the form, force, and effect of the statute," etc.

The argument is that this charges an offense against Gardner F. Williams, and not against the prisoner. But it is apparent that the insertion of the name of Williams was a mere clerical error. The information first distinctly states that the prisoner stole the property, and that it was the property of Williams; and it cannot be that Williams stole his own property. Moreover, the statement in question is that the property was "stolen, taken, and carried away, *as aforesaid*, by the said Gardner F. Williams," which clearly refers

to the first part of the information, and shows that the name of Williams was not intended to follow. The words last quoted may be stricken out altogether, without in any degree impairing the sufficiency of the information. We think that, taking the whole information together, it sufficiently charges the prisoner of the crime of which he was convicted. Very probably there was a defect of form. But defects of form must be taken advantage of by demurrer. A defendant cannot be allowed to take his chances of a favorable verdict, and hold in reserve the power to have an unfavorable one set aside for a defect of form which could easily have been rectified if attention had been called to it at the proper time.

2. Part of the defense was that the prisoner was intoxicated when he took the horse. With reference to this a witness for the prosecution, who saw the prisoner a short time before he took the horse, was asked what appeared to be his condition as to sobriety. It is urged that, since the witness was not an expert, she was not competent to testify on this point. But drunkenness is unfortunately of such common occurrence that it does not require an expert to pronounce upon it. We think the case falls within the principle of *People* v. *Sanford*, 43 Cal. 32, 33.

3. The fact that the information charged the stealing of a horse, whereas the evidence showed the stealing of a "gelding," does not constitute a variance. *People* v. *Pico*, 62 Cal. 52.

The other points made do not require special notice. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order affirmed.

73 Cal. 11

SCOTT *v.* SUPERIOR COURT OF YOLO CO. (No. 12,138.)

(*Supreme Court of California.* June 29, 1887.)

APPEAL—COMPROMISE.

An entry in the docket of a justice of the peace, after judgment rendered, that plaintiff and defendant came into court and settled on a certain basis, is not conclusive; and the payment of the amount of the judgment into court by defendant cannot deprive plaintiff of his right to appeal to the superior court.

In bank. Appeal from superior court, Yolo county.

J. Lambert, for petitioner. *G. P. Harding* and *R. Clark*, for respondent.

TEMPLE, J. One Hayes sued H. H. Scott before a justice of the peace in Yolo county, to recover a sum of money. Defendant answered, offering to permit judgment to be entered against him for a specified sum. The plaintiff declining to accept the offer, a trial was had, in which the plaintiff recovered less than had been offered. Judgment was entered for plaintiff for the amount, and also for defendant for costs. Defendant paid the amount of the judgment into court. Afterwards plaintiff also paid to the justice all of the costs which accrued at the trial. The justice's docket states, after showing the entry of payment and filing defendant's cost-bill: "January 17th. Plaintiff and defendants came into court and settled on the above basis. Plaintiff paid witness fees for himself, $14.60." It does not appear that satisfaction of the judgment was entered by the justice. The plaintiff appealed to the superior court, where a motion was made to dismiss the appeal on the ground that the judgment appealed from had been satisfied. Upon the hearing of this motion, affidavits of various parties were read, tending to show whether the judgment had been satisfied or plaintiff had received the money paid into the justice's court.

There is here no question of jurisdiction. The entry of the justice that the parties appeared and settled upon the basis is not one which he was required to make officially; and, if required to be made, was not conclusive. If it is to be considered a jurisdictional question, however, it was one to be determined by an inquiry into facts *dehors* the record. That investigation was one which the superior court had jurisdiction to make, and its conclusion upon that matter is conclusive in this proceeding. If the plaintiff received the money, ordinarily the superior court should dismiss the appeal; but this fact, if it existed, did not deprive the court of jurisdiction. The mere payment of the money into court by the defendant, under such circumstances, could not deprive the plaintiff of his right to appeal if he was dissatisfied with the judgment. Writ denied.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

73 Cal. 21

DOE *v.* TYLEY and others. (No. 11,990.)

(*Supreme Court of California.* June 30, 1887.)

MINES—LOCATION.

Where, in making a location of a mining claim in the night-time, by mistake all but one or two of the monuments erected to mark its boundaries are placed over upon adjoining claims, such location, if otherwise sufficient, will be held valid to the extent to which the claim was subject to location.

Commissioners' decision. Department 1.

Appeal from superior court, San Bernardino county.

Action to settle title to mining claim. Findings and judgment were for defendants. Plaintiff appeals.

H. C. Rolfe and *J. C. Perkins*, for appellant. *Harris & Allen* and *Paris & Goodcell*, for respondents.

BELCHER, C. C. The contest in this case is about a piece of mining ground in San Bernardino county. The plaintiff claims the ground under a mining location made by W. C. Stoughton on the twenty-fourth day of June, 1885, and the defendants claim it under a location made by the defendant Foster, on the eighteenth day of July, 1885. The ground in question appears to have been a piece of vacant ground lying between other claims, having a width at its northerly end of about 14 feet, and at its southerly end of about 235 feet, and a length of about 700 feet. It was bounded on the easterly side by a claim known as the "Thunderer," on the westerly side by a claim known as the "Veto," on the northerly end by two claims known as "Occidental No. 1" and "No. 2," and on its southerly end by a claim known as the "Invincible." The principal question in the case relates to the validity of Stoughton's location. The court below held the location invalid, because all but one or two of the monuments erected to mark its boundaries were placed over upon the adjoining claims.

Stoughton made his location in the night-time. He was told by one Tucker that the ground was vacant, and advised to locate it. He went out with Tucker and marked off a claim, extending in length from the Invincible to the Occidental, and having a width of about 200 feet at its north end, and of a little more than that at its south end. He erected a monument at each of its four corners, and at about the center of each of its end lines. He also placed a notice of location at the monument at the center of the south line. The north-east corner monument was over on the Thunderer claim, the north-west one was on the Veto claim, the center one at that end was on one of the Occidental claims, and the south-east and south-west ones may have been slightly over on the Thunderer and the Veto.

It seems to be admitted that the location would have been a good one if all the ground covered by it had been vacant, as then it would have been so marked out that its boundaries could be readily traced. But it is insisted that when Stoughton placed his monuments upon adjoining claims, which were held under valid locations, he was a trespasser, and could acquire no rights by such trespassing; that his acts were void, and he could claim nothing by reason of the monuments so placed; that the parcel of land in controversy was not so marked on the ground that *its* boundaries could be readily traced, and therefore his attempted location was wholly invalid. If this be so, then it must follow that if the locator of a mining claim should happen, through mistake or otherwise, to place some of the monuments, necessary to mark out his boundaries, upon another's claim, though they might be over the line only a yard or a rod, still his location must wholly fail.

We do not think this is or ought to be the law. It is familiar history in mining districts that claims have often been found to overlap one another to a greater or less extent. In such cases the question as to the ground covered by two locations has been, which location was prior in time and superior in right? And it has never been held, so far as we know, that either of them must wholly fail because of the conflict. On the contrary, in so far as the ground taken was vacant, each location, if properly made in other respects, has been considered to be valid and sufficient.

We know of no case where the exact point presented here has been decided. In *Richmond Min. Co.* v. *Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, it appeared that 140 feet of the east end of the plaintiffs' location was lost to them by the superior right of the Tip Top claim, and yet, so far as the record shows, it was not even suggested that the balance of the location was affected thereby. If the point made here is good, it would seem that it might have been, and would have been, made there. In that case the principal objection to the right of the plaintiffs to hold the ground in controversy was that the claim covered 800 lineal feet of the lode when there were only three locators; and, under the act of congress and the local laws of that mining district, only 200 feet could be appropriated to each locator. It was claimed, therefore, that the excess of 200 feet over the 600 which the three could locate rendered the whole claim void. But the court said: "We hardly think it needs discussion to decide that the inclusion of a larger number of lineal feet than two hundred, renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, when there exists no intention to claim more than the two hundred feet. Must the whole claim be made void by this mistake which may injure no one, and was without design to violate the law? We can see no reason, in justice or in the nature of the transaction, why the excess may not be rejected, and the claim be held good for the remainder, unless it interferes with rights previously acquired."

So, in *Jupiter Min. Co.* v. *Bodie Con. Min. Co.*, 11 Fed. Rep. 666, it was ruled that where a location, otherwise valid, exceeds the width allowed by law, it is void as to the excess, but valid as to the balance. Why should not the law, thus declared, apply here? We think it does, as "we can see no reason, in justice or in the nature of the transaction," why a different rule should be adopted.

In support of their views, counsel for respondent cite several cases, but in none of them was the question presented here involved. They are chiefly cases where one of the parties was claiming the ground in controversy under a relocation, and insisted upon his right to do so because the first locator had failed to do the necessary work upon his claim, and had thereby forfeited his right to hold it. *Belk* v. *Meagher*, 104 U. S. 279, is the principal case cited, and in that the court, using the language quoted by counsel, said: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public

lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done." While this is undoubtedly sound law, it evidently has nothing to do with the matter in hand.

The other points do not require special notice.

In our opinion, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

73 Cal. 17

PICO *v.* WARNER and others. (No. 11,961.)

(*Supreme Court of California.* June 30, 1887.)

TRUSTS—EXTINGUISHMENT.

The owner of one of two conflicting land grants gave to the owner of the other, one Warner, a power of attorney to dispose of the land granted to him. This grant was rejected by the board of land commissioners. Warner's was confirmed. *Held*, that Warner, upon the rejection of said grant, ceased to be a trustee for its owner, and was free to take, under his grant, the land covered by both grants.

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

Leach & Parker and *Byron Waters*, for appellant. *Bicknell & White*, *Levi Chase*, and *T. V. O'Brien*, for respondents.

BELCHER, C. C. This action was brought to quiet the plaintiff's title to a tract of land in San Diego county, containing 26,688 acres. The plaintiff claims title to the land under a Mexican grant made to Jose Antonio Pico in 1840, and the defendants claim under a like grant, made to the defendant Warner in 1844. In the court below the findings and judgment were in favor of the defendants. The plaintiff appealed, and the case comes here on the judgment roll.

The findings are in substance as follows: On the eighth day of June, 1840, the governor of California granted to Jose Antonio Pico the tract of land known as "Agua Caliente," to the extent of four square leagues, the same being a part of the Valle de San Jose, which contained about ten square leagues, and is now situated in San Diego county. On the twenty-eighth day of November, 1844, the governor of California granted to the defendant J. J. Warner the tract of land known as the "Valle de San Jose," to the extent of six square leagues.

In January, 1852, Pico executed to Warner an instrument in writing, which reads as follows: "Know all men by these presents that I, Jose A. Pico, resident of the city and county of San Diego and state of California, do hereby make and nominate my trusty friend, Hon. J. J. Warner, my attorney in fact, for me and in my name to sell and dispose of a tract of land situated in San Diego county, being part of said Warner's ranch; and I hereby do give, grant, and convey the same unto him, so that he can convey the same in as ample a form as I can. The same is situated, as aforesaid, at Agua Caliente as per title granted me by Juan B. Alvarado, governor of California, dated

eighth day of June, 1840, and registered on the second leaf of the archives of the Book of Records of Unoccupied Lands, dated at Monterey, hereby ratifying all that he may lawfully do in the premises. Given under my hand and seal," etc.

In May, 1852, Warner duly presented to the board of land commissioners, appointed under the act of March 3, 1851, to ascertain and settle private land claims in the state of California, both of the grants before named for confirmation. Thereafter the Pico grant was rejected, and the Warner grant was confirmed, by the board, and on appeal to the United States district court for California the action and decision of the board in regard to each of the grants was duly affirmed. In pursuance of the confirmation of the Warner grant, the United States, on the twentieth day of February, 1880, issued to Warner its patent for the premises described in the complaint, including the Agua Caliente tract and other lands not embraced in the Pico grant. Prior to the commencement of this action, Jose Antonio Pico conveyed to plaintiff, by deed duly executed, all his right, title, and interest in and to the lands embraced in the patent to Warner.

Upon these facts counsel for appellant insist that the judgment was wrong, and should be reversed. Their contention seems to be based upon the theory that the instrument executed by Pico to Warner in January, 1852, was a power of attorney, and that under it Warner became the agent and trustee of Pico; that having, as such agent and trustee, presented the Pico grant for confirmation, and having prosecuted the claim until the grant was found to be invalid and was rejected, Warner could not afterwards take the land covered by it under his own grant, and, having done so, must be deemed to hold the title to the land in trust for Pico, and the plaintiff, as his grantee.

We do not see how this theory can be supported. It is not alleged or claimed that Warner was an unfaithful agent, or that the grant was rejected because of any want of diligence on his part in seeking its confirmation, and the contrary must therefore be assumed. Conceding, then, that he was the trustee of Pico, still when the grant was rejected, without his fault, the object of the trust became impossible, and his duties under it were completed. The trust was therefore extinguished, and he was discharged from all its obligations. Sections 2279, 2282, Civil Code. Whether the grant to Warner was properly located or not on land previously covered by the grant to Pico is a matter which does not concern the plaintiff. When that grant was confirmed it became the duty of the government to locate it, and it must be presumed to have performed that duty properly. The plaintiff had no interest in the grant, or in the land selected under it, and he cannot, therefore, be heard to question the government's action.

In our opinion, the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 26

STEPHENS *v.* DOE. (No. 11,533.)

(*Supreme Court of California.* June 30, 1887.)

MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANT.

The case of a mining employe, who is injured by rock falling upon him while he was engaged in investigating the result of a recent blast, at the direction of the foreman, is within Civil Code Cal. § 1970, which declares that an employer is not liable for the injury of an employe caused by the negligence of a co-employe engaged in the same general business with him, unless the employer neglected to use ordinary care in the selection of the foreman.

Commissioners' decision. Department 1.

Appeal from Superior Court, San Bernardino county.

Rowell & Rowell, for appellant. *H. C. Rolf* and *J. C. Perkins,* for respondent.

FOOTE, C. This was an action for the recovery of damages caused, as is alleged, by injuries received by the plaintiff while employed as a miner by the defendant. The court below, after the evidence for the plaintiff had been introduced before the jury, granted a nonsuit, and from the judgment rendered in the premises this appeal was taken.

From the record it appears that the plaintiff sought employment from the defendant as a miner, and was engaged and put to work as such; that under the orders of defendant's foreman the plaintiff set off a blast in a stope or sort of chamber dug into the earth and rock, and proceeded to inspect the result of the blast in order to discover if any ore had been thrown down thereby, and that, while in the act of doing this, rocks which had been loosened at the top of the chamber just alluded to fell upon him, crushing the bones of one of his legs, and otherwise injuring him.

The plaintiff contends that the judgment should be reversed, for the reason, as he alleges, that the carelessness of the defendant was the proximate cause of the injury, and that he (the plaintiff) was not guilty of contributory negligence in obeying the order of the foreman, and approaching the spot where the blast had been set off before sufficient time had elapsed to permit all loose earth and rocks to fall from the place blasted, and its vicinity, because, as he claims, he was an inexperienced miner, and did not know and appreciate the danger into which he ran in acting as he did. But the facts as disclosed in the record go conclusively to show that the injury to the plaintiff happened by reason of the blast being set off, and there is no evidence of any carelessness on the part of the defendant prior to that time which contributed to the plaintiff's injuries. If there was any carelessness, it was by the foreman who ordered him to inspect the place where the blast had occurred, and the plaintiff who incautiously approached it. But under our statute, (section 1970, Civil Code,) as interpreted by this court, the defendant would not be responsible for the careless acts of a person such as the foreman, who was employed in the same general business with the plaintiff, unless the defendant is shown to have neglected to use ordinary care in the selection of the foreman. *McLean* v. *Blue Point Gravel M. Co.*, 51 Cal. 257.

There is nothing in the record which tends to show that the defendant was guilty of any such negligence, and therefore he is not responsible for the injuries which the plaintiff received, even if, not appreciating the danger, the latter nevertheless obeyed the foreman's instructions. For these reasons we are of opinion that the judgment of the court below should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 598

ALHAMBRA ADDITION WATER CO. *v.* RICHARDSON and others.
(No. 11,502.)

(*Supreme Court of California.* June 27, 1887.)

1. WATERS AND WATER-COURSES—RIGHT TO DIVERT WATER—PRESCRIPTION.
In an action to maintain a riparian right to water, where the defense was a prescriptive right of diversion, the effect of the findings, taken together, was that defendants' user was actual, open, notorious, exclusive, continuous, and uninter-

rupted, under a claim of title as defendants' own, in hostility to plaintiff's title, and with plaintiff's knowledge and acquiescence. *Held*, that the findings sufficiently set out the elements of a prescriptive title.[1]

2. Same.

Findings of a jury which set out that, "for five years before action, and during all seasons, excepting when the soil was moistened by rain, defendants had used for irrigation and domestic purposes 2½ inches of water," and that defendants were owners of a quantity of said water equal to a constant flow of the waters of said canon of 2½ inches, measured under a 4-inch pressure," sufficiently set forth a prescriptive right in defendants to a *definite* portion of the water.

3. Limitation of Actions—Pleading.

A right to property founded upon the statute of limitations is a prescriptive right, and under section 458, Code Civil Proc. Cal., is sufficiently pleaded as a defense by reference to those sections of the Code which bar the cause of action, without setting out any of the facts relied on.

4. Trial—Special Findings.

Facts found by the jury need not be set out in the precise language of the pleading, if the ultimate facts sustaining the verdict necessarily result from those stated in the findings.

5. Same.

Where there is no necessary conflict between the several findings of a jury, the court will not strain the language of a finding to make out a case of conflict.

6. Appeal—Objection not Raised Below.

The rule that an appellate court will not entertain an objection to the sufficiency of a pleading, when such objection has not been raised before the court below, applies whether the defense is by way of denial, or is an affirmative defense.

7. Same—Review of Evidence.

The findings of a jury will not be set aside on the ground that they are unsupported by evidence, where there is a substantial conflict in the evidence.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

Chapman & Hendrick and *Glassell, Smith & Patton*, for appellant. *Wells, Van Dyke & Lee* and *Bicknell & White*, for respondents.

Hayne, C. Action to maintain a riparian right to water; defense, a prescriptive right of diversion. The first point made on behalf of the appellant is that the answer does not sufficiently set forth the prescriptive right relied on. We think the point cannot prevail for two reasons.

In the first place, if it be conceded that the answer is defective, it is a case of mere defects, and not of total absence of averment; and the pleading was treated as sufficient at the trial. Nearly all the defendants' evidence bore more or less directly upon the question of prescriptive right. It was the main question litigated, and in all the voluminous record before us there is not a single objection raising the question of the insufficiency of the pleading. The case was evidently tried on the theory that it was sufficient, and the plaintiff cannot be permitted to raise the question for the first time in the appellate court. *White* v. *San Rafael & S. Q. Co.*, 50 Cal. 419. It is argued that this decision relates to denials only; but the rule extends to affirmative defenses as well. *King* v. *Davis*, 34 Cal. 106; *Hutchings* v. *Castle*, 48 Cal. 153; *Pacific Bridge Co.* v. *Kirkham*, 54 Cal. 561.

But we think the answer is sufficient on another ground. It set up the statute of limitations by reference to sections of the Code of Civil Procedure,

[1] Respecting rights in waters and water-courses acquired by prescription, see Dority v. Dunning, (Me.) 6 Atl. Rep. 6; McConnell v. American Bronze Powder Co., (N. J.) 5 Atl. Rep. 785, and note; Mueller v. Fruen, (Minn.) 30 N. W. Rep. 886; Ware v. Walker, (Cal.) 12 Pac. Rep. 475; Cagle v. Parker, (N. C.) 2 S. E. Rep. 76; Levet v. Lapeyrollerie, (La.) 1 South. Rep. 672.

in accordance with the provision of section 458 of that Code. This was a sufficient pleading of the prescriptive right claimed. The Code expressly provides that the statute of limitations may be pleaded in that manner, and a right to property founded upon the statute of limitations is a prescriptive right. According to some writers, the term "prescription" covers both senses in which the word "limitation" has been used; that is to say, as conferring a right and as taking away a remedy merely. See Ang. Lim. *c.* 1. In the case of *Billings* v. *Hall*, 7 Cal. 4, Chief Justice MURRAY, delivering the opinion, said: "Statutes of limitation are designed to affect the remedy, and not the right or contract. * * * Prescription is defined by civilians to be a right by which a mere possessor acquires the property of a thing which he possesses, by the continuance of his possession during the time fixed by law. * * * So that the difference between statutes of limitation, as they are known to the courts of common law, and the law of prescription, consists in this: that the one confers a right and the other takes away a remedy." But, while this doctrine as to the effect of statutes of limitation still obtains with respect to rights resting in contract, (*McCormick* v. *Brown*, 36 Cal. 184; *Grant* v. *Burr*, 54 Cal. 300,) it has been the settled rule ever since the case of *Arrington* v. *Liscom*, 34 Cal. 365, that the possession of property of the requisite character and time confers a title to the property. *Cannon* v. *Stockmon*, 36 Cal. 540; *San Francisco* v. *Fulde*, 37 Cal. 352; *Williams* v. *Sutton*, 43 Cal. 73; *Sharp* v. *Blankenship*, 59 Cal. 289; *Johnson* v. *Brown*, 63 Cal. 393. So far, therefore, as the title to property is concerned, or, at all events, so far as the title to real property is concerned, prescription and limitation are convertible terms; and a plea of the proper statute of limitations is a good plea of a prescriptive right. The language of decisions with reference to water-rights has been in accordance with this view. See *Crandall* v. *Woods*, 8 Cal. 144; *Campbell* v. *West*, 44 Cal. 646; *Cave* v. *Crafts*, 53 Cal. 135.

But it is contended that there is no finding upon this plea of the statute. There is no finding in the words of the plea. But it is not necessary that the facts should be stated in the finding in the language of the pleading. *Clary* v. *Hazlitt*, 67 Cal. 286, 7 Pac. Rep. 701. Where "probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found," the finding is sufficient. *Coveny* v. *Hale*, 49 Cal. 555; *People* v. *Hagar*, 52 Cal. 189; *Osborne* v. *Clark*, 60 Cal. 623.

Then, do the findings sufficiently set forth the elements of the prescriptive right relied on? The jury returned answers to various questions put to them in relation to the defendants' use of the water, among which are the following, which, for convenience of reference, we will number as follows, viz.:

"(1) Have the defendants uninterruptedly used any waters from the Kewen canon for any period of time? If so, for how long a time, and from what time to what time? *Answer.* Yes, during the time of the occupancy of the defendants.

"(2) Have the defendants used any of the waters of the Kewen canon under a claim of right? If so, for how long a time, and from what time to what time? *A.* Yes; from 1867 to the present time.

"(3) Have the defendants peaceably used any of the waters of the Kewen canon under a claim of right? *A.* Yes.

"(4) Did the plaintiff, or its grantor, the Lake Vineyard Land & Water Association, know that the defendants were using any of said waters under a claim of right or adversely? *A.* Yes.

"(5) Have the defendants exclusively, continuously, and uninterruptedly used any portion of the waters of the Kewen canon? If so, from what time to what time? *A.* Yes; from 1867 to the present time.

"(6) Has the plaintiff and its grantor, the Lake Vineyard Land & Water Association, knowing that the defendants claimed to use any of the waters of the Kewen canon adversely, acquiesced therein. *A.* Yes.

"(7) Did said Wilson [one of plaintiff's predecessors] at all times during his life-time, acquiesce in defendants' use of said water on their said lands? *A.* Yes.

"(8) Has not the plaintiff and its predecessors known for more than five years prior to the commencement of this action that defendants claimed the water-rights, easements, and privileges asserted and claimed in the answer? *A.* Yes.

"(9) Have or have not defendants and their predecessors, for more than twenty years, made such claim, and asserted and maintained it? *A.* Yes, they have.

"(10) Has or has not such use, during said time, been made by defendants openly, notoriously, and under a claim of right, and adversely to all the whole world? *A.* Yes; it has.

"(11) Have or have not defendants, for more than five years prior to the commencement of this action, continuously, notoriously, under claim of right, and adversely to the whole world, used and appropriated upon their said land the water in controversy herein? *A.* Yes; they have.

"(12) Did defendants, or either of them, ever admit to B. D. Wilson, or to his successors, that their rights to the use of the water of the Kewen, or Mill canon, was dependent upon the wishes of Wilson, or his successors, or was otherwise than absolute? *A.* No."

Do these findings sufficiently set forth the elements of a prescriptive right to any portion of the water of Kewer canon? The appellant cites the case of *Unger* v. *Mooney*, 63 Cal. 595, as correctly laying down the requirements of an adverse psssession. Accepting the statement in the opinion in that case as correct, and applying it to the above findings, we think they are sufficient. (*a*) The user was actual, open, and notorious. See findings 11, 10, 5, 2, and 1. Being open and notorious, it could not have been secret and clandestine. Moreover, it is expressly found that the plaintiff and its predecessors knew of the adverse use, (see findings 8, 6, and 4,) and acquiesced in it. See findings 7 and 6. (*b*) It was in hostility to the plaintiff's title. The word "hostility" is not used. But it is found that the use was "adversely to the whole world," (see findings 11 and 10,) and "under a claim of right." See findings 11, 10, 9, 4, 3, and 2. (*c*) It was under a claim of title as defendants' own. See finding 11, 10, 9, 4, 3, and 2. (*d*) It was exclusive of any other right. This seems to us to follow from the fact that it was under a claim of right, and adversely to the whole world, as shown above. But in addition to this the word "exclusively" is used. See finding 5. (*e*) It was continuous and uninterrupted. See findings 11, 5, and 1.

The fallacy of the argument of the ingenious counsel for the appellant is in assuming that each finding must be considered separately, and that one cannot be "helped out" by the others. The counsel treats the findings as if they were dug up from the ruins of ancient cities at different epochs. But we think they must be read together. That is the rule with reference to the findings of a judge. "The findings of a court cannot be altogether detached from each other, and considered piece-meal. If a particular finding be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning." *Millard* v. *Hathaway*, 27 Cal. 140, 141; *Kimball* v. *Lohmas*, 31 Cal. 156; *Polack* v. *McGrath*, 38 Cal. 669. And we see no reason why the same rule should not be applied to a special verdict.

Reading these findings together, we think they sufficiently show an adverse user of some portion of the water of Kewen canon. What portion? This question is answered by other findings, which we will designate as follows: "(*a*) Did the defendants since the year 1870 use the water in question for the purpose of irrigation, domestic use, and stock purposes, at all times when the same was necessary for such purposes, under a claim of right? *Answer.* Yes. (*b*) What quantity of water is required to irrigate defendants' premises, and

for their domestic purposes, in the same manner as has been used by them for the five years immediately before the commencement of this action? *A.* Two and one-third inches. (*c*) During what seasons of the year is water required upon defendants' lands for irrigating purposes, and what quantity of water is required for irrigating purposes only? *A.* During all seasons, excepting when the soil is moistened by the rains. Two and one-fourth inches. (*d*) What quantity of water is necessary for the domestic use of the defendants? *A.* One-twelfth of an inch." And in its supplementary findings the court found that the defendants are the owners of a quantity of said water "equal to a constant flow of the waters of said canon of two and one-third inches, measured under a four-inch pressure."

Reading all these findings together, we think they sufficiently set forth a prescriptive right in defendants to a definite portion of the water.

But it is earnestly contended that the findings are contradictory It is said that the findings as to an adverse user by the defendants are in contradiction of the following findings, viz.: "Did J. H. Carpenter, during the time he occupied the place known as the Richardson place, assert any ownership in any portion of the waters of Kewen canon? *Answer.* Yes. Did said Carpenter use any of said waters by the permission of and under license from B. D. Wilson? *A.* Yes."

The argument is that if Carpenter's use was by the permission of Wilson, it could not have been adverse to him. But who is Carpenter, and when did he occupy the place "known as the Richardson place?" There is nothing in the findings, or in any other part of the judgment roll, which enlightens us as to these points. It does not help the appellant that the evidence shows who Carpenter is, and when he occupied the place; for the point relates to the findings, and, for anything they show to the contrary, Carpenter is an entirely irrelevant personage.

It is next urged that the findings as to the adverse user by the defendants, and the acquiescence of the plaintiff and its predecessors, are in contradiction of the following finding: "Have the employes of the plaintiff and its grantors, since the pipe was laid through the Richardson place, claimed and exercised the right to turn the water out of the pipe conveying the same by shutting it off at the head of the pipe? *Answer.* Yes."

When was the pipe "laid through the Richardson place?" The findings are silent upon this point; and, unless we can know the time, we cannot say the shutting off of the water had anything to do with the defendants' case. But on looking into the answer we see that the pipe was laid in 1875. But, nevertheless, we do not think a contradiction in the findings is made out. It would be straining the finding to say that it means that the employes of the plaintiff and its grantors claimed and exercised the right of shutting off the water *ever* since the pipe was laid. The finding would be true if they claimed and exercised the right for a single day. Now, since 1875, when, according to the answer, the pipe was laid, a period of more than eight years elapsed before the filing of the complaint; and therefore there was ample time for whatever the above finding means to have happened before the defendants' adverse user need commence. There is therefore no necessary conflict between the findings. And we do not think the court should strain the language of a finding to make out a case of conflict. The findings should be reconciled, if it can be reasonably done and be so construed *ut res magis valeat quam pereat.*

The findings, therefore, dispose of the issues, and sufficiently set forth the elements of an adverse user, and are not contradictory. It is contended, however, that they are not supported by the evidence. But the conflict in the evidence was extremely substantial, and therefore the findings cannot be set aside on this ground, although it be conceded that the user did not commence to be adverse until the Wilson deed, in 1873. Many of the arguments on be-

half of the appellant are merely reasons why the verdict should have been the other way, and were eminently proper to have been addressed to the jury, but, in view of the conflict in the evidence, cannot be entertained on appeal. Thus, when it is said that a party cannot acquire a right by the use of surplus water which is not needed by the owner, the answer is that the jury did not believe it was a case of the use of surplus water, and it cannot be said, upon the record, that they were not justified in so finding. So, when it is said that there was no use of a definite quantity of water, the answer is that the jury and the judge evidently thought that there was, and it cannot be said that there was no evidence upon the point. There was much testimony to the effect that they used what was necessary, and some testimony as to how much was necessary. Part of this was in relation to measurement by inches and pressure.

It must be remembered that the case does not admit of the nicest accuracy of measurement, and the question must be looked at from a practical point of view. Pushed to its logical conclusion, the argument of appellant would prevent the acquirement of a water-right by adverse user, except when the party diverted the whole stream, or measured what he used by a meter,—cases which very rarely occur in those parts of the state where irrigation has been practiced, at least until very recently. So with reference to the argument that where a permissive use is once established some point at which it became adverse must be shown. The occupation of Carpenter was before 1867. The defendant Hutchinson bought out his possessory claim to the land, and, assuming that Carpenter's use of the water was permissive, there was ample testimony from which the jury were authorized to infer that the use of the subsequent occupants was adverse. With reference to the shutting off of the water subsequent to the laying of the pipe, the defendants' evidence shows that it was done on but a single occasion, and on that occasion Mrs. Richardson went out to the man who did it, and "asked him what in thunder he was meddling with that hydrant for," and the water was then turned on, and does not appear to have been subsequently interfered with. This does not seem to us to have interrupted the defendants' user.

We do not attach much importance to the change in the mode of conducting the water across the defendants' land. At first it was brought through a ditch. Then the parties agreed to substitute an iron pipe, which naturally changed the route to some extent. The change was beneficial to all parties, and the arrangement has taken place between persons whose title to water was absolute and undisputed, without in any degree interfering with the *status* of either. The material thing was the flow of water, and whether it flowed through a ditch or a pipe, or by a direct or circuitous route, does not matter. The evidence as to a license being established on that occasion is negatived by the verdict.

The appellant contends, however, that the court committed an error in law in excluding the declarations of B. D. Wilson, who formerly owned the land of defendants, with reference to the water, and the nature of the defendants' use of it. If the controversy had been concerning the land which Wilson had conveyed, the declarations of the grantor would probably have been admissible. But the controversy is not concerning that land. It is concerning water. The defendants cannot claim the water by virtue of the conveyance of Wilson. Their right to it arises from their use of it, which was a right acquired adversely to Wilson, and not through him. Where a right rests upon the statute of limitations, "the disseizor acquires a new title, founded on the disseizin. He does not acquire or succeed to the title and estate of the disseizee, but is vested with a new title and estate, founded on and springing from the disseizin." *Williams* v. *Sutton,* 43 Cal. 73. This being the case, the declarations sought to be proven were mere declarations of a party in his own favor, and were properly excluded.

We do not think the appellant's criticisms upon the form of the judgment are well founded.

The foregoing disposes of the main points made. In the 240 pages of argument filed on behalf of appellant many points are made which do not require special notice. Many of them are arguments as to the weight of evidence; some are objections to the form of the verdict, which should have been taken before it was received and recorded, (*Algier* v. *Steamer Maria*, 14 Cal. 170,) and some have no support in the record.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion judgment and order affirmed.

73 Cal. 25

MURDOCK *v.* CLARKE. (No. 11,866.)

(*Supreme Court of California.* June 30, 1887.)

APPEAL—SERVICE OF NOTICE.

An appeal was taken to the California supreme court in a case tried in Oroville, Butte county, and notice of appeal was served by depositing it in the mail, at Oroville, directed to respondent's counsel in Sacramento, where he resided. Appellant's counsel resided, one at Quincy, Plumas county, the other at Alturas. There was regular communication by mail between Oroville and Sacramento, and between both Quincy and Alturas and Sacramento. *Held*, that the notice of appeal was not served as required by law, and that the appeal should be dismissed.

Department 1. Appeal from superior court, county of Butte.

J. D. Goodwin and *D. W. Jenks*, for appellant. *A. L. Hart* and *D. Solon Holl*, for respondent.

BY THE COURT. Motion is made to dismiss this appeal on the ground, among others, that the notice of appeal was not served as required by law. Appellant's attorneys resided, one at Quincy, Plumas county, the other at Alturas. Respondent's counsel resided at Sacramento. The case was pending in Butte county, and was tried at Oroville, in that county. There was regular communication by mail between Oroville and Sacramento; also between both Quincy and Alturas and Sacramento. The notice of appeal was served by mail from Oroville. The objection seems to be sustained by the case of *Reed* v. *Allison*, 61 Cal. 461; also by *Moore* v. *Besse*, 35 Cal. 184; and *Cunningham* v. *Warnekey*, 61 Cal. 507.

If we were to adopt the view of appellant, that it would be a sufficient answer to the objection to show that the notice of appeal was actually received by respondents' counsel in due time, that fact is not made to appear here. Manifestly, under such view, this should appear by express and positive evidence. It could not be shown by a presumption as to the regularity of the mails. The alleged stipulation to extend the time for filing transcript is denied, and is not produced. If it were admitted, however, it would be difficult to see how it could constitute a waiver of the notice of appeal.

The motion must be granted. Appeal dismissed.

73 Cal. 43

CADWALADER *v.* NASH. (No. 11,600.)

(*Supreme Court of California.* July 1, 1887.)

1. DEED—DESCRIPTION—EVIDENCE.

In an action to quiet title, *held*, that where the land in controversy described in a sheriff's deed was incapable of identification without reference to some map, and there were two maps which answered the description equally well, neither of which was ever filed with the county recorder, testimony of the sheriff as to which map he referred to in the deed was inadmissible.

2. JUDICIAL SALE—DEED—DESRIPTION.
An insufficient description in a notice of sale and in a sheriff's deed, of property sold at execution sale, is not waived by the failure of the judgment debtor to apply to the court to have the sale set aside.[1]

3. TAXATION—ASSESSMENT—VALIDITY.
Under section 3650, Pol. Code Cal., which provides that the assessor must list, in separate columns, under the appropriate head, city and town lots, naming the city or town, and the number of the lot and block, according to the system of numbering in such city or town, an assessment of taxes on one half of a pueblo lot, which is subdivided into a large number of smaller lots, as one undivided parcel, is void, no return having been made by the owner, and nothing appearing in the record to show that he refused to make a return.

Department 1. Appeal from superior court, San Diego county.
M. A. Luce, Works & Titus, and *Philip A. Galpin*, for appellant. *Levi Chase*, for respondent.

PATERSON, J. Action to quiet title. Plaintiff is the executrix of the last will and estate of George Cadwalader, deceased. On July 25, 1877, and thereafter, to December 20, 1877, defendant, Nash, was the owner of the property in controversy, except a few lots that he had conveyed to Phillips. In July, 1877, Frank Johnson commenced an action against Nash, and on July 25, 1877, caused an attachment to be levied on the property mentioned in the complaint. Thereafter Johnson recovered judgment therein, execution was issued, and certain property sold thereunder, which plaintiff claims included the property in controversy. Some of the lots numbered in the complaint are described as being in the "right of way *through Middletown*, all according to a map filed on the partition of said *Middletown property*, in the case of *Baldwin et al.* v. *Couts et al.* Decree recorded October 24, 1874, in Book 4 of Miscellaneous Records of said county." And in the findings they are described substantially in the same way.

The return of the sheriff on the execution, and also the sheriff's deed, admitted in evidence against the objections of appellant, describe the premises sold as follows: "Lots number [giving the numbers] and blocks number, [giving the numbers,] all described according to the *commissioner's map of Middletown*, on *file* in the office of the *recorder* of San Diego county," etc. The respondent, in order to identify the property described in the sheriff's deed, introduced in evidence a map marked "Exhibit A," and commonly called the "Referee's Map," or "Jackson Map." This map is designated as "Referee's Map," and not a "Commissioner's Map," and was filed in the county clerk's office, and not in the recorder's office, and was indorsed, "Filed by the clerk of the district court." At that date, and for a long time thereafter, the office of clerk and recorder was held by the same person, to-wit, A. S. Grant. He was clerk and *ex officio* recorder of the county. The business of the two offices was done in the same room in the court-house, and the maps were kept together in the same drawer in that office. There was also in evidence another map of Middletown, known as the "Pascoe Map," and indorsed "John B. Mhoon, Referee." This map is also marked as an exhibit in *Baldwin* v. *Couts*, and filed by the clerk, August 3, 1869. It was found in the recorder's office, with his tag attached to it, and was with the rest of the maps in that office. This exhibit shows the described lots and blocks to be situated in different parts of Middletown from those shown by the Jackson map.

The court being in doubt as to which map was described in the deed from the words of the deed, and consequently being uncertain what lots the deed described, permitted parol proof to be introduced. The sheriff was called to

[1] An erroneous or uncertain description in the notice of a judicial sale, or in the deed given pursuant thereto, will avoid the sale. Herrick v. Merritt, (Minn.) 33 N. W. Rep. ——; Helmer v. Rehm, (Neb.) 15 N. W. Rep. 344; Burrows v. Gibson, (Mich.) 3 N. W. Rep. 293; Chambers v. Brown, (Tex.) 2 S. W. Rep. 518; Allday v. Whittaker, (Tex.) 1 S. W. Rep. 794; Pfeiffer v. Lindsay, Id. 265.

testify as to the map, and under objection said: "We took a traced copy of the map before starting out with the surveyor. *This* is the map I referred to in the deed as the commissioner's map. This is the map we used," referring to Exhibit A. It is claimed by appellant that by parol proof the court undertook to find out where the premises were which ought to have been, but were not, described in the conveyance. This is simply to pass the title to land by *parol*, for without this proof the land could not be identified. The deed alone did not describe it, and for this error a new trial should be granted.

1. Where a deed refers in general terms to the *official* map of a town, parol evidence is admissible to identify the map which has been officially declared to be the town map, and the fact that a particular reference in the deed to the survey and to the surveyor who made the map does not literally accord with the indorsement on the map is immaterial. *Penry* v. *Richards*, 52 Cal. 496. In all cases where the deed refers to a map or instrument in writing, the latter is regarded as incorporated in the deed as a part thereof. *Vance* v. *Fore*, 24 Cal. 436. The deed and the map or instrument, however, when taken together, must be as certain in respect to the description as a description contained in the deed itself, and the identity of the map referred to must be clearly established. When the deed itself contains a sufficient description of the land, so that it can be identified without resorting to the map to ascertain its locality, it is not necessary for the party introducing the deed in support of his title to produce the map in connection with it; but when, as in the case at bar, the land is incapable of identification without reference to *some map*, the map referred to in the deed is as essential as the deed itself. Accordingly it has been held that a deed which described the land conveyed as "lot No. 1 in the subdivision of the tract of land lying on the new county road, and known as 'Foley's Tract,' the map of which is duly recorded in the recorder's office, does not, when taken alone, contain a description sufficient to attach itself to any particular tract of land without the aid of further evidence." *Caldwell* v. *Center*, 30 Cal. 540. In that case the court held that a map pasted between the leaves of the recorder's book was not admissible in evidence with the deed to identify the land, because not recorded. In *Brandon* v. *Leddy*, 67 Cal. 43, 7 Pac. Rep. 33, the deed did not show whether the lot described was north or south of the base line established by the official map; and, although it was shown that the grantor never owned any lot south of the base line, the court held that the deed itself should show the situation of the lot; and, as the ambiguity was patent, resort could not be had to parol.

In the case at bar it was not shown whether there was a base line with blocks and lots of corresponding numbers on each side of the line, but the two maps in evidence represent blocks and lots of corresponding numbers as being situated in different parts of Middletown. Thus, for instance, Exhibit A represents block 96 as situated six blocks north of California avenue, while Exhibit B shows that it is only two blocks north of the avenue; and block 150 is represented on Map A as being six blocks north of California avenue, while on Map B it is situated one block south of the avenue. Which map is correct? Both are referee's maps, in different cases it is true, but of the same title, between the same parties, and for the same purpose,—partition of lands. If it be conceded that "commissioner's map of Middletown" is equivalent to "referee's map," the fact remains that Exhibit B answers the description as well as Exhibit A. Both maps were used in suits between the same parties for the same purpose, and neither of them was ever filed with the county recorder. They were both marked as exhibits in civil cases pending in the district court, were filed therein by the clerk thereof, and the clerk did not and could not lawfully make them a record of any other office. If the fact that the clerk and *ex officio* recorder kept the records of both offices in the same room be material at all, it would tend to show that the map upon which he put a tag showing it to be among the records of the recorder (Exhibit B) was

the map referred to by the sheriff in his deed as "commissioner's map of Middletown on file in the office of the recorder of said county of San Diego."

The fact that Map B contains a plat of only a portion of the blocks and lots numbered in the deed of the sheriff, and that Map A contains what appears to be a full plat of Middletown, might, under some circumstances, be pertinent and forceful, but in view of the other facts here shown cannot avail the respondent. The deed introduced in evidence to support the title of the estate to these particular lots in controversy described the premises as above quoted, while the complaint, findings, and decree herein, in describing them, read "all according to the map filed in the partition of said Middletown property in the case of *Baldwin et al.* v. *Couts et al.* Decree recorded October 24, 1874, in Book 4 of Miscellaneous Records of said county." The record shows that the description of the land intended to be conveyed is not complete and certain without reference to a map. No one could find it without the map. The sheriff himself, in making the levy, found the property only by using the map and making a survey. Against the objection of the defendant, he was allowed to testify: "We took a traced copy of the map before starting out with the surveyor. This is the map [Exhibit A] I referred to in the deed as the commissioner's map. This is the map we used." Without this testimony the court could not have found that the property conveyed, or intended to be conveyed, by the sheriff, was shown by "the map filed in the partition of the said Middletown property in the case of *Baldwin* v. *Couts*, etc." That this testimony was inadmissible we think there can be no doubt. *Mason* v. *White*, 11 Barb. 175.

The contention of the respondent that, as Nash was a party to the proceedings in which the execution was issued, he is presumed to have known all that was done by the sheriff, and if there was any irregularity detrimental to his interests he should have applied to the court to set aside the sale, and, having failed to do so, the purchaser took all the title Nash held, cannot be maintained. Of course, in judicial sales, where the court acts directly upon the property sold, the deed can be made to conform to the true description of the thing sold, and the rules applicable to sales between man and man to a great extent apply; but not so in case of execution sales. Freeman on Executions, in section 281, says: "The object of the advertisement is to give notoriety to the proposed sale, so that all persons may understand what it is that is to be sold. No one will bid unless he can know what he is bidding for. The rights of the defendant must necessarily be sacrificed unless the thing to be sold is made certain. People may refuse to bid, or, after successful bidding, may claim more than the officer intended to sell. So the deed ought to be free from ambiguity." Id. § 330. "Hence a description from which the land intended to be transferred can be located, is indispensable to the validity of the deed."

Our conclusions upon this branch of the case therefore are—*First*, that the court erred in admitting the testimony of the sheriff; and, *second*, that without this testimony the evidence does not support the allegations of the complaint, or the findings of the court relating to the Middletown lots.

It is admitted that there is no uncertainty in the sheriff's deed as to the E. ½ of pueblo lots 1,126 and 1,127, and the only question in relation to those lots is as to the validity of the tax deeds under which defendant claims title thereto. In June, 1873, Nash for a valuable consideration conveyed to Phillips certain lots and blocks of land, the same being a portion of the E. ½ of pueblo lot No. 1,126, and Phillips reconveyed the same to Nash by deed dated December 13, 1883. As there was no uncertainty in the sheriff's deed so far as these two pueblo lots were concerned, the defendant's interest in every portion thereof not previously conveyed to Phillips passed to Cadwalader by virtue of the sheriff's levy, sale, and deed under execution, and defendant's title thereto, if he has any, is derived from the tax deed.

It appears from the findings of the court that these pueblo lots are large lots containing several acres, and that they are subdivided into a large number of smaller lots designated upon the map by numbers. The decree adjudges Nash to be the owner of over 150 subdivisions, being a portion of the E. $\frac{1}{8}$ of one pueblo lot alone, giving the number of each block and lot. The map showing these subdivisions was made by the city engineer in 1870.

The assessor did not assess the lots nor even the block separately, but assessed the E. $\frac{1}{8}$ of lot 1,126 as one undivided parcel. This, we think, could not under the law be done. "The assessor must prepare an assessment book, * * * in which must be listed all property within the county, and in which must be specified in separate columns, under the appropriate head, * * * *third*, city and town lots, naming the city or town, and the number of the lot and block according to the system of numbering in such city or town, and improvements thereon; *fourth*, all personal property showing the number, kind, amount, quality; but a failure to enumerate in detail such *personal* property *does not invalidate the assessment.*" Section 3650, Pol. Code. Under the revenue act of 1861 it was held that, where *one man owned and returned* a whole block or half block, the assessor might list and value it as a whole. *People* v. *Morse*, 43 Cal. 541; *People* v. *Culverwell*, 44 Cal. 620. Since the decisions in these cases the duty of the assessor has been made more specific and imperative, as will be seen by a comparison of section 20 of the revenue act of 1861 with the provisions of section 3650 of the Political Code. Of course, where the owner himself returns the property as a whole, he cannot be heard to complain that it has been improperly listed in that manner; but where, as in this case, no return was made by the owner, and there is nothing to show that the owners of the property refused to make a return to the assessor, we are bound to say that the assessment is void, or to hold that the imperative language of section 3650 is simply directory, unimportant, and that the assessor may regard it or disregard it at will. We think that the rule prescribed is based upon reason, and should be followed. Several parties may own different portions of a pueblo lot divided into city blocks containing several hundred well-known lots. An owner of one lot who is a nonresident would be required, if his lot be assessed, as this lot was, to pay the tax on the whole property to save his own from tax sale; and this, without any fault of his own. There is no way of ascertaining what proportion of the whole tax any particular lot-owner should pay, and of course the tax collector will accept nothing less than the full amount of the tax.

That the assessor is bound to assess in subdivisions is apparent also from provisions of the Code which relate to assessment and sale. Thus he is required to exact from each person under oath a statement showing separately—"*Fifth*, an exact description of all lands in parcels and subdivisions." "When the assessor has not received from the owner of the tract of land the statement required by section 3629, or when such statement does not sufficiently describe a tract of land to enable the assessor to assess the same as required by law, * * * he shall cite such owners to appear," etc. Section 3634. The form of the assessment book is prescribed, in which one column is for "Real Estate other than City and Town Lots," and half columns for: "Range E. or W.;" "Township N. or S;" "Section;" "Subdivision of Section." Also a column for "City or Town Lots," with half columns beneath for "Block," "Lot," and "Fraction." Section 3651. "The supervisors must provide for the assessor * * * maps of cities and villages." Sections 3658, 3659. The tax collector must commence the sale at the head of the list, and continue alphabetically, or in the numerical order of lots and blocks, until completed, (section 3771;) and the owner has the right to designate what particular parcel he wishes sold, if less than the whole, (section 3773.)

We think, therefore, that the court below was right in its conclusion that the assessment, sale, and deed affecting the pueblo was void.

Appellant requests that the court below be directed to enter judgment in his favor for the Middletown lots, but this request cannot be granted. The evidence on another trial may show a state of facts entirely different from those shown in this record. Judgment and order reversed and cause remanded for a new trial.

We concur: McKINSTRY, J.; TEMPLE, J.

73 Cal. 72

SMITH *v.* LING. (No. 11,722.)

(*Supreme Court of California.* July 1, 1887.)

PRACTICE IN CIVIL CASES—DISMISSAL BY CONSENT.

Where the complaint is, by consent of both parties, after answer denying all the allegations therein, stricken out, the court should dismiss the action.

Department 2. Appeal from superior court, Los Angeles county.

N. Smith, appellant, *pro se*. *R. A. Ling*, for respondent.

SHARPSTEIN, J. The record on this appeal consists of a copy of a complaint, and of an answer denying all the allegations of the complaint, and of a judgment in these words: "WEDNESDAY, June 10, 1885.

"This cause came regularly on for trial, all parties in court with their respective attorneys. Upon motion of the plaintiff, and by consent of defendant, ordered that the amended complaint be stricken out. Defendant moved the court for judgment upon the pleadings. Motion argued, and ordered that the action be dismissed. A. BRUNSON, Judge."

The form is unique, but we gather from it that the complaint was stricken out by consent of both parties, and that the court then dismissed the action. We see no error in that. After the complaint was stricken out, there was no case to try, and it was proper to dismiss the proceeding. An action can only be commenced by filing a complaint, and when the complaint is stricken out the action is terminated.

Judgment affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

73 Cal. 58

WOOSTER and others *v.* NEVILLS and others. (No. 11,973.)

(*Supreme Court of California.* July 1, 1887.)

FRAUD—REMEDIES—DEMAND AND TENDER.

Defendant induced plaintiffs to transfer to him their stock in a mining company, in order that he might sell the mine, and, instead of acting in good faith, proceeded in fraud of their rights to sell the mine for a very large sum of money, for which he did not account to them, except to give them $8,000, and to have them cancel a debt due from him to them of $3,000; retaining the stock, which was worth much more than he represented it to be, in his own name, and drawing dividends thereon. *Held*, that plaintiffs could maintain an action against defendant as their agent for an accounting, and to compel him to return the stock, without previously making a demand for the return of the stock, and tender of the money that they had received.

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco.

Sidney V. Smith, for appellants. *A. C. Adams*, *Curtis H. Lindley*, and *Lindley & Spagnoli*, for respondents.

FOOTE, C. This action was for an accounting, and to compel the defendant William A. Nevills to return to plaintiffs certain mining stock a transfer of which he had fraudulently obtained from them. The complaint was demurred to, the demurrer sustained, and, the plaintiffs declining to amend

their pleading, judgment was rendered for the defendant. In support of that judgment their counsel contend that the complaint was to compel the rescission of a contract, and that, in order to obtain that right, it was incumbent upon the plaintiffs to have alleged in their pleading that they had made a demand for the return of their stock, and tender of the money they had received from Nevills prior to the institution of this suit.

But as it appears to us, from the statement of facts set out in the complaint, Nevills was not a purchaser of the stock from the plaintiffs in the proper and legal sense of that term. He never was, at any time during the transaction, so far as they were concerned, anything more than an agent or trustee, bound to act for them in the whole matter in the utmost good faith. He deceived them into the belief that he, for them, could sell the mine in which they were stockholders for a certain sum of money, if they would make him the apparent, but not the real, owner of the stock. For the purpose, not of vesting title to the stock in him, but to enable him the better as their agent to sell the mine upon which the issue of the stock was based, they transferred the stock to him as requested. Instead of acting in good faith towards the plaintiffs, Nevills proceeded in fraud of their rights to sell the mine for a very large sum of money, for which he did not account to the plaintiffs, except to give them $8,000, and to have them cancel a debt due from him to them of $3,000. He still retains their stock in his own name, in a mine which is worth many thousand dollars more than he falsely assured the plaintiffs was its value, and has drawn their dividends upon the stock.

We see no good reason why, under such a state of facts, Mr. Nevills should not be made to retransfer this stock to its true owners, towards whom he assumed the relation of an agent or trustee, nor why a full accounting, as between the parties, should not be had. The facts asserted as true in the complaint do not show any sale of the stock to Nevills on the part of the plaintiffs. He was to make a sale of the mine for their account. He deceived them as to the price he could obtain for the mine, and deceived them into the belief that a sale could more easily be effected if the stock stood in his name rather than in theirs. Thus, as we have before said, he was nothing more than their agent, in whose apparent ownership the stock stood. The transaction was not one of sale. It was the giving to an agent power, clothed with apparent ownership, to make a sale to third parties. In such a case, where an agent has abused his trust, and holds his principal's property in fraud, the principal can compel a return of his property, and any increase of it by way of dividends while in the agent's possession.

It was unnecessary to have made a tender of money to Nevills before this suit was instituted, for there is no contract of sale, or actual sale, alleged by the complaint to have been made to him by the plaintiffs of the stock in dispute. The plaintiffs, as one of the incidents necessary to a proper accounting between Nevills and themselves, seek to recover from him, as their trustee, property of which he has, through turpitude, gotten from them the apparent ownership, to which property he never had, nor was intended under their agreement to have had, any title. As no sale of the stock was made to him, no rescission of a sale was asked for in the complaint; and no rescission being required, no tender of any money prior to the bringing of the action was needed.

As a part of the accounting asked for from Nevills by the plaintiffs, they demand from him a return of their stock, which he obtained from them by fraudulent statements, and to which he had no shadow of claim, either in his own or their estimation, beyond its possession and apparent ownership, as their trustee. It is evident, therefore, upon the facts stated in the complaint, if they are to be taken as true, that the plaintiffs were entitled to an accounting as asked for, and the other relief prayed for therein.

The judgment and order dissolving the injunction should be reversed, and

the cause remanded, with instructions to the court below to overrule the demurrer to the complaint, and give leave to the defendants to answer that pleading within a reasonable time, upon which the cause can be tried upon its merits.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with direction to the court below to overrule the demurrer to the complaint, with leave to defendants to answer within a reasonable time.

73 Cal. 52

HANCOCK *v.* BURTON and others. (No. 11,599.)

(*Supreme Court of California.* July 1, 1887.)

1. LIMITATION OF ACTION—ADVERSE POSSESSION—PROOF.
In an action of ejectment, where the plaintiff showed clearly a chain of title to the demanded premises, reaching back to the patent from the government, and there was at least substantial conflict as to whether the defendants, who claimed by adverse occupation, had occupied for such time, and in such manner, as would enable them to set up the statute of limitations, *held*, there was sufficient evidence to support a verdict for the plaintiff.[1]

2. APPEAL—REVIEW—OBJECTION NOT TAKEN BELOW.
Where, in an action of ejectment brought against several defendants, who claimed that they were severally in possession of specific portions of the land in controversy, a judgment was rendered against each of the defendants for the entire tract, *held*, on appeal from an order denying a new trial, that whether such a judgment was error could not be considered, no specification of the insufficiency of the evidence on this point having been made in the motion for a new trial.

Department 1. Appeal from superior court, San Bernardino county.

Paris, Smith & Hutton and *Paris, Goodcell & Fox*, for appellants. *Curtis & Otis* and *Barclay, Wilson & Reddick*, for respondent.

BY THE COURT. The plaintiff brought this action against the appellants and one Thomas M. Agers, to recover the possession of a tract of land in San Bernardino county, containing 1,280 acres, with $500 damages for the withholding thereof, and $100 per annum from and after January 1, 1879, for rent and profits. The defendants denied the plaintiff's ownership or right to the possession of the land, and denied that he had been or would be damaged in the sums of money alleged, or in any sums, by reason of their withholding its possession, or on account of a loss of its rents and profits. They then set up that they were in possession of and holding separate parcels of the land, and that as to each one of them the plaintiff's cause of action was barred by the statute of limitations. The case was tried before a jury, and a verdict was returned in favor of the plaintiff, but without damages, on which judgment was entered. The appellants moved for a new trial, and now prosecute this appeal from the judgment, and an order denying their motion.

Two points only are made in support of the appeal: (1) That the verdict was not justified by the evidence; and (2) that the judgment was erroneously entered against each of the defendants for the possession of the entire tract, when it should only have been against each one for the parcel separately claimed by him.

1. We think there was ample evidence to support the verdict. The plaintiff showed clearly that he had title to the demanded premises, and there was

[1] Respecting the character of occupancy necessary to constitute adverse possession, see Cooper v. Morris, (N. J.) 7 Atl. Rep. note, 427; Merrill v. Tobin, 30 Fed. Rep. 738, Roots v. Beck, (Ind.) 9 N. E. Rep. 698, and note; Murphy v. Doyle, (Minn.) 33 N. W Rep. 220; Murray v. Hudson, (Mich.) 32 N. W. Rep. 889.

at least a substantial conflict as to whether the defendants had occupied and claimed and paid taxes on their respective parcels for such time and in such manner as would enable them to assert title under the statute of limitations.

2. Conceding that the court erred in rendering a joint judgment against the defendants for the whole tract, still the error cannot be considered on this appeal. Although the defendants answered severally, claiming that they were not jointly withholding the entire tract from the plaintiff, and that they were severally in possession of specific portions thereof only, the plaintiff was not precluded from proving his allegation that they were jointly in possession of the entire tract. It was so found by the jury, and there is no specification, in the statement on motion for new trial, of insufficiency of the evidence in this respect.

It follows that the judgment and order should be affirmed. So ordered.

73 Cal. 105

WHITE *v.* WHITE. (No. 12,144.)

(*Supreme Court of California.* July 7, 1887.)

DIVORCE—ALIMONY—APPEAL.

An order in a divorce suit for a payment, an account of alimony, counsel's fees, and costs, will not be interfered with unless it appears affirmatively and clearly that there has been a gross abuse of discretion by the court below in making the order.

In bank. Appeal from superior court, Mendocino county.

E. D. Wheeler and *Barclay Henley*, for appellant. *H. E. Highton*, *H. C. McPike*, and *J. A. Cooper*, for respondent.

MCFARLAND, J. This is an action of divorce brought by the husband against the wife. By her answer the wife denies the averments of the complaint, which state facts constituting a cause for divorce; and by a cross-complaint she avers causes of divorce against the husband. The action is still pending in the court below; but during its progress the court made an order directing the payment by said plaintiff to said defendant of certain sums, aggregating $3,850, as and for costs and expenses, alimony and counsel fees, and from this order the plaintiff appeals. The only point made by appellant is that the allowance was excessive, and an abuse of discretion. The evidence upon which the order was made was conflicting as to appellant's financial ability, and as to other matters which it was the duty of the court below to consider. Of course we could not be expected, under any circumstances, to interfere with the judgment of a *nisi prius* judge in such a matter, unless it appeared affirmatively and clearly that there had been a gross abuse of discretion. No such abuse appears here, and therefore we will not stop to determine whether or not our estimates of counsel fees, costs, expenses, etc., would correspond with those of the learned judge of the court below. This view disposes of the appeal, and therefore it is not necessary to consider the other point made by counsel for respondent, viz., that an appeal does not lie from an order of this kind in a divorce case, where the marriage and the relation of the husband and wife are not denied. Order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; PATERSON, J.; TEMPLE, J.

73 Cal. 97

Ex parte WILSON. (No. 20,315.)

(*Supreme Court of California.* July 7, 1887.)

DIVORCE—ALIMONY—CONTEMPT.

Upon the hearing of a petition for *habeas corpus*, where it appears that the petitioner was committed for contempt in not paying alimony, the fact that he has since filed his petition in insolvency, and obtained a preliminary order thereon,

does not alone entitle him to his release, where the superior court, in making the order, found as a fact that petitioner was able to comply with it; and the correctness of that finding will not be inquired into upon *habeas corpus*.

In bank. Appeal from superior court, Alameda county.

Habeas corpus.

J. H. Meredith and *H. Miller*, for petitioner. *Wells Whitmore* and *Fredk. E. Whitney*, for respondent.

McFARLAND, J. The petition merely avers that petitioner was committed to the custody of the sheriff of Alameda county by an order of the superior court of said county made in a certain action therein pending, in which Jesse Wilson was plaintiff, and petitioner was defendant, and that said court did not have jurisdiction to make said order. The return of the sheriff shows that the order committed petitioner for contempt in not paying certain money ordered to be paid as alimony in a divorce case; and it is apparent that the court had jurisdiction to make the order.

The petitioner filed an answer to the sheriff's return, in which he shows that since his imprisonment commenced he filed his petition in insolvency in another department of said superior court, and obtained the usual preliminary order declaring him an insolvent, directing the sheriff to take possession of his property, etc.; and he contends that this last order entitles him to be released by this court. But we do not see how it can have that effect. The thing which petitioner seeks to have determined by this court in this proceeding is that he is unable financially to pay the alimony. But the superior court, when it made the contempt order, found as a fact that he was able to comply with the order for alimony, and we would not upon *habeas corpus* inquire into the correctness of that finding. It raises no jurisdictional question. Now, the subsequent initiation of insolvency proceedings which might turn out to be fraudulent, and which might be discontinued at any time before the appointment of an assignee, is merely additional evidence touching the question of petitioner's financial ability. If presented to the superior court on another application for the release of petitioner from custody, it might or might not be deemed by that court sufficient to warrant his discharge, but it cannot be considered here on this proceeding.

Let the petitioner be remanded.

We concur: SEARLS, C. J.; McKINSTRY, J.; TEMPLE, J.

PATERSON, J. I concur in the judgment.

73 Cal. 99

WILLIAMS, Ex'r, *v.* WILLIAMS, Jr., and others. (No. 12,135.)

(*Supreme Court of California.* July 7, 1887.)

1. WILL—VESTED INTEREST.
 A devise to a person "absolutely," to be "distributed" to him at the expiration of three years, is a vested interest in fee, postponed merely in enjoyment.[1]
2. SAME—CONSTRUCTION—JURISDICTION.
 A court of chancery in California has jurisdiction to construe a will, even though the doubt arising is a speculative one.

In bank. Appeal from superior court of Sacramento.

The action was brought to procure a judicial construction of certain provisions of testator's will. The main question sufficiently appears in the opinion. At the hearing, before Judge VAN FLEET, his honor is reported to have said that his impression was "that, in order to give a court of chancery jurisdiction to construe a will, there must be some question of doubt, either *act-*

[1]See note at end of case.

ually existing, or *certain to arise* in the future, in order that the decree may have something to operate upon. Here the only question proposed by plaintiff * * * is as to the result of the defendant Percy dying before distribution,—a contingency not even highly probable, and at least not certain to arise. *Quære*, does not the bill then present for the determination of the court a question purely 'speculative?'" This point had not been taken by any of the parties to the suit.

C. H. Oatman, guardian *ad litem*, for appellant. *G. W. Gordon*, guardian *ad litem*, for respondent.

SEARLS, C. J. This is an action in the nature of a bill of interpleader by plaintiff, as the executor of the last will of Thomas H. Williams, deceased, to procure a judicial determination of the construction to be given to certain provisions of said last will.

The specific questions submitted by the bill relate to a devise or bequest of $50,000, made to defendant Percy Williams, and arise under the following clause of the will:

"*Item* 4. When the term of three years after my death shall have elapsed, unless the executor herein named shall, for good cause, extend it for two years, or in case there be another executor, three of my children or representatives shall, by writing, extend it for two years, distribution of my estate shall be made as herein directed.

"*Clause* 2 *of Item* 4. *Second.* There shall be vested absolutely in Percy, property or money, fifty thousand ($50,000) dollars."

"*Item* 6. The first fifty thousand ($50,000) dollars given to Percy is intended to vest in him absolutely, but the remainder of the estate is only intended for the use and benefit of the children during their respective lives, with the remainder in fee to those herein named, except the fifty thousand ($50,000) dollars absolutely given Percy, which may be given in money or property as desired."

"*Item* 13. This will is lengthy, but I hope it clearly expresses my purposes, thus: That, with the exception of fifty thousand ($50,000) dollars, the property of my estate is to be 'set aside' in and for the benefit of my children,"—naming them, and providing that each of said children so named is to have the net income of the estate so set aside for them respectively; that the legal title is to be and remain in the executor, etc.

The complaint contains a copy of the will, and alleges, in general terms, that doubts have arisen and are entertained by the executor and those interested in the estate of the testator, as to the true intent and meaning of the will, and as to the duty of plaintiff in the proper execution of the various trusts thereby created.

The particular questions raised, however, and which the court is asked to determine, are with reference to the bequest of $50,000 made to defendant Percy Williams, and are very clearly stated by the court below in the following language: "*First*, whether or not, said legacy or devise of $50,000 to defendant Percy Williams is an absolute and vested estate in him, and of which the time of enjoyment only is postponed until distribution, so that on his death, before distribution, intestate, it would pass to his legal heirs, or could now be transmitted by his will or conveyed by deed, as he might desire; or, *second*, whether the scheme and design of the will was that it was so far conditional as to depend on his survival to the time of distribution, and, if not surviving, whether said $50,000 legacy or devise does not go to and vest in those designated by the will as devisees in remainder, together with the balance of the interest devised to said Percy."

The court below answered the first of these two propositions in the affirmative, which, as may be seen, disposed of the whole matter. We think the conclusion reached by the learned judge who tried the cause was correct, and

that his reasoning in the premises clearly illustrates the questions involved. The language used is as follows, and we adopt it as the opinion of the court:

"It will be seen by reference to the language of the will that by clause 2 of item 4, and the first clause of item 6, $50,000 is given to defendant Percy 'absolutely,' to be 'distributed' to him at the expiration of three years (or, in a certain contingency, five years) from the date of testator's death. By the other clauses of those items, the bulk of the residue of the estate is devised and bequeathed to the children in certain proportions, for their lives, with remainders over to their descendants in a named order. The gift to Percy, it is declared, 'is intended to vest in him absolutely,' and in that respect item 6 draws a distinction between that devise and the others made to the children. Now, so far as these provisions of the will are concerned, there can be no doubt that the interest of Percy in this devise is a *vested* interest in fee, postponed merely in enjoyment. No other legal conclusion can flow from the language used. *Johnson* v. *Baker*, 9 Amer. Dec. 605; *Tazewell* v. *Smith*, 10 Amer. Dec. 533; *Reed* v. *Buckley*, 40 Amer. Dec. 531; *Bentley* v. *Long*, 47 Amer. Dec. 523; *Furness* v. *Fox*, 48 Amer. Dec. 593; Civil Code, § 694.

"The law favors the vesting of interests, and every interest will be presumed to be vested unless a contrary intention is clearly manifest. Civil Code, § 1341. But these provisions are free from ambiguity. The devise is made in express terms, and declared to be absolute and vested. No provision is made for any remainder over in case of the death of the beneficiary before distribution, or in any other contingency, while ample provision in that regard is made as to the various other devises. In fact, if it could be held that this devise could, in any event, fail to vest, it would result that the testator died intestate as to this portion of his estate, for there is no residuary clause in the will; the only devises or bequests being made out of the remainder of the estate after deducting this $50,000. It would seem to follow, then, as a matter not admitting of doubt, that, under the provisions referred to, the interest of Percy in this share is a vested future interest in fee, which will pass by grant, devise, or succession, and which he may alienate at his pleasure. If he should die before distribution, without such alienation, it will vest in his heirs, devisees, or legatees. See cases cited above, and section 669, Civil Code.

"It is claimed, however, by counsel for the defendant Frank Hansford Johnson that these provisions will not bear this construction, when viewed in conjunction with items 9 and 7. But, in my judgment, the conclusions I have expressed are in no respect affected by the language of items 9 and 7, or either of them. As to item 9, it will be seen that the precedent estate thereby vested in the executor ceases immediately when the future estates vest in possession, whenever that occurs. That this is the clear intention of the testator is shown by the fact that the legacies named in item 3 also fall within the language of item 9. The position is equally untenable as to item 7. That item contains an indefinite restraint upon alienation by the children. This clause is valid as to the life-estates, because, as to them, the power of alienation is only restrained during the continuance of lives in being, but, as to this devise of $50,000, such a restraint would be void, as the interest created therein is one in fee, and the restraint would be perpetual. Civil Code, §§ 715, 716.

"It is clear that this clause was not intended to refer to this share. It is confined, by its terms, to 'any estate left for his or her benefit,' and does not extend to anything left absolutely to a child. The expression used plainly refers to the estate vested in the executor *in trust* for '*the benefit*' of the children. In fact, taking the whole will together, I think that, as to the other shares or devises, all that is left to the children is the *income*, to be paid over by the executor as it accrues, and item 7 is intended to carry out that intention. It will be seen that the last clause of item 10 also bears out my

first conclusions, and I find nothing in the will to alter them, or in any measure repugnant to the interpretation I have given. Civil Code, § 1322; 1 Redf. Wills, *c.* 9, § 6, art. 32; *Damrell* v. *Hartt*, 137 Mass. 218; *Ordway* v. *Dow*, 55 N. H. 15; *Quackenbos* v. *Kingsland*, 102 N. Y. 130, 6 N. E. Rep. 121; *Bushnell* v. *Carpenter*, 92 N. Y. 273; *Stuart* v. *Wrey*, 30 Ch. Div. 507.

"W. C. VAN FLEET, Judge."

Upon the question of the jurisdiction of the court, a question not raised by the parties in the court below, but suggested by the learned judge who heard and decided the case, we are of opinion that whatever doubts may exist as to the jurisdiction, founded upon the decisions of courts in other states of the Union, so far as the power of courts to hear and determine in proper cases questions relating to the rights and duties of executors and beneficiaries under wills which have been admitted to probate is concerned, this court has settled the proposition in the affirmative. *Rosenberg* v. *Frank*, 58 Cal. 387; *Payne* v. *Payne*, 18 Cal. 291; *Deck* v. *Gerke*, 12 Cal. 433.

The jurisdiction of the court below established, it follows that the decree in the case becomes binding upon all parties in interest, and, in the absence of all formal objection in the lower court, we do not feel called upon to scrutinize closely the case as made, for the purpose of determining the policy of hearing or refusing to entertain the action on account of the facts as stated not being as conclusive as they might have been, and perhaps would have been put, had objection appeared. In other words, we deem the case made, within the rule enunciated by this court in the cases cited, and, in the absence of a special demurrer, as sufficient to sustain the decree.

Judgment affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.; PATERSON, J.; MCKINSTRY, J.

NOTE.

WILL—VESTED INTEREST. Words postponing the conveyance or division of the property to the expiration of a particular estate, or for a definite period, are presumed to relate to the beginning of the enjoyment, and not the vesting of the estate, McArthur v. Scott, 5 Sup. Ct. Rep. 652; Chasy v. Gowdry, (N. J.) 9 Atl. Rep. 580; Parker v. Glover, Id. 217; Crosby v. Crosby, (N. H.) 5 Atl. Rep. 907; Wiggin v. Perkins, Id. 904; Naundorf v. Schumann, (N. J.) 2 Atl. Rep. 609; Pond v. Allen, (R. I.) Id. 302; Dodd v. Winship, (Mass.) 11 N. E. Rep. 588; Gibbens v. Gibbens, (Mass.) 3 N. E. Rep. 1; Scott v. West, (Wis.) 24 N. W. Rep. 161; Rood v. Hovey, (Mich.) 15 N. W. Rep. 525; and the gift will vest at once, though the time for payment or distribution is postponed for the convenience of the fund or property, Rubencane v. McKee, (Del.) 6 Atl. Rep. 639; Pond v. Allen, (R. I.) 2 Atl. Rep. 302; Scott v. West, (Wis.) 24 N. W. Rep. 161; or that some one else may meanwhile have the use or the income of the *corpus*, Crosby v. Crosby, (N. H.) 5 Atl. Rep. 907; Pond v. Allen, (R. I.) 2 Atl. Rep. 302; Scott v. West, (Wis.) 24 N. W. Rep. 161; Rood v. Hovey, (Mich.) 15 N. W. Rep. 525; Davidson v. Bates, (Ind.) 12 N. E. Rep. —.

73 Cal. 106

VALENSIN *v.* VALENSIN. (No. 11,781.)

(*Supreme Court of California.* July 9, 1887.)

1. WITNESS—PRIVILEGE.
 Where a physician called as a witness refuses to answer a relevant and material question on the ground of "privilege," and his patient waives that privilege, the court should compel him to answer.
2. SAME—EXAMINATION.
 It cannot be assumed in advance that a question is improper; and an objection to its receipt ought not to be taken until the question is asked.

Department 1. Appeal from superior court, Sacramento county.

W. H. Beatty and *S. C. Denson*, for appellant. *A. P. Catlin* and *Grove L. Johnson*, for respondent.

TEMPLE, J. Action for a divorce on the ground of cruelty, which consisted in a course of treatment on the part of defendant causing grievous bodily suffering and grievous mental anguish.

On the trial, Dr. Simmons was called as a witness for plaintiff. He stated that he had attended both plaintiff and defendant professionally. He was asked as to the condition of plaintiff's health. Witness declined to answer unless he was assured by the court he would not be cross-examined, averring that he might be required to state on such cross-examination matters which had been confided to him professionally. Plaintiff was personally present in court, and her counsel then released the witness from any obligation to secrecy. Counsel then stated: "We expect to ask his professional opinion as to whether, in the condition of health in which she was, it would have been seriously detrimental to her health to be subject to annoyance, excitements, threats, and the anxiety caused by such threats. We do not propose to ask what was the cause of her ill health, but whether, in the condition in which he found her, her health was likely to be seriously injured by being subjected to the said harassing trouble that we think she was about that time subjected to." Evidence had been introduced tending to show conduct on the part of defendant of the character charged in the complaint, and that its effect on the plaintiff had been to produce nervous excitement and exhaustion.

A hypothetical question was then propounded which had reference entirely to the effect which would probably result to plaintiff, in her then condition, from the acts (which were specially recited) which plaintiff claimed to have proven. The question did not involve the statement of any matter which the witness had learned from the defendant. The witness did not in fact claim that it did. On the contrary, he would willingly consent to answer if the court would protect him from cross-examination, which might, as he thought, make it necessary for him to reveal professional secrets confided to him by defendant. The court was asked to compel the witness to answer, but declined, and plaintiff excepted. In this we think the court erred. The matter was material and relevant. The form of the final question was objectionable, but no objection was interposed. Had there been, the objection could easily have been avoided by a new question. As the matter was material and relevant, the witness should have answered, and the court erred in not compelling it.

If the defendant had insisted on cross-examination for a disclosure of matters confided by himself to his physician, that would have absolved the physician from the obligation. But in any event it would have been time enough for the witness to object when he was asked to make such disclosures. It may be true that the witness would be protected, not only from the necessity of telling what was said by his patient, but also from stating facts which would in effect amount to a betrayal of confidence. But here confessedly the answer sought was not of that character.

We think there was also error in refusing to allow the evidence offered for the purpose of impeaching the witness Moore. The attention of witness had been called to the time, the place, and the circumstances of the alleged statement. After the impeaching witness had stated that she remembered the occasion, objection was made to the testimony, and sustained before any further question was asked. It could not have been assumed in advance that the question to be asked would be improper.

Whether it was correct, as a matter of practice, to allow a supplemental complaint to be filed, is not involved on this appeal. We see no reason, however, why it may not be allowed on proper terms. It was done in this case, and the action as to the new ground of complaint set up must be considered as being commenced when the supplemental complaint was filed. Whether the false and malicious charge made after the actual separation of the parties, would be less apt to inflict grievous mental anguish for that reason, was for the trial court to determine in view of all the facts.

Order and judgment reversed, and new trial ordered.

We concur: McKINSTRY, J.; PATERSON, J.

73 Cal. 120

In re KOWALSKY. (No. 20,245.)

(*Supreme Court of California.* July 12, 1887.)

1. HABEAS CORPUS—WHEN GRANTED—DEFECTIVE INDICTMENT.
Habeas corpus is not intended to review the regularity of the proceedings in any case, and a prisoner will not be discharged under it when the indictment, however defective, discloses facts sufficient to base a charge of any offense known to the law.

2. LIBEL—CAUSING PUBLICATION.
Section 9, art. 1, Const. Cal., providing that in all criminal prosecutions for libels, "indictments found or informations laid for publications in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause," applies to a person who *causes* a libel to be published equally with the one who publishes it.

In bank. Appeal from superior court, San Joaquin county.

Habeas corpus.

Davis Louderback, W. H. L. Barnes, David McClure, and *Henry J. Kowalsky, in pro. per.*, for petitioner. *David S. Terry,* for respondent.

SEARLS, C. J. The petitioner was indicted by the grand jury of the county of San Joaquin for an alleged libel of David S. Terry, a resident of said county. A warrant of arrest was issued under said indictment, by virtue of which petitioner was taken into custody by the sheriff, and he now sues out a writ of *habeas corpus*. The petitioner claims that he is entitled to his discharge upon the ground that the indictment does not state facts constituting a crime, or showing the superior court of San Joaquin county to have jurisdiction of the alleged offense.

The *gravamen* of the charge, as contained in the indictment, is that on or about the thirty-first day of July, 1885, at the county of San Joaquin, state of California, the defendant did willfully and maliciously, and with intent to injure David S. Terry, a resident, etc., "cause to be printed and published, and expressed by printing, in a certain newspaper called the 'Evening Post,' printed in the city and county of San Francisco, and * * * published and circulated in said county of San Joaquin, the following defamatory and libelous words of and concerning said Terry, to-wit, that 'he [said Terry meaning] had attempted to assassinate Hopkins,' contrary to the force and effect of the statute," etc.

"A libel is a malicious defamation expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation * * * of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Pen. Code, § 248.

1. The inquiry upon *habeas corpus* may extend to the question whether the indictment charges any offense known to the law; for this goes to the jurisdiction, which is always a proper subject of inquiry in a proceeding of this character. *Ex parte Coryell*, 22 Cal. 179; *Ex parte Kearney*, 55 Cal. 212.

2. Where an indictment has been found, which although defective, and subject to attack and overthrow upon a demurrer, yet if enough appears in such defective indictment to show that an offense has been committed, of which the court has jurisdiction, the party charged cannot be discharged upon a writ of *habeas corpus*, but will be remitted to the court in which the indictment is pending for such proceedings as the law may warrant by way of defense. *Ex parte Whitaker*, 43 Ala. 323.

The writ of *habeas corpus* is not intended to review the regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law. *Ex parte Prime*, 1 Barb. 340.

We are of opinion the indictment contains such substantial statement of

the facts constituting the alleged offense that it cannot be said of it that, if they are all taken as true, no violation of the law has been committed by defendant. The defects in the indictment, if any, are of such a character that they can only be reached in the court where the indictment is pending, or by appeal therefrom.

It is further contended, however, that neither the grand jury of San Joaquin county, nor the superior court of such county, had nor has any jurisdiction of the person of defendant, or of the crime charged in said indictment. Section 9 of article 1 of the constitution of the state provides that, in all criminal prosecutions for libels, "indictments found or information laid for publications in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause." The contention of petitioner is that this section of the constitution applies to the publishers of libels, who alone can be tried elsewhere than in the county where the publication office of the newspaper is located; that petitioner is not charged with *publishing* a libel, but with having *caused* such libel to be printed and published.

The constitution is not limited to cases of *newspaper publishers and proprietors* alone, but applies to "indictments found or informations laid for publications in newspapers." The term used is broad enough to include a person who *causes* a libel to be published in a newspaper equally with one who publishes it. The constitution is aimed at a *class* of libels, viz., *those published in newspapers*, and any and all persons guilty of such libels are liable to be tried at the places specified in the constitution, without reference to the fact whether they are or are not editors or proprietors of the paper containing the libel.

Again, conceding the point well taken, according to the indictment, the Evening Post, in which the alleged libel was published, while it is shown to be printed in the city and county of San Francisco, is and was *published* in the county of San Joaquin, and, so far as appears in the indictment, was not published elsewhere. If, as we may suppose, the Evening Post has a publication office and is in fact published in San Francisco, the fact must be established by way of defense before petitioner can avail himself of it in bar to a prosecution in San Joaquin county.

Townsend on Slander and Libel says, at section 115: "As respects a publication by writing, a libel, not only the publisher, but all who in anywise aid or are concerned in the publication of the writing are liable as publishers; the publication of the writing is the act of all concerned in the production of the writing. Thus, if one composes and dictates, a second writes, and a third publishes, all are liable as publishers, and each is liable as a publisher."

There it still another reason why the contention of petitioner cannot avail him. Section 9 of article 1 of our constitution is a limitation upon the right to indict and punish for libel in any county of the state where the same may be published. *Com.* v. *Blanding*, 3 Pick. 304; Bish. Crim. Proc. § 69; 1 Archb. Crim. Pr. p. 241, and note 1.

It follows, therefore, that, if the constitution only applies to the editor and proprietor of a newspaper, those not coming within that category are still liable to punishment as at common law wherever the paper containing the libel may be circulated. We do not subscribe to this doctrine, but refer to it as a necessary consequence of assuming the position of petitioner to be correct.

The petition is denied, and petitioner remanded to the custody of the proper officer.

We concur: McFARLAND, J.; McKINSTRY, J.; THORNTON, J.; TEMPLE, J.

73 Cal. 109

GREGORY and another *v.* PERSHBAKER and another. (No. 12,105.)

(*Supreme Court of California.* July 12, 1887.)

1. MINES—LOCATION—"LODE."
The word "lode" is properly defined as a "zone or belt of mineralized *rock* lying within boundaries clearly separating it from the neighboring rock," and does not apply to a bed of gravel from which particles of gold may be washed, although such gravel may be inclosed within defined boundaries.
2. SAME—"PLACER" CLAIMS.
"Placer" claims include all forms of deposits excepting veins of quartz or other rock in place.
3. SAME.
A location of "placer" mineral land is valid without previous discovery of valuable mineral therein.
4. SAME—LOCATION—EVIDENCE.
In an action where both parties claim to have made locations of mineral land in themselves valid, and the question is which of the two has made the prior location, the prior actual or constructive possession, evidenced by posting the notice, and by marking the boundaries in the manner required by statute, must prevail.

Department 1. Appeal from superior court, Butte county.

Plaintiffs are grantees and successors in interest of Johnson and others, who, on December 14, 1882, located the Lucretia mining claim upon gold-bearing mineral land of the United States, in Butte county, California. Defendant, on December 22, 1882, filed his application for a patent to the Howard mining claim, which included a portion of the Lucretia location. Plaintiffs brought this action, under sections 2325 and 2326, Rev. St. U. S., to have the question of right of possession of the claim determined. The Magalia Mining Company, by leave of the court, intervened, claiming an interest in the location through defendant. The court found that neither plaintiffs, defendant, nor intervenor had any title. Plaintiffs appealed. Other facts are sufficiently stated in the opinion.

A. L. Hart, Wm. Singer, Jr., and *H. V. Reardon*, for appellants. *Hundley & Gale, W. C. Belcher*, and *W. H. H. Hart*, for respondents.

MCKINSTRY, J. 1. It is contended by the defendant and the intervenor (respondents) that the mineral, if any, found in the land claimed by the plaintiffs herein, constitutes a lode within the meaning of the acts of congress; that ledges or lodes can be located only in a manner entirely different from the mode adopted by plaintiffs' predecessors; and therefore, however regular their surface location might have been as a location of a placer claim, it is invalid because no placer exists within its limits.

Finding No. 51 of the court below is as follows: "That in the year 1856, John Barrett, and others associated with him, discovered on the westerly bank of Little Butte creek, on the south-east quarter of said section 13, a thin seam of gravel cropping out between an underlying bed of slate rock and an overlying bed of lava rock; and, finding that the said seam of gravel was gold-bearing, located the same as and for a mining claim under the name and designation of the 'Burch and Barrett Claim,' and thereupon commenced to work and develop their said claim by excavating a tunnel into the hill, following the course of the channel, and the said channel became thicker and better developed and more valuable as they pursued and explored the same into the hill, and showed that the said deposit was a well-developed channel, varying from a few inches to eight and ten feet in thickness, and from eight or ten to forty feet in breadth, with a well-defined bed and side walls of slate rock, and capped by a thin stratum of clay, with an overlying body of lava rock for hanging wall. Prior to the year 1879 the said John Barrett, by mesne conveyances from his associates in said location, became sole owner of the said Burch and Barrett location, and in that year sold and conveyed the same to

the intervenor, the Magalia Gold Mining Company, a corporation duly formed and organized under the laws of the state of California, and the said intervenor thereupon entered into and took, and thence hitherto has kept and held, and still holds, the possession, and has ever since continued the work of exploring and pursuing and working and mining the said gravel deposit in and along the said channel or bed, and had, in the spring of the year 1882, pursued and opened and worked the said gravel channel or bed in said south-east quarter of said section 13, and in the direction of the said south-west quarter of said section, and had discovered that the said gold-bearing channel extended towards and probably into the said south-west quarter, and that the said south-east quarter of section 13 contained deposits of gold-bearing gravel in quantity sufficient, not only to pay for working and mining the same, but sufficient to render the said quarter section of great value for mining purposes. That, after the commencement of this action, the said Magalia Gold Mining Company projected and extended its tunnel, mentioned in these findings, into said south-west quarter of said section 13, following the said gold-bearing deposit or channel. That said channel in its course into the hill descends or drops at an angle on an average of about eight degrees. That the bed-rock of said channel, during its entire length so far as worked, is composed of a slate formation, and upon that slate formation said gravel rests, and over said gravel is a formation of clay gouge, overlapping said mineral deposit, and that above said clay seam is the lava which extends to the surface; and that the overlying lava rock, at the point where the said channel crosses the easterly line of the said south-west quarter aforesaid, is about six hundred feet in thickness. That said gravel is of a hard nature, and in mining and extracting the same has to be detached from its position by the use of picks and gads, and, when extracted, is taken out to the surface, and there washed, and in so washing gold is extracted therefrom. That neither gold nor any other mineral was discovered within the boundaries of said south-west quarter of said section 13 until the said tunnel of said Magalia Company penetrated therein, as aforesaid. That said pay-streak of gravel and deposit does not crop out at any other place or places than the place where the same was discovered, as aforesaid; and that the same cannot be seen or reached without entering the works of the said Magalia Gold Mining Company, and following the trend and meanderings of said channel to the present face of the mineral deposit, except by sinking a shaft or running expensive tunnels other than those run, occupied, and used by the intervenor therein."

In support of their view, counsel cite the *Eureka Case*, 4 Sawy. 302, and other decisions following and referring to that. In the *Eureka Case*, Mr. Justice FIELD of the supreme court of the United States said: "We are of opinion that the term [lode] as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." It includes, to use the language cited by counsel, "all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes." This definition would not include a bed of gravel from which particles of gold may be washed. The words "mineralized rock" were evidently intended to qualify the last as well as the first sentence. That which in the *Eureka Case* was declared to be a "lode" was a zone of *limestone* lying between a wall of quartz and a seam of clay or shale, the one having a dip of 45 deg., and the other of 80 deg.

Section 2320 of the Revised Statutes of the United States (1873–74) treats of "mining claims upon veins or lodes of quartz or other rock in place bearing gold;" section 2322, of veins, lodes, and ledges "the *top or apex* of which" lies inside of surface lines extended vertically downward.

In Seane's Neuman and Barretti (by Valazquez) a "placer" is said to be "a place near the bank of a river where gold dust is found." In the last edi-

tion of Webster, which gives the meaning of the term as approved by usage in Mexico and California, it is defined: "A gravelly place where gold is found, especially by the side of a river, or in the bed of a mountain torrent." Whatever the origin of the subterranean channels containing gravel beds, they have long been known to exist in California, and they have been generally supposed to be, and generally spoken of as, the beds of ancient rivers in which the gravel was deposited by fluvial action, and which were either from their beginning subterranean, or upon which the superincumbent earth or rock has been hurled by means of convulsion, caused by volcanic or other natural force. That the bed of gravel mentioned in the findings, to the limited extent it has been prospected by the intervenor's tunnel, "descends or drops on an average of about eight degrees," does not of itself make the gravel deposit a lode with "a top or apex," nor contradict the theory that the channel was the channel of a mountain stream or torrent.

The terms employed in the acts of congress are used in the sense in which they are received by miners. The *Eureka Case, supra.* Moreover, by express enactment, "claims usually called placers" are declared to include all forms of deposit, "excepting veins of quartz or other rock in place." Rev. St. U. S. § 3229. Referring to the common use of the word by miners, to the dictionaries, and to the adjudications of courts, the gravel bed with gold therein, as described in the finding, is a placer.

Other findings of the court below strengthen this conviction. The court found that for a long time the land which is the subject of this action was generally reputed and understood throughout the mining district in which it is to be valuable placer mining ground, through which ancient channels, containing gravel-bearing gold in paying quantities, extended. No. 13. While it does not appear, except inferentially, that ground like that in controversy was generally located as placer, neither does it appear that there were district laws with respect to locations of veins, lodes, or ledges; and, on the other hand, the district laws with reference to the location of flat and placer claims are set out in the findings at length. It further appears that the intervenor attempted to locate the ground as and for a placer claim, and its application for a patent was based on that location.

2. If the ground located by those under whom plaintiffs deraign was not previously located as a placer claim, and the plaintiffs or their predecessors fully complied with the acts of congress, and the local rules and regulations, the plaintiffs would seem to have the right of possession. There is no finding of any local law which provides for the location of placers, or beds of gravels containing precious metals below the surface, as tunnel claims, or of facts showing that the grantors of the intervenor, who constructed the tunnel, pursued the mode laid down by local laws in locating it. As to any claim to the possession based on occupancy by the tunnel of a portion of plaintiffs' location, such occupancy, if it would be considered at all under the statutes, would extend only to the space within the walls of the tunnel, and could not be extended beyond them by any rule of constructive possession. We are not required, therefore, to interpret the section of the act of 1872 (Rev. St. U. S. 2344) which reads: "Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws," if, indeed, that provision refers to any rights other than those acquired under the act of 1866 and under the act of 1870, "granting to A. Sutro the right of way," etc.

The claim and location of plaintiffs "was distinctly marked on the ground, so that its boundaries could be readily traced." Rev. St. 2324. The mining laws of the district provided: "A notice shall be posted in a conspicuous place on each claim, or body of claims, describing the same with convenient certainty, and shall be recorded by the district recorder in his office, or in the office of the county recorder of Butte county." "All records of mining claims

shall contain the name or names of the locators, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify them." The last requirement is substantially a transcript from the United States statute. Rev. St. 2324. The location by plaintiffs' predecessors in interest conformed strictly to the law with respect to the posting and registration of notices and their contents.

It is insisted by counsel for respondents that no location of mineral land is valid unless valuable mineral had been actually discovered in the land before the location was made. As to placer claims, we find no such condition in the acts of congress, in the local laws, or in the practice of miners; but, if the laws contemplated discovery before location, it would seem from finding 51, above quoted, that here the discovery preceded the location. Of course, a patent for mineral lands can only issue under the acts of congress relating to the disposition of mineral lands, on proof that they are such.

3. It is contended that the intervenor had already located the same ground as a placer. The intervenor's notice of location was *recorded* December 5, 1882. The plaintiffs' claim was marked on the ground. The marking was commenced on the thirteenth and completed on the fourteenth of December, 1882. Plaintiffs' notice was posted in a conspicuous place on their claim on the said fourteenth of December, and was recorded by the district recorder on the sixteenth and by the county recorder on the twentieth of the same month.

On the said December 14th, and after the boundaries of plaintiffs' claim were fully marked on the ground, the intervenor's notice of location (which described its claim by boundaries coterminous with plaintiffs' claim, and which had been so as aforesaid recorded on the fifth day of December) was posted on the claim. And on the said December 14th the intervenor proceeded to mark its claim on the ground in such manner as that its boundaries could be readily traced by blazing trees and driving painted stakes, along the same lines already marked by the plaintiffs.

If the rights of the parties hereto are to be determined by reference simply to what was done by them or their grantors on the surface and in the recording office, and without regard to work, if any, done in intervenor's tunnel within the limits of the claim, the plaintiffs would seem to have the better right. The facts that the intervenor recorded a notice containing a description of the claim by reference to government subdivisions, and posted a copy thereof outside of the limits of the claim as described in the notice, were not of themselves such acts as that the subsequent marking of the boundaries related to the record or posting of the notice, so as to cut out any rights of plaintiffs acquired by compliance with the statute and district laws. The local laws seem very clearly to provide that the designation of the boundaries on the ground and posting of the notice shall precede its record. In the land office, where the question between the applicant for a patent and the United States is the right of the applicant to purchase, the order in which are done the several acts which give the right to purchase may be immaterial. And so in an action in the state court, where only one of the parties claims to have complied with the laws, the order of the acts done by him may be immaterial. But in an action where both parties claim to have made locations, in themselves valid, and the question is which of the two has made the *prior* location, the prior actual or constructive possession, evidenced by posting the notice and by marking the boundaries in the manner required by statute, must prevail,—at least unless there has been unreasonable delay in recording the notice, even if it be conceded that a failure to record the notice will invalidate a location otherwise regular. It cannot be said here that the plaintiffs unreasonably delayed the record.

The act of congress does not in express terms require the posting or registration of a notice, but recognizes the power of the miners to require the registration by providing that all records of mining claims shall contain a certain

description, etc. The miners are warned that a tract of land is claimed, by the posted notice and the evidence of its boundaries made necessary by the statute. They are not required to search the records in the first instance. A recorded notice gives no information of a claim not actually located. Nor does even a notice posted on the ground, unless it appears that the party posting it is proceeding to indicate with reasonable diligence, or is about to indicate, the boundaries by marking them.

It may be asked: Suppose work is being actually prosecuted on or in the ground, and a struggle ensues between the person doing the work and another party, each striving to secure a precedence in marking out the boundaries of a claim to include the place where the work is being done, can the mere fact that he who has done nothing towards extracting ore, or developing the ground, first completes or first commences the marking of the boundaries, give to him the right of possession? In such case, would the performance of the only work done in the mine, the record of a notice defining the limits of a claim including the work, and the posting of the notice *near* the claim, as described in the record, go for naught? Although merely working at a particular place or places gives no right to patent under the statutes of the United States, and would not, under the local law, proved herein, extend by construction the actual possession, yet, as to a third person who has not complied with the statutes and local laws, the person doing work, or who has done work not abandoned, has an actual possession to the extent of the work done.

We have said that, as between two persons, neither of whom had done any work before his attempted location, and both of whom claim to have made valid locations, the issue must be determined by reference to priority in the statutory designation, on the surface, of the limits of the claim. Of course, we are not to be understood as saying that a claim can be *held*, prior to the patent, without work subsequent to the formal location within it, in case no work was done before. That is not a question involved in this case. But, in determining the question of priority in the particular referred to, it may be possible that the person doing work in the ground, and who has indicated by his acts his intention to perfect a location under the mining laws and statutes, should be held, by proper application of the doctrine of relation, to have first marked the boundaries of the claim, in legal effect, as against one who, for the purpose of depriving him of the benefit of his work, or of his discovery of mineral of value, shall intervene and mark the boundaries before the first occupant shall have completed or even commenced their alignment. But no such question is distinctly presented by the findings herein; and, as we think the interests of justice demand a new trial of the action, we decline to express any opinion upon a suppositive case.

Judgment reversed, and cause remanded for a new trial.

We concur: TEMPLE, J.; PATERSON, J.

73 Cal. 142

In re SIC. (No. 20,308.)

(*Supreme Court of California.* July 14, 1887.)

MUNICIPAL CORPORATIONS—ORDINANCE—CRIMES.

Section 3 of ordinance No. 192 of the city of Stockton, California, makes it unlawful for two or more persons to assemble, be, or remain in any room or place for the purpose of smoking opium, or inhaling the fumes thereof. Section 307 of the State Penal Code declares that every person who visits or resorts to any place where opium, or any of its preparations, is sold or given away to be smoked at such place, for the purpose of smoking opium, or its said preparations, is guilty of a misdemeanor, and punishable by fine or imprisonment. *Held*, that the ordinance, in so far as it made criminal precisely the same acts that were declared a crime by the state law, was in conflict therewith; and, under Const. art. 11, § 11, limiting the power of municipal corporations to the passage of ordinances not in conflict with general laws, was void, and that persons accused of assembling in a room for the purpose of smoking opium therein could not be prosecuted thereunder.

In bank. Application from San Joaquin county for *habeas corpus*. *Lyman J. Mowry*, for petitioner. *F. H. Smith*, for respondent.

TEMPLE, J. A complaint was filed in the police court of the city of Stockton, charging Sam Lee and petitioner Sic with the crime of assembling for the purpose of smoking, as follows, to-wit, "the said Sam Lee and Sic [at a time and place specified] were willfully and unlawfully in that certain room, in that certain building, on the south-east corner of El Dorado and Washington streets, in said city, for the purpose of smoking opium, contrary to the provisions of a certain ordinance," etc. The ordinance was entitled "Ordinance No. 192. To prohibit and prevent the smoking of opium, and the inhaling of fumes of opium." The first section declared the smoking of opium, or the inhaling of the fumes of opium, injurious to public health, contrary to public morals, and against the peace and good order of the city, and prohibits the keeping of places where persons assemble for the purpose of smoking or inhaling the fumes of opium. Section 2 makes it unlawful for persons keeping certain places of resort to allow persons to smoke or inhale the fumes of opium therein.

Section 3 is the one under which this complaint is lodged, and is as follows: "Sec. 3. It shall be unlawful for two or more persons to assemble, be, or remain in any room or place for the purpose of smoking opium, or inhaling the fumes thereof."

Section 4 makes it unlawful for any one to knowingly remain in the room or place where the offense is committed.

Section 5 is aimed at the person owning or controlling any building who permits the offense therein.

Section 6 punishes those who aid or abet the offense.

Section 7 punishes one who may stand before, upon, or in the vicinity of the building, room, or place where the offense is committed, to give warning of the approach of any person.

It is claimed that this ordinance is void because it conflicts with section 307 of the Penal Code, which is as follows: "Every person who opens or maintains, to be resorted to by other persons, any place where opium, or any of its preparations, is sold or given away, to be smoked at such place, and any person who at such place sells or gives away any opium, or its said preparations, to be there smoked or otherwise used, and every person who visits or resorts to any such place for the purpose of smoking opium, or its said preparations, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $500, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Section 3 of the ordinance is broad enough in terms to prohibit opium smoking under all circumstances, except when the person "keeps moving." Persons may not assemble at any place for the purpose of smoking, or be at a place for the purpose, or remain at a place to smoke. The other sections of the ordinance are equally marked in this respect. They are all aimed at rooms or places where opium is smoked or inhaled. In short, the ordinance is evidently intended to prohibit opium dens or places of resort for the purpose of smoking opium. The ordinance, notwithstanding the comprehensive language used, would hardly be given a more extensive effect than that. To prohibit vice is not ordinarily considered within the police power of the state. A crime is a trespass upon some right, public or private. The object of the police power is to protect rights from the assaults of others, not to banish sin from the world, or to make men moral. It is true no one becomes vicious or degraded without indirectly injuring others, but these consequences are not direct or immediate. *In jure non remota sed proxima spectatur.*

Thus it is said it is no crime to be idle, but one may be punished for begging, for that interferes directly with the comfort of others; that it should

not be made a legal wrong for one to become intoxicated in the privacy of his room, if he does not offend others by displaying his drunkenness; yet the consequence of each of these vices may be to inflict great injuries upon others. Possibly this resulting injury to others, and to society, may justify the legislature in declaring these vices to be crimes. We are not required to pass upon that question, and we do not. It is enough to say that such legislation is very rare in this country. There seems to be an instructive and universal feeling that this is a dangerous province to enter upon, and that through such laws individual liberty might be very much abridged. Hence laws to suppress intemperance, prohibit the sale of liquor, suppress places of resort where it is drank, and punish offensive exhibitions of drunken people, but do not punish the immoderate use of spirits.

Since this whole ordinance, therefore, is evidently aimed at places of resort where opium is smoked or inhaled, we feel justified in limiting section 3 to that evil, although the natural and usual import of such words might, in the absence of a strong presumption against it, extend its effect much further. Perhaps it would be enough to say that the offense charged in the complaint, of which respondent was convicted, may be, for aught that appears, the same as that prohibited in the Code. The section plainly covers the same ground as the Penal Code. It was probably intended to cover some supposed defects in the Penal Code; still it denounces as criminal precisely the same acts which are attempted to be prohibited by the Code. It is admitted that no ordinance is valid which conflicts with the general laws of this state. Does section 3 of the ordinance conflict with section 307 of the Penal Code? Upon this subject there is a very great conflict of authority.

Judge Cooley says that, although the decisions are not uniform, the clear weight of authority is that the same act may constitute an offense both against the state and the municipal corporation, and both may punish it without violation of any constitutional principle. Const. Lim. 199.

In Bishop on Statutory Crimes it is said (section 24) that the true rule is: "If the statute so authorizes, it is not apparent why a city corporation may not impose a special penalty for an act done against it, while the state imposes also a penalty for the same act done against the state." This implies that to enable the city to pass such an ordinance—that is, one imposing a penalty for an act already prohibited by the general law—special authority must be found in the charter.

In Dillon on Municipal Corporations, § 68, after noticing the great conflict in the authorities, the following rules are laid down, it is said, with some distrust as to their correctness: "(1) A general grant of power, such as mere authority to make by-laws for the good government of the place and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act—for example, as assault and battery—which is made punishable as a criminal offense by the laws of the state. * * * (2) Where the act is in its nature one which constitutes two offenses, one against the state and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offense under the state law; but the legislative intention that this may be done should be manifest and unmistakable, or the power in the corporation should be held not to exist. (3) Where the act or matter covered by the charter or ordinance and by the state law is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language, which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for in general laws."

The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one, and these rules, perhaps, express the law, as we understand it, as well as any.

Section 11, art. 11, of the constitution, authorizes cities and towns "to pass and enforce within their limits such local police, sanitary, and other regulations as do not conflict with general laws." The last clause of this section must be held to be a limitation upon the power of municipalities, whether that power is derived under this provision of the constitution, or from the charter. If, as is held both by Bishop and Dillon to be the effect of authorities, a municipality can only pass ordinances punishing the same acts which are punishable under general laws when expressly authorized to do so, and that no authority to pass such laws will be presumed from grants of power general in their character, it must be because such ordinances may supersede the general law upon the subject. Here there is not only no such authority, but, if such ordinances are conflicting, there cannot be such authority.

It would seem that an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law. The constitution provides that no one shall be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law. The contrary doctrine has been held in some states, but this conclusion seems more in consonance with reason and justice. Some of these decisions apply to acts which are said to be of a dual nature, and offend at once against the general law and police regulations, which are not directed specifically at the offense denounced in the general law. If there be such acts, no question of this kind can arise with reference to them. But there are decisions, no doubt, which hold squarely the doctrine that both may punish for the same offense. In Alabama it was said (*Mayor* v. *Allaire*, 14 Ala. 400) that assault and battery could be punished under the ordinance and under the state law also,—the one to maintain the peace of the state and the other the peace of the city. It is difficult to see how the peace of the state is disturbed except through the disturbance in the city. The case has been said to be like that where the state punishes for an offense against its laws, and the same act is punishable under the laws of the United States. It was said by Mr. Justice GRIER that the citizen may be said to owe allegiance to two sovereigns, and the same act may be an offense against each. The United States, however, has no general criminal jurisdiction. In these cases, where the same act may be punished as criminal under such jurisdiction, it will be found that the act, besides offending the general law of the state, is an assault upon the United States in some of its functions as a government. Thus, counterfeiting is an injury to the people, for they are likely to be cheated and swindled through it. But the United States finds it necessary to punish the same act, not because of the injury to the people, but to protect itself in its function of coining money and regulating the currency. State laws and city ordinances all rest upon the same ultimate authority,—the people of the state,—and they aim at the same evil. But it is said that, even in cases where a person is punishable under both state and federal laws, the actual practice is to punish but once.

Holding these views, we think the respondent must be discharged. It will be observed that we only hold that there is a conflict where the ordinance and the general law punish precisely the same acts. We do not wish to be understood as holding that the sections of the ordinance which make criminal other acts not punishable under the general law are void because the legislature has seen fit to legislate upon the same subject.

The petitioner is hereby discharged.

We concur: SEARLS, C. J.; MCFARLAND, J.

PATERSON, J., (*concurring.*) I concur in the judgment. I cannot agree with Mr. Justice TEMPLE, however, in his construction of the ordinance. It is not only intended to cover cases not provided for by section 307 of the Penal Code, but it accomplishes that end. Thus section 6 provides: "It shall be unlawful for any person to aid and abet or assist another person in the smoking of opium, or inhaling the fumes of opium." This provision has no reference to the place where the smoking is done. And section 3, under which the petitioners were convicted, is aimed more at the act of smoking than at the place where it is indulged in. I think, therefore, that the question must be met and answered in this case whether the city council has unlimited power to prohibit the smoking of opium under all circumstances. The provisions of section 3 of the ordinance upon which the complaint was made are general, universal in their operation, and present the issue squarely. Will they support a conviction? I feel bound to answer this question in the negative. However much we might prefer a different conclusion in this particular case, there are certain great principles which cannot be invaded in special cases without trespassing upon that province which Mr. Justice TEMPLE speaks of as being dangerous to enter by legislation. Every man has the right to eat, drink, and smoke what he pleases in his own house, without police interference, (unless he is trying to kill himself;) and, before the state or municipal authorities should ask the conviction of a person for smoking, eating, or drinking any particular thing, facts ought to be alleged and shown—even in cases of opium smoking—that at least it was not done in the privacy of his own house, or that he was using his house as a resort for others, or that he was in some way aiding, encouraging, or abetting others in the use of the drug,—injuring or jeopardizing the rights of others; or, in a word, that he was offending against the welfare of society in some way, beyond merely the injurious effect of the act upon himself alone.

That some of the sections of the ordinance are valid, and that section 3 of the ordinance can be so amended as to provide lawfully for conviction in the cases which it was intended to cover, I have no doubt. It is unnecessary to say, in this case, how far the local authorities may go in their legislation against gambling-houses or saloons. The legislature has recognized the opium habit as a great evil. It has, by general legislation, attempted to suppress it. Section 307 was passed and approved for that purpose. By an act entitled "An act to regulate the sale of certain poisonous substances," approved April 16, 1880, it was made a misdemeanor punishable by a fine not exceeding $500, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment, for any person other than a physician authorized to practice medicine under the laws of this state to retail opium without distinctly labeling the box or package, and the wrapper or cover thereof, together with the word "poison," and the name and place of business of the seller; and the act further provided: "Nor shall it be lawful for any person to retail any of the substances enumerated in either of said schedules to any person, unless upon due inquiry it is found that the person receiving the same is aware of its poisonous character, *and that it is to be used for a legitimate purpose.*" Section 2 of the act requires the seller to keep a book in which shall be entered the date of sale, name of the purchaser, quantity sold, purpose for which the purchaser stated it was required, etc., and that the book should be always open to inspection by the proper authorities. But all this legislation has failed to meet the exigency of affairs, and unless we close our eyes to what is taking place daily in the larger cities of the state, and becoming a part of our most deplorable police history, we must recognize the fact that those who are engaged in this nefarious traffic—especially that class who seek among the youth of both sexes for victims of the drug—are the most insidious enemies of society. For the purpose of shielding themselves and their enslaved and unhappy customers from arrest and punishment

for violation of the law, they secrete themselves and their "outfits" in deserted buildings, under bridges, and in out of the way places; thus planning in advance of arrest that which will be a defense under section 307, viz., that they were not caught in a place which was opened *to be resorted to by others, and where opium is sold or given away.*

They sell the opium at one place, lease their smoking outfits to be used at another place, and keep constantly moving about, with transitory "joints," thus eluding the police, and evading the operation of the statute. These are matters of common notoriety. A resort being "a place of frequent assembly, a haunt," (Webst. Dict.,) before a conviction can be secured, under section 307, it must be shown that the place where the smoking was done was opened or maintained to enable opium smokers to frequent the same for the purpose of smoking. But it is not for us to say what municipal legislation should or may be provided. What I have said is intended only in support of other provisions of the ordinance, which, though different from or the same as the state law, are, in my opinion, valid, notwithstanding the invalidity of section 3.

72 Cal. 549

Estate of SULLENBERGER. (No. 11,670.)

(*Supreme Court of California.* June 17, 1887.)

1. LIMITATION OF ACTIONS—ACKNOWLEDGMENT—EXECUTOR.
 Transactions between the maker of a promissory note and the executor of the payee, showing that the dealings were not carried on by the executor as such, but in his personal character, and a simple permission given by the maker to the executor that he might apply any balance of accounts there might be in his favor to the payment of the note belonging to the estate, will not take such a note out of the statute of limitations.
2. SAME—NOVATION.
 A loose statement by the maker of a note, after the running of the statute of limitations, to the effect that he would settle the whole indebtedness on his return, and pay the balance, if any was found due, does not amount to such "a substitution of a new obligation between the same parties, with intent to extinguish the old obligation," as is required to constitute a novation.
3. PROBATE PRACTICE—ALTERATION OF CLAIM.
 No substantial change in a claim on file in probate court can be made, either by amendment or otherwise, after the expiration of the time for the presentation of claims.
4. SAME—SETTING ASIDE JUDGMENT.
 A probate court has power to set aside its own judgments obtained *ex parte*.
5. SAME—NOTICE OF MOTION.
 If an order is made out of court, and without notice, allowing a claim against an estate, no notice of motion to set it aside is necessary.

Commissioners' decision. Department 1.

Appeal from superior court, Yolo county.

Benj. Bullard, Add. C. Hinkson, and *Armstrong & Hinkson*, for appellant. *Reese Clark*, for respondent.

HAYNE, C. This is an appeal from an order setting aside the allowance by the judge of a claim against the estate. The ground of the order was that the claim was barred by the statute of limitations. We think the claim was barred. It was upon a promissory note dated December 2, 1878, and payable eight months after date. Sullenberger died December 5, 1883, at which time the statute had run against the note, unless the case is taken out of its operation by the following circumstances: After the death of L. C. Drummond, (the payee,) Sullenberger (the maker) sold some wheat to M. Drummond, who was the son of the payee and the executor of his will, and delivered some hogs to him to be sold; and M. Drummond advanced some money to Sullenberger, and paid some of his debts, and testifies that on one occasion, when about to go on a short journey, "he said that when he should return, which would be in a short time, he would settle the whole indebtedness; and, if the proceeds of the wheat and hogs were not sufficient to settle the note and money advanced and paid to his creditors, he would pay the balance." M. Drummond sold the hogs, and after applying the proceeds of the hogs and wheat to the various demands against Sullenberger there remained due on the note a balance of $828, for which sum the claim was presented. Two grounds are urged to show that the foregoing circumstances take the case out of the statute.

1. It is said that the transactions mentioned constitute a mutual open and current account. But if we assume that this is so, the account was not between the parties to the note. There is no evidence that M. Drummond had any authority from the probate court that the estate of which he was executor should advance money to Sullenberger, or pay his debts, or buy his wheat, or act as his broker in selling hogs. And it does not appear that the estate did so. So far as the evidence showed, M. Drummond advanced his own money for the purposes mentioned, and acted individually in his purchase of the wheat and sale of the hogs. His testimony is as follows: "He

was going away from Davisville temporarily, and was owing some *to me* and Liggett and to other persons. He delivered *to me* some hogs to sell for him and Liggett, and *I had bought* from him his wheat. *I* was to let him have some money then, which *I* did, and paid some debts for him." There is not a word to show any dealing between Sullenberger and the estate of Drummond. The passage first above quoted amounts to nothing more than a permission from Sullenberger to M. Drummond to apply whatever balance should remain in his hands to the payment of the note due to the estate. We attach no importance to the statement of M. Drummond that the note was "considered a part" of the business transactions which he had with Sullenberger, or that it "was understood to form a part of the indebtedness."

2. It is argued that there was a novation, and that the provision requiring a writing to take a case out of the statute does not apply, because there was a new consideration. Without considering the latter branch of this argument, it is sufficient to say that the loose statements of Sullenberger to the effect that "he would settle the whole indebtedness" on his return, and would "pay the balance" if a balance should remain after application of proceeds of sales, do not amount to "the substitution of a new obligation between the same parties with intent to extinguish the old obligation," and hence there was no novation. Civil Code, § 1531. If, however, we overlook this, and disregard the fact that the new consideration did not move from the estate, then it would follow that the claim should not have been on the note, but upon the "new obligation," which must have existed if there was any novation. The claim, however, which was allowed, and the allowance of which was set aside, was a simple claim upon the note. The "amended claim," which was allowed to be filed "in opposition to the motion" to vacate the allowance of the first claim, is not an element of the question. No substantial change can be made in a claim on file, either by way of amendment or otherwise, after the expiration of the time for the presentation of claims. Furthermore, the permission was merely to file the "amended claim" on the hearing of the motion. When the court came to consider the matter, it rejected the claim.

But it is urged that the allowance of the first claim was a judgment, and that the court could not set aside its action for mere error. But, if it was a judgment in this sense, it was a judgment obtained *ex parte*, and the rule with reference to the power of a court to revise its own action suffers an exception in the case of *ex parte* proceedings. This must necessarily be so; for, if an appeal should be taken directly from the "judgment" allowing the claim, it must be heard upon the case made upon the application to the court below; and the opposing party is not heard upon such application, and consequently has had no opportunity to present his side of the question. The only way he has to make a showing is by moving to set aside the "judgment."

Exception is taken to the notice of motion to set aside. But the order allowing the claim having been made out of court and without notice, no notice of motion to set it aside was necessary. Code Civil Proc. § 937. Moreover, we think the notice was, under the circumstances, sufficient. We therefore advise that the order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

72 Cal. 568

MONROE *v.* FOHL. (No. 12,948.)

(*Supreme Court of California.* June 21, 1887.)

1. PAYMENTS—APPLICATION OF—UNEARNED INTEREST.

Payment of a given sum of money on a note four months after date, the interest on the note being payable annually, and the payment exceeding the annual inter-

est on the note, operates, in the absence of special agreement, as a payment of the principal indebtedness so far as the sum paid exceeds the interest then due, and is not a payment of unearned interest.[1]

2. MORTGAGE—DEFAULT IN INTEREST PAYMENT—CLAIMING PRINCIPAL DUE—NOTICE.
A note secured by mortgage provided that the mortgagee, upon a failure of the mortgagor to pay the interest annually, might elect to have the whole principal become due. Upon the mortgagor's failure to pay the annual interest, the mortgagee left notices at the residence and place of business of the mortgagor with persons of discretion in charge thereof; the mortgagor being absent, and the mortgagee being unable to find him after diligent search. *Held*, that the notice was sufficient to indicate the mortgagee's election.

3. PLEADING—CONCLUSIONS OF LAW.
The execution and delivery of a note payable to the order of plaintiff being admitted, a denial that plaintiff is the "holder" of it and an allegation that a third party is such "holder," without stating any facts showing such to be the case, *held* to be conclusions merely, and not to raise an issue.

4. MORTGAGE—FORECLOSURE—ATTORNEY'S FEES.
Under the California statute of March 27, 1874, entitled "An act to abolish attorney's fees and other charges in foreclosure," when a mortgage provides a certain amount as attorney's fees, it is error for the court to allow more than is specified.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county.

Aug. Muenter and *W. B. Nutter*, for appellant. *Carter, Smith & Kenis-ton*, for respondent.

HAYNE, C. Action to foreclose a mortgage, the plaintiff claiming that he was entitled to elect, and did elect, to have the principal become due for non-payment of interest. The plaintiff had judgment on demurrer to the answer and the defendant appeals. We think the answer presented no defense.

1. The note was dated June 25, 1885, and the interest was payable annually. On October 10, 1885, the defendant paid $800 on account of the note, without anything being said on either side as to whether the payment was to be applied to the interest or to the principal. Conceding, in favor of the defendant, that the payment was to be applied first to the interest, it will be so only as to interest up to the date of the payment. The balance of the payment must be applied to the principal. The law will not apply it to future or unearned interest. After making the application as above stated, there remained something over eight months' interest to fall due on June 25, 1886. That balance of interest fell due on that day; for the meaning of the contract is that the interest was to be paid annually from its date, and not annually from any date at which a payment might happen to be made; and the fact that the defendant chose to make the payment above mentioned does not affect the interest on the unpaid principal. The non-payment of this eight months' interest entitled the plaintiff to elect to consider the principal as due.

2. The plaintiff did elect to have the principal become due. The complaint alleges that on July 14, 1886, the plaintiff notified the defendant of his election by leaving a notice at the defendant's residence with a person of discretion in charge of such residence, and by leaving a notice at the defendant's place of business with a person of discretion in charge of such place of business; the defendant being then absent from his residence and place of business, and the plaintiff having been unable, after diligent search and inquiry, to ascertain his whereabouts. The only construction we can give to the answer is that the defendant was not *personally* notified or "informed" of the election. We think the notice given was sufficient.

3. The execution and delivery of the note payable to the order of plaintiff being admitted, the denial that plaintiff was the "holder" of the note, and

[1] Respecting the application of payments, see Gage v. Dudley, (N. H.) 9 Atl. Rep. 786; Robie v. Briggs' Estate, (Vt.) Id. 593; The Martha, 29 Fed. Rep. 708; Magarity v. Shipman, (Va.) 1 S. E. Rep. 109, and note; Murphy v. Reedy, (Miss.) 2 South Rep. 167.

the assertion that the bank was the holder, without averring any facts showing such to be the case, were of conclusions merely, and raised no issue. *Poorman* v. *Mills*, 35 Cal. 119; *Wedderspoon* v. *Rogers*, 32 Cal. 571; *Hook* v. *White*, 36 Cal. 302.

4. But we think the court erred in allowing a greater sum as counsel fee than the one stipulated in the mortgage. In the absence of a provision in the mortgage, the plaintiff is not entitled to a counsel fee (*Sichel* v. *Carrillo*, 42 Cal. 493; *Mascarel* v. *Raffour*, 51 Cal. 242,) unless there is a statute which allows one. The statute of March 27, 1874, provides that, "in all cases of foreclosure of mortgage, the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." Read literally, this language might mean that "in all cases of foreclosure" a counsel fee shall be fixed by the court, whether the mortgage provides for one or not. But we do not think that such is its meaning. The title of the act is "An act to *abolish* attorney's fees and other charges in foreclosure." And there is no provision in terms that any fee shall be allowed. The thing to be "fixed" is "*the* attorney's fee." We think this means "the attorney's fee provided for by the mortgage," and that it has no application where none is so provided. But even if this is not the true construction, and the court can allow a counsel fee where the mortgage is silent upon the subject, if, as here, a counsel fee is agreed upon between the parties, it must be held to be an exclusion of any greater fee.

The court therefore erred in allowing a greater fee than the one provided in the mortgage. But this does not make the ruling on the demurrer to the answer erroneous. The counsel fee stipulated to be paid was not an element of the cause of action, but was, like the costs, a mere incident to it, and was to be fixed by the judge in his discretion, not exceeding the stipulated amount. *Carriere* v. *Minturn*, 5 Cal. 435.

The other points do not require special mention.

We think the cause should be remanded, with directions to the court below to modify its judgment in accordance with the views above expressed, the appellant to recover his costs of appeal.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the cause is remanded to the court below, with direction to modify its judgment in accordance with the views expressed in said opinion, the appellant to recover his costs of appeal.

72 Cal. 540

LINDSAY *v.* STEWART. (No. 11,962.)

(*Supreme Court of California.* 1887.)

1. ACTION—ENTIRE DEMAND—SEPARATE ACTIONS—COUNTER-CLAIM.

An action was brought to recover the sum of $1,146.91. Defendant answered and pleaded a counter-claim arising from "a mutual open and current account" for $1,660.13. Previous to the commencement of this action, defendant had commenced an action in justice's court against plaintiff for items amounting to $118.18, which items were included in the counter-claim above stated. The action in justice's court was still pending when the answer and counter-claim were filed. *Held*, that while defendant could not bring another action (after the action in justice court) to recover the balance due on the account above the $118.18 claimed, and while he could not on his counter-claim obtain an affirmative judgment, yet he could avail himself of the claim as a defense to plaintiff's action.

2. SAME—ELECTION.

Defendant was not bound to dismiss the action in the justice's court in order to avail himself of his counter-claim, nor was he bound to elect between that action and his defense, judgment not having been entered in the justice's court.

Appeal from superior court, Ventura county.

S. A. Sheppard, *J. Marion Brooks*, and *Frederick Hall*, for appellant. *Blackstock & Shepherd*, for respondent.

PATERSON, J. This action was commenced in February, 1886, to recover from the defendant—*First*, the sum of $750 with interest, alleged to be due on a promissory note executed and delivered by defendant to M. H. Lindsay, who assigned to plaintiff; *second*, the sum of $396.91, for work, money advanced, and merchandise furnished by plaintiff at request of defendant between February 11, 1884, and February 10, 1886. The defendant answered denying generally and specifically every allegation of the complaint, and setting up a further defense and counter-claim, alleging that plaintiff was indebted to him in the sum of $1,660.13 for the balance due on a mutual open and current account for goods sold and delivered by defendant to plaintiff, also for work done, money lent and paid out, lands sold, rent of land, board and lodging, and for pasturage,—all between January 1, 1884, and December 14, 1885.

The court found—*First*, that the note for $750 was executed and delivered and thereafter duly assigned as alleged in the complaint, that only part thereof was paid, and there was still due and unpaid $292.50. *Second*, that of the items claimed by plaintiff in his "second cause of action" the sum of $188.25 was still unpaid. *Third*, that defendant, on February 8, 1886, commenced an action in the justice's court against plaintiff for the sum of $118.18, for money lent, labor performed, and merchandise furnished, all of which items were included in and were a part of the counter-claim set forth in the answer of defendant herein; that the defendant therein (plaintiff herein) appeared and answered, denying each and every allegation of the complaint; and that said cause in justice's court was at the commencement of this suit and is "still pending and undecided, and has not been dismissed nor discontinued." *Fourth*, as conclusions of law the court finds that plaintiff is entitled to judgment; that plaintiff's plea in abatement be sustained, and defendant's counter-claim be abated and dismissed, and that plaintiff is entitled to judgment against defendant for $480.75, and costs. The judgment was that "plaintiff do have and recover of and from T. H. Stewart, defendant, $480.75, and costs, amounting to $128.15."

There was no plea in abatement to the counter-claim of defendant, and there could be no such plea under the circumstances. To sustain the defense of a former action pending, it must appear that in that action the plaintiff is the same as in the action in which the plea is offered, and the cause of action in both must be founded upon one entire contract, or upon one single or continuous tortious act. The law abhors a multiplicity of actions, and will not permit a party to prosecute two actions for the same cause, because it annoys and harasses the defendant without cause; but there can be no reason for the application of this rule in cases where the defendant in the former action is the aggressor, and the other party relies upon the matters contained in that action for his defense. *Ayres* v. *Bensley*, 32 Cal. 630; *Herriter* v. *Porter*, 23 Cal. 385.

In *Naylor* v. *Schenck*, 3 E. D. Smith, 135, the court, speaking upon this subject, said: "There is in this holding a misapprehension of the defendants' position. They are not prosecuting two actions, one of which abates the other. In an endeavor to recover their damages they find themselves prosecuted by their adversary. They may defend by setting up any matter which the law recognizes as a defense, whether it be a cause of action, or whether it be a judgment actually recovered thereon; the only difference being that after judgment it must be used as a judgment and by way of set-off."

The defendant herein was not bound to dismiss his action in the justice's court, nor was he required to elect between that action and his defense in

this suit, the former not having gone to judgment. *Fuller* v. *Read*, 15 How. Pr. 238; *Wiltsie* v. *Northam*, 3 Bosw. 168.

We think, however, that defendant can make use of the matters contained in his counter-claim only in defense of the plaintiff's claim, and as an offset thereto, and will not be entitled to judgment in his favor for any balance due on the account. In his counter-claim, defendant alleges "that the plaintiff is indebted to the defendant in the sum of $1,660.13, the balance due defendant on the ninth day of February, 1886, upon a mutual open and current account in which there were reciprocal demands between the plaintiff and defendant," and that the items were "charged in account between the first day of January, 1884, and the fourteenth day of December, 1885, the date of the last item of said account, all of which will more fully appear from the copy of account hereto annexed and made a part of this amended answer and counter-claim, marked 'A'; that the aggregate amount of said above alleged items of account and demands is the sum of $1,797.80, no part of which has been paid, except the sum of $137.75, leaving a balance of $1,660.13 of said demand unpaid; that the plaintiff refused to pay the same."

As before stated, this account contained all of the items sued for in the justice's court, and all were due at the time that suit was commenced. The defendant could not have maintained another action against plaintiff for the balance of the account.

The allegations of the counter-claim clearly show that the balance of the mutual open and current account in favor of the defendant constitutes an entire demand, against which it was intended the statute should not begin to run earlier than the date of the last item, to-wit, December 14, 1885. Such an account cannot be severed, and different suits be brought upon it piecemeal, (*Corey* v. *Miller*, 12 R. I. 338; *Borngesser* v. *Harrison*, 12 Wis. 544;) and, if action be brought in such case for a part only of the items, he cannot afterwards sue for the rest. For the purpose of defending against the claim of his adversary, however, he may set out any and all items of the account, whether included in the former action pending or not.

Judgment and order reversed, and cause remanded for a new trial.

We concur: TEMPLE, J.; MCKINSTRY, J.

73 Cal. 137

GLASCOCK *v.* CENTRAL PAC. R. CO. (No. 11,581.)

(*Supreme Court of California.* July 13, 1887.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—RAILROAD CROSSING—SIGNALS.

In an action against a railroad company for the negligent killing of plaintiff's husband at a railroad crossing, it appeared that the railroad track at the place of the occurrence was unobstructed and in plain view of the highway along which deceased was approaching the crossing; that deceased was a man in the full possession of all his faculties, active, sober, cautious, and fully acquainted with the usual time that trains passed over the road; that the train that killed him was going south, was a special train, and unexpected at the station just north of the crossing. No evidence showed that the train made any signal of warning before passing the crossing. It made a loud noise in its course, and the track along which it passed was near and in sight of the highway along which deceased was driving for some distance before they crossed. There was no evidence whatever of the manner of the collision, nor of the circumstances before or connected with it. The wind was from the north; there was no smoke, dust, or other obstruction to a fair view of the track. The engineers had been in the habit of passing this crossing without the usual signals, and defendant was aware of the habit. *Held*, that deceased, by failing to use the faculties and opportunities of observation which the plaintiff's own case showed that he had, was guilty of contributory negligence, and the plaintiff was properly nonsuited.[1]

[1] Respecting contributory negligence in crossing a railroad track, see Kelly v. Pennsylvania R. Co., (Pa.) 8 Atl. Rep. 856; Purinton v. Maine Cent. R. Co., (Me.) 7 Atl. Rep. 707, and note; Chase v. Maine Cent. R. Co., (Me.) 5 Atl. Rep. 771, and note; Sherry v.

In bank. Appeal from superior court, Yolo county.

F. E. Baker, J. C. Ball, and *Jackson Hatch,* for appellant. *P. C. Denson,* for respondent.

PATERSON, J. Plaintiff is the widow of George Glascock, who was killed by defendant's cars at a railroad crossing near Black's Station on the morning of November 1, 1884. The cause came on for trial before a jury, and after the plaintiff had rested her case a motion for a nonsuit was made and granted. Counsel for appellant in the following epitome give a very fair statement of the facts:

"Black's Station is a village about ten miles north-west from Woodland, in Yolo county. A public road about sixty feet wide leads from Black's in a southerly direction for about a quarter of a mile; thence easterly about one mile, crossing defendant's railroad track about a quarter of a mile east from the point where the road turns east. After leading east for about a mile, as above stated, the road turns south, and goes due south, and past the residence of deceased. The crossing where the collision occurred was on this road about fifteen hundred feet north of the house. A person passing down the highway in question to the crossing would have a clear view of the railroad track to his right nearly all the time. There are no obstructions that would prevent him seeing the track or an approaching train. There are two whistling posts north of the crossing on the railroad track; one 1,370 feet distant, and beyond a crossing on another road, the other 588 feet distant. A wind was blowing at the time from the north.

"The train that collided with the wagon of deceased that day was a special freight train from the north, going south; no notice of its coming having been received by the company's agent at Black's. It passed the station about 10 o'clock A. M. Just before the collision it was running at the rate of probably ten miles an hour. The regular freight train going north on that day was due at Black's about 11:30 o'clock A. M., and the regular passenger train going north that day was due at Black's at 1:03 P. M. In fact a train did pass the crossing going north about one-half hour after the collision. It is fair to conclude that the collision actually occurred between 10 and 11 A. M. that day.

"Deceased was a thrifty, prudent, cautious, strictly temperate, and unusually active man; a man of strong individuality, self-reliant, and had lived on a farm owned by him, through which defendant's railroad track passed, since 1853, and was familiar with the crossing where the collision occurred. He was a good horseman also. He had been especially cautious in approaching and passing over this crossing. Before the colliding train reached the crossing, no signal of its approach was given by the sounding of a whistle, or the ringing of a bell. No witness saw deceased after he had started homeward from Black's, nor was he seen by any one at the time of the collision. There is no evidence whatever of the manner in which the collision occurred; nor of the manner in which the deceased approached the railroad track; nor of any of the circumstances immediately preceding, or concurrent, in point of time, with the collision. It is shown by the pleadings that deceased, at the time of the collision or immediately prior thereto, was driving two horses harnessed to a wagon along and upon the public highway referred to, and was in the act of crossing defendant's railroad track at the crossing."

None of the witnesses could say whether the train began to "slow down" before it reached the crossing. Several of the witnesses testified that they were on the road in view of the crossing, but further from the crossing than the deceased, and that they heard the whistle when the train was at Black's,

New York Cent. & H. R. R. Co., (N. Y.) 10 N. E. Rep. 128; Cooper v. Lake Shore & M. S. R. Co., (Mich.) 33 N. W. Rep. 306; Slater v. Burlington, C. R. & N. R. Co., (Iowa,) 32 N. W. Rep. 264; Mynning v. Detroit, L. & N. R. Co., (Mich.) 31 N. W. Rep. 152, and note; Union Pac. R. Co. v. Henry, (Kan.) 14 Pac. Rep. 1.

and again at a crossing south of Black's; that the country was level, and the track graded slightly above the general surface of the ground; that the train made a great noise, which was carried southward by the wind. The angle made by the railroad and the highway is one of about 35 deg. The evidence showed that the engineers had been in the habit of passing the crossing where the accident occurred without giving the signals required by the statute, and that the deceased was aware of the fact.

We think there can be but one reasonable conclusion drawn from the facts. Mr. Glascock either saw the train before he reached the track, or he did not look towards the track as he approached it. According to the testimony of his son he was in full possession of his mental and physical powers; "and when at the crossing, and a little ways from it," as his brother testified, "could see up and down the track at least a couple of hundred yards from the crossing; it was always an open, plain view." Having good eyes, it was his duty to use them, at least to some extent, for his own protection; and his failure to do so would be contributory negligence, and prevent a recovery, notwithstanding the negligence of the defendant in failing to ring the locomotive bell or blow the whistle. It is an irresistible inference from the facts developed from the testimony of the plaintiff that, if Mr. Glascock had at any time looked up the track after the train reached the point where the engineer ought to have rung the bell, he could and would have seen the train coming in time to stop and let it pass. There was no dust,—nothing to obstruct the view. The case is not one, therefore, where we are called upon to say how much investigation, listening, or looking by the deceased would overcome the charge of contributory negligence, as where a curve in the road, tunnel, embankment, trees, buildings, or dust obscures the view; but it is a case where the deceased could have seen and heard if he had exercised his faculties therefor to any extent whatever. If he looked, he saw; and, having age and faculties to understand the dangers, is charged with a knowledge of them, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances. His failure to so act was negligence which, notwithstanding the negligence of the defendant, the law regards as such a contributory cause on his part as will make the injury his own misfortune, and relieve the other party from liability therefor. *Flemming* v. *Western Pacific R. Co.*, 49 Cal. 257; *McQuilken* v. *Central Pac. R. Co.*, 64 Cal. 466, 2 Pac. Rep. 46; *Clark* v. *Missouri R. R. Co.*, 11 Pac. Rep. 138; *Union Pac. R. Co.* v. *Adams*, 6 Pac. Rep. 529; *Schofield* v. *Chicago, M. & St. P. R. Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125.

While the question of negligence is nearly always a matter for the jury, and the burden of proving contributory negligence rests upon the defendant, yet, when it appears from the undisputed facts—shown by the plaintiff's own evidence—that the deceased has not exercised such care as men of prudence usually exercise in positions of like exposure and danger, the question is one of law for the court. *Fernandes* v. *Sacramento R. Co.*, 52 Cal. 50; *Flemming* v. *Western Pac. R. Co.*, *supra*. In the case at bar we think the facts shown by the plaintiff would not support a verdict in her favor, and that the court below properly granted the motion for nonsuit.

There was no error in sustaining the objections to the questions propounded to the witness Glascock. The questions called for the conclusion or opinion of the witness. If admissible at all, the inquiry should have been confined to matters of fact,—to a relation of the circumstances. In passing upon the motion for nonsuit, the court below was bound to presume that the defendant was ordinarily a cautious and prudent man. But neither this presumption, nor the fact, if shown, that he had on every other occasion been careful in crossing the railroad, could avail the plaintiff in view of the other facts in the case. *Sanderson* v. *Frazier*, 5 Pac. Rep. 632.

Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.

73 Cal. 54

HOGUE *v.* FANNING. (No. 12,038.)

(*Supreme Court of California.* July 1, 1887.)

1. TROVER—VERDICT—JUDGMENT—EXECUTION—MANDAMUS.

In an action of trover before a justice of the peace, where the value of the property claimed is set out in the complaint, but the jury render a verdict as follows: "We, the jury in the case of ——, find for the plaintiff, less damages claimed," without stating the value of the property, — a judgment rendered by the justice upon such verdict adjudging that the plaintiff recover the possession of the property, or the value thereof as given in the complaint, though erroneous, as being founded upon a defective verdict, is not void, and execution will issue thereon, and, if refused by the justice, a *mandamus* will be granted to compel the issuance of an execution upon it.

2. SAME—DESCRIPTION OF PROPERTY.

A judgment which adjudges that the plaintiff do recover the possession of "the property in the complaint herein described and filed," where the complaint sufficiently describes the property sought to be recovered, is not void for want of certainty.

Commissioners' decision. Department 1.
Appeal from superior court, Fresno county.
W. D. Grady, for appellant. *Wharton & Shaw*, for respondent.

FOOTE, C. According to the stipulation of the parties, the following appear to be the facts in this case: "(1) That heretofore, to-wit, on the first day of March, 1886, one J. N. Fanning commenced an action in the justice's court of the Fourth township, county of Fresno, state of California, against one Andrew Farley, for the recovery of the possession of a certain mare and colt, or for the sum of $275, the value thereof, in case a delivery could not be had; and for $50 damages for the detention thereof, with cost of suit. Said action was in the usual form of actions for claim and delivery of personal property. That on the sixteenth day of September, 1886, said cause was duly tried before the defendant, S. L. Hogue, a justice of the peace, with a jury; and after the evidence was introduced in said cause, the said jury returned the following verdict: 'SELMA, September 16, 1886.

" 'We, the jury in the case of *Fanning* v. *Farley*, find for plaintiff, less damages claimed. C. S. STANTON, Foreman.'

"That thereupon the said justice made and entered the following judgment in said cause:

" 'In accordance with the foregoing verdict, and the premises having been by the court considered, it is ordered and adjudged that the plaintiff, J. N. Fanning, do have and recover from the defendant, Andrew Farley, the possession of the personal property in the complaint herein described and filed, or for the sum of $275, in case a delivery cannot be had, together with said plaintiff's costs of suit herein paid out and expended.

" 'Done in open court this sixteenth day of September, 1886.

" 'S. L. HOGUE, Justice of the Peace.'

"That thereafter, on the tenth day of November, 1886, it having been stipulated that defendant's counsel have time to file the same, defendant's counsel filed a motion to set aside the verdict, and vacate the judgment filed; and on the twenty-sixth day of said month the said court denied said motion; and on the tenth day of January, 1887, plaintiff's counsel asked for an execution in said case to issue, whereupon the said justice of the peace refused to issue said execution in the said case, unless ordered to do so by the honorable superior judge of Fresno county, for the following reasons, among others:

" 'That before the entering of the judgment in his docket, one J. R. Webb, attorney for plaintiff, wrote said justice that the verdict was not good, and that said justice had concluded and consented that said judgment was void. He refused to act unless so ordered by the superior court. That thereafter the plaintiff, J. N. Fanning, on the eleventh day of January, 1887, applied to the superior court of Fresno county for an order directing the said S. L. Hogue to show cause on the twenty-second day of January, 1887, why a writ of *mandamus* should not issue, compelling the said justice to issue an execution in said case. That on the twenty-second day of January, 1887, the said justice having made his return, from which it appears that he refused to issue said execution for the reasons hereinbefore set out, the said superior court, after hearing argument in said matter, and being fully advised, made and entered its judgment, granting peremptory writ of *mandamus*, directing the said defendant, S. L. Hogue, as justice of the peace, to issue execution in said case for the enforcement of said judgment; and from which judgment granting said writ the said defendant appealed to this court.' "

It is contended by the appellant that the peremptory writ of mandate issued to the justice who tried the case and rendered the judgment was improper because, as is alleged—*First*, the judgment was void from the fact that it was based upon a verdict of the jury which failed to find the value of the property, for the recovery of which, or its alternative value, the action was in-

stituted; *second*, because, as is claimed, the judgment does not contain a sufficient description of the property sued for, and is void on its face.

We cannot concur in the view of the law thus entertained by the appellant. The verdict of the jury was erroneous in that it did not find the value of the property; but the court, when it came to render the judgment, in the exercise of its judicial functions, evidently concluded that the jury intended to find for the plaintiff upon all the issues made by the pleadings, except with reference to his demand for $50 damages for the detention of the property, which was found against him. The value of the detained property was set out in the complaint as $275, the amount for which the court gave judgment, and, from an inspection of the verdict of the jury, it is plain that their intention was to find the plaintiff entitled to recover this sum of money from the defendant in case the specific personal property sued for should not be returned to him.

In rendering the judgment the court committed an error; but the judgment being regular in form, and jurisdiction being had by that tribunal, both of the person of the defendant and the subject-matter of the action, the judgment was not void on that account, but might have been reversed on appeal. We have been able to find no case which is precisely in point, but the reasoning of this court in *Hunter* v. *Hoole*, 17 Cal. 420, seems conclusive of the view we entertain.

The second point made by the appellant is not tenable, for, upon inspecting the complaint to which the judgment refers for a description of the property sued for, it will be found that it is full and ample, and therefore, under the rule of law, *certum est quod certum reddi potest*, the judgment is not void for want of certainty.

The defendant did not appeal from the judgment, and it being merely erroneous, and not void, it was the duty of the justice to have issued execution as requested. Failing in this duty, it was the plaintiff's right to invoke the writ of mandate issuing from the superior court. Section 1085, Code Civil Proc. The judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the forgoing opinion the judgment is affirmed.

2 Cal. Unrep. 774

CUMMINGS *v.* CUMMINGS and others. (No. 11,881.)

(*Supreme Court of California.* 1887.)

1. DIVORCE—JOINDER OF PARTIES AND CAUSES OF ACTION—FRAUDULENT CONVEYANCE.
With a suit for divorce, plaintiff also joined an action for the division of community property, uniting Ketchum, Simpson, and the Bank of Watsonville as defendants. The complaint alleged that, during the coverture of plaintiff and defendant Cummings, the latter acquired, by the joint efforts of himself and wife, a quantity of real estate, which was community property, and part of which, without the knowledge or consent of plaintiff, he attempted to convey to defendant Ketchum; that this was done with the purpose and intent on the part of both parties to the conveyance to defraud plaintiff of her rights in the property; that the conveyance was without consideration; that the Bank of Watsonville claims some interest in the property by reason of a mortgage thereon, given by Ketchum, but that the mortgage was taken with knowledge of the fraud of the above-named defendants, and for the purpose of assisting in carrying it out; that said Simpson claims an interest in the land, but that his interest or claim is subordinate to plaintiff's interest therein. Defendants Ketchum and the Bank of Watsonville demurred, on the grounds (1) that several causes of action were improperly united; (2) that there was a misjoinder of parties defendant. *Held*, that the demurrers should have been sustained.

2. HUSBAND AND WIFE—ACTION BETWEEN—FRAUDULENT CONVEYANCE.
An action to set aside the conveyance of community property made by a husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists.

Department 2. Appeal from superior court, Santa Cruz county.

A. S. Kittredge, for appellant. *Thomas H. Laine*, *Goldsby & Jetter*, and *Z. N. Goldsby*, for plaintiff.

THORNTON, J. This action is brought by the plaintiff, Mary R. Cummings, against her husband, William N. Cummings, defendant, for a divorce from the bonds of matrimony, and for a division of the community property, etc. Morgan L. Ketchum, James L. Simpson, and the Bank of Watsonville were also made defendants.

It is averred in the complaint that, during the coverture of plaintiff and defendant Cummings, the latter acquired, by the joint efforts of plaintiff and defendant just above named, a large amount of real property in the city of Santa Cruz, of the value of $16,000 or thereabouts, which was community property, and that a portion of the property was a lot situate in the city of Santa Cruz, which is particularly described in the complaint. It is further averred that defendant Cummings, by an instrument in writing by him signed, acknowledged, and delivered on the eighteenth of May, 1876, in form a deed of conveyance, without the knowledge, approbation, or consent of plaintiff, purported to convey to defendant Ketchum the lot of land above mentioned, in which instrument $8,000 is stated as the consideration thereof; that Cummings and Ketchum, in the execution and delivery of the pretended conveyance, combined and confederated willfully for the purpose and with the intent to defraud plaintiff of her rights and interest in and to said property, and to fraudulently cover up and conceal the legal title for the sole use and benefit of defendants Cummings and Ketchum; that said conveyance was without consideration, and that no part of it was ever paid or ever agreed to be paid by Ketchum to Cummings: that the whole scheme is a contrivance to defraud plaintiff of her rights and interest in the property aforesaid.

As to the Bank of Watsonville, it is alleged that it has or claims to have some interest in the lot above mentioned; that its claim is based on a mortgage executed by Ketchum to it, dated on or about the sixteenth day of August, 1881; that said mortgage was taken with knowledge of the fraud of Ketchum and Cummings above set forth, and with the intent to enable Ketchum and Cummings to carry out the fraud aforesaid; that defendant Simpson has or claims to have some interest in the lot in controversy, but said interest is subordinate and subject to the interest of plaintiff in said lot. A like averment as that just preceding is made as to the interest of the Bank of Watsonville.

Ketchum and the bank demurred to the complaint on the following among other grounds: (1) That several causes of action have been improperly united, to-wit, an action for a divorce, and an action based on a fraud alleged to have been committed upon plaintiff's marital community rights, said fraud being wholly without relation to, connection with, or anticipation of, a divorce, or any proceedings therefor. (2) That there is a misjoinder of parties defendant,—William N. Cummings, defendant in an action for divorce, and these defendants as parties to an alleged fraud upon plaintiff's marital community rights,—said fraud being wholly without relation to, connection with, or anticipation of, a divorce, or any proceedings therefor. The demurrer was overruled, and the cause proceeded to trial. A nonsuit was granted as to the bank, and a judgment was rendered adverse to Ketchum.

It is contended that the demurrer on the grounds above mentioned should have been sustained, and we concur in this contention. The joinder of causes of action is governed by section 427, Code Civil Proc. That section is as follows:

"The plaintiff may unite several causes of action in the same complaint, where they all arise out of (1) contracts, express or implied; (2) claims to recover specific real property, with or without damages for the withholding

thereof, or for waste committed thereon, and the rents and profits of the same; (3) claims to recover specific personal property, with or without damages, for the withholding thereof; (4) claims against a trustee by virtue of a contract, or by operation of law; (5) injuries to character; (6) injuries to person; (7) injuries to property. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

We do not find the causes of action here united, viz., an action for a divorce and an action to set aside a conveyance on the ground of fraud, to belong to any of the classes of action allowed to be united by the above section. Nor can Ketchum or the bank be made defendants in such a cause as this. They have no concern in the action for a divorce between plaintiff and her husband.

Furthermore, we are of opinion that the action to set aside a conveyance of the community property made by the husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists. The reasons for this conclusion are given in *Greiner* v. *Greiner*, 58 Cal. 119, 121, where the point is decided. We think the ruling in that case is correct, and should be adhered to. The action which the wife can probably maintain during coverture is set forth in *Greiner* v. *Greiner*, 58 Cal. 121. When a decree of divorce has been obtained, the plaintiff can bring an action to redress any such wrong as she alleges she has sustained by the conduct of Ketchum. The court erred in not sustaining the demurrer to the complaint.

The appointment of the receiver is without any ground to sustain it. Ketchum was a mortgagor in possession, with the right to collect the rents and profits. It is found that he had committed no fraud. He had a right to retain the whole property as security for the payment of the amount due him, and there was no ground to deprive him of the possession of any portion of the lot involved herein.

The judgment is reversed and the cause remanded, with directions to discharge the receiver on his properly accounting, and to sustain the demurrer as to Ketchum. Ordered accordingly.

We concur: McFARLAND, J.; SHARPSTEIN, J.

2 Cal. Unrep. 778

LEVY *v.* BURKLE and others. (No. 11,967.)

(*Supreme Court of California.* July 27, 1887.)

1. FRAUD—AS DEFENSE TO TRUST DEED.

 In an action to foreclose a trust deed, where the answer set up that the property conveyed was the separate property of the wife; that her husband had been arrested on a criminal charge, and obtained bail; that he became financially embarrassed; and that the wife signed the trust deed upon the representation made to her by her husband and the plaintiff, who was a creditor of the husband and one of his bondsmen, that unless she signed the deed the bondsmen would withdraw, and her husband would have to go to jail, and would probably be convicted, and go to the penitentiary, and that by signing the deed she would not lose anything, and that the deed would not divest her of her homestead: *held*, that a demurrer to such answer was properly sustained.

2. TRUST DEED—ORDER OF SALE—RIGHT OF REDEMPTION.

 A court has no authority to order a sale of property without the right of redemption given by statute; and it makes no difference whether the security under which the sale is ordered is a mortgage or a trust deed.

Department 2. Appeal from superior court, Los Angeles county.

This was an action to obtain an order to sell certain property under a trust deed. The complaint alleges that, on the twenty-third of May, F. Burkle, one of the defendants, was indebted to sundry persons in about the sum of

$3,000; that on that day he entered into an agreement with his creditors to pay to the plaintiff, Levy, as trustee, the amounts of his debts, in 12 monthly installments; that, to secure the payment of said sums, Burkle and his wife, Elizabeth Virginia Burkle, executed a trust deed to Levy; that in October, 1885, the Burkles commenced an action against Levy to have the trust deed vacated and set aside on the ground of fraud; that a judgment was rendered against them in this action, and subsequently they commenced another suit against Levy to have the deed vacated on the ground that the land conveyed was the homestead of defendants, and the separate property of the wife, and that the wife had been induced to sign the deed by fraud and undue influence; that the Burkles had declared that they intended to harass perpetually said Levy by litigation; that the threats, the bringing of the second suit, and the possession of the property by the Burkles, tend to cloud plaintiff's title, as such trustee, and he prays that the title of the trustee be declared good, and the trust property be sold without the right of redemption.

The defendants demurred to the complaint. The demurrer was overruled, and they answered, denying the alleged threats to harass plaintiff, and setting up as new matter, by way of separate defense, that at the time of the execution of the trust deed the property conveyed was the separate property of the wife, and the homestead of herself and husband; that the wife executed the trust deed through fraud and undue influence on the part of the plaintiff. The fraud relied on was that on the second of May, 1884, her husband, who was a merchant in San Pedro, Los Angeles county, assaulted one Jones, and was arrested and taken to Los Angeles; that upon securing bail he was again arrested on a second complaint by Jones, and again compelled to give bail; that, from that time until the date of the execution of the trust deed, he was engaged in preparing to defend these proceedings; that his attorney and friends had told him that he would probably be convicted, and go to the penitentiary; that he became financially embarrassed, and his creditors began to harass him; that Levy, the plaintiff, who was one of the creditors, and a trusted adviser, suggested that he and his wife join in a deed of all her property to him (Levy) in trust, to conciliate the other creditors; that he was given to understand that his bondsmen, (Levy and one Jacoby,) both creditors, would withdraw from the bond, and he would have to go to jail, unless the deed was given; that prior to the date of the execution of said trust deed he confided to his wife all his troubles, as they were known to himself and Levy; that in consequence she became greatly agitated and unfitted for business, and while in this condition she was asked by Levy, he at the time knowing her condition, to attend a meeting of her husband's creditors, and was then asked to sign the trust deed; that she refused to do so until told by her husband and Levy that by so doing she could relieve her husband from his embarrassments, and that she would not lose anything thereby, and that the deed would not divest her of her homestead; that it was only upon the faith of these assurances that she signed the deed; that all the representations so made by her husband and Levy were intentionally and deliberately false on the part of said Levy. To this answer the plaintiff demurred, which demurrer was sustained, and defendants appealed.

For a former action between these parties, involving the same facts, see 11 Pac. Rep. 643.

P. W. Dooner, for appellants. *Chapman & Hendrick* and *Graves & O'Melveny*, for respondent.

THORNTON, J. The demurrer to the answer of defendant Elizabeth Burkle was properly sustained. We are of opinion that there is error in the judgment in the direction for the sale of the property without the right of redemption. The right to redeem is given by statute, and the defendant cannot be deprived of it by the court. It makes no difference that the security here in-

volved is a deed of trust. It was held at an early day in *Kent* v. *Laffan*, 2 Cal. 595, and ever since, that the statutory redemption applied to a sale on foreclosure of a mortgage. If it applies to a mortgage, it as well applies to a deed of trust. Both are securities only. The difference is only in form. In one case the mortgagee is the trustee; in the other a third person.

The judgment is ordered to be modified in the court below by striking out the direction for the sale without the right of redemption, and when so modified will stand affirmed. Ordered accordingly.

We concur: McFARLAND, J.; SHARPSTEIN, J.

72 Cal. 609

PEOPLE *v.* KERNAGHAN. (No. 20,209.)

(*Supreme Court of California.* June 27, 1887.)

1. CRIMINAL PRACTICE—INSTRUCTIONS—REASONABLE DOUBT.
 In the charge to the jury in a trial for murder the language, "Your minds should be able to rest *reasonably satisfied* of the guilt of the defendant before a verdict of that character is given;" and, "On the other hand, however, mere probabilities of innocence or doubts, however reasonable, *which beset some minds on all occasions*, should not prevent such a verdict,"—does not injure the defendant, and is no ground for setting aside a verdict of guilty of murder in the first degree, when the court in other parts of its charge has fully and correctly stated the law on the subject of reasonable doubt.[1] TEMPLE, J., dissenting.
2. HOMICIDE—MANSLAUGHTER.
 In a charge to the jury in a trial for murder, after giving a proper definition of manslaughter, the court added that it was homicide, "not excusable, not justifiable, but yet not intentional." *Held* that, as the intent in manslaughter, if present, may be disregarded, in accordance with the settled rule in California, the difference between the absence of intention and the presence of an intention which may be disregarded is too slight to be ground for setting aside a verdict of guilty of murder in the first degree. THORNTON, J., dissenting.
3. INSANITY—DEFENSE TO CRIME—EMOTIONAL INSANITY.
 It is not error to state, in a charge upon the defense of insanity, that "the law rejects the doctrine of what is called 'emotional insanity,' which begins on the eve of the criminal act, and leaves off when it is committed."

In bank. Appeal from superior court, San Francisco county.

Robert Ferral and *Clarence Gray*, for appellant. *Atty. Gen. G. A. Johnson*, for respondent.

McFARLAND, J. The jury found the appellant guilty of murder in the first degree, and assigned the punishment of death. He now contends for a reversal of the judgment upon the grounds that the court erroneously instructed the jury—*First*, as to reasonable doubt; *second*, as to manslaughter; *third*, as to excusable homicide; and, *fourth*, as to insanity. The difficulties in this case arise mostly out of the attempt of the learned judge of the court below to employ new and unusual forms of speech to state old principles, the proper expression of which has long since settled into well-considered and well-chosen language. For instance, the definition—or, rather, the description—of "reasonable doubt" given by Chief Justice SHAW in the *Webster Case* has been adopted by this court, and by nearly all American courts, as a statement of that mental condition sufficiently accurate. Therefore, where a *nisi prius* court had given the language used by Chief Justice SHAW, and had confined itself to such language, we would be slow to reverse the case, although other instructions upon the subject, not objectionable, had been asked by defendant, and had been refused. But, in the case at bar, the court, in addition to a correct statement of the law concerning reasonable doubt, taken substantially from the *Webster Case*, used other expressions which are objectionable;

[1] Respecting what is a reasonable doubt, see People v. Lee Sare Bo, *ante*, 310, and note; McCullough v. State, (Tex.) 5 S. W. Rep. 175.

and the question to be determined is, does it appear from the whole charge, considered as an entirety, that the defendant was not injured by that part of it which, considered by itself, might be admitted to be erroneous? *People* v. *Doyell*, 48 Cal. 93. For the solemn verdict of 12 men, rendered upon their oaths, will not be set aside for a mere "slip of the judge" in charging them, when no prejudicial injury was done thereby.

The first objection to the charge on this subject is to the following language, which constitutes the latter clause of a sentence: "Your minds should be able to rest reasonably satisfied of the guilt of the defendant before a verdict of that character is given." "Reasonably satisfied," as here used, is undoubtedly an unfortunate expression. If it had stood alone, it might possibly have been understood by the jury as meaning "satisfied by a preponderance of evidence." But how could that be when the court had repeatedly told them that they must be convinced of defendant's guilt beyond a reasonable doubt, and when, in a former part of the very sentence in which the objectionable words occur, it had said that "the probability of guilt outweighing the probability of innocence" was not sufficient to warrant a conviction? Keeping the whole charge in view, the jury could not have understood the words "reasonably satisfied" other than as an equivalent of the phrase "satisfied beyond a reasonable doubt." We do not think, therefore, that this objection to the charge should work a reversal of the judgment.

The other main objection on this point is directed to the following language, which constitutes the first clause of a sentence: "On the other hand, however, mere probabilities of innocence or doubts, however reasonable, *which beset some minds on all occasions*, should not prevent such a verdict." To this language, standing by itself, we can attach no definite meaning, and it is not to be presumed that the jury could, or that they did, attach a meaning to it prejudicial to defendant. The latter part of the sentence is as follows: "But if the whole testimony in the case produces in your minds this degree of conviction of the guilt of the defendant,—that is, satisfies you beyond a reasonable doubt of his guilt,—it is your duty to say so by your verdict; if it does not, it is your duty to say, not guilty."

It must be remembered that the court, in other parts of its charge, had fully and correctly stated the law on the subject of reasonable doubt. Among other things, having said that the doubt was not sufficient if merely "chimerical, or based on groundless conjectures," it correctly defined reasonable doubt as "that state of the case which, after an entire consideration and comparison of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." The practical administration of justice should not be allowed to depend too much upon nice questions in philology. In a case like the one at bar the real question should be, was the correct exposition of the law given in the main body of the charge so qualified by the injudicious expressions complained of as to impair its truthfulness as a whole? We think that this question, put in this case upon the point under discussion, should be answered in the negative; although, of course, we cannot commend all that was said in the instructions.

The charge of the court on the subject of manslaughter is correct, with the exception of the use of the words "not intentional." After giving a proper definition of manslaughter, and saying that "the distinguishing feature between murder and manslaughter is the presence or absence of malice," the court adds as follows: "In other words, gentlemen, manslaughter is a homicide, not excusable, not justifiable, but yet not intentional." The latter part of this language is, in one sense, inconsistent with former decisions of this court. It has been held by some eminent jurists that the sudden, irresistible passion, overcoming the reason, and deadening the conscience to the voice of humanity, which reduces unlawful homicide to manslaughter, is inconsistent

with the notion of intention. And while this court has said in *People* v. *Freel*, 48 Cal. 436, that the intent to kill may be present in manslaughter, yet, in the same case, it said that "the law, out of forbearance for the weakness of human nature, will *disregard the actual intent.*" In *People* v. *Doyell*, 48 Cal. 96, this court uses the same expression; and in discussing the distinction between murder in the second degree and manslaughter, says: "In the former cases the slayer is presumed to be actuated by an intent which may not exist; in the latter, out of forbearance for the weakness of human nature, the slayer *is presumed not be actuated by an intent to kill*, although such intent may, in fact, exist." Now, the distinction between no intent at all, and an intent which the law "disregards," and by which the slayer is "presumed not to be actuated," is a very slight basis for the reversal of a judgment. And the distinction becomes less apparent when we consider that one of the definitions of malice given in section 7, Pen. Code, is "*an intent* to do a wrongful act, established either by proof or presumption of law;" and that, in section 188, practically the same definition is given, although, in dividing malice into express and implied, the former is described as existing when the "intention" to kill is "manifested" by direct proof, and in the latter as resting on a "presumption of law." Indeed, the primary and generally received legal definition of malice includes the notion of intent. Some of the common definitions are, "the doing of a wrongful act *intentionally*, without just cause or excuse;" a "*conscious* violation of law;" "the *intent* from which flows any unlawful and injurious act, committed without legal justification." 2 Bouv. Law Dict. 33, and cases there cited. It is difficult, therefore, to reconcile the absence of malice with the presence of an intent to kill; and we would hesitate to set aside a verdict on such a delicate distinction, even in a case where it was apparent that the jury may have had doubts which involved the boundary line between manslaughter and murder in the second degree. But, in the case at bar, there were evidently no such doubts. The evidence tending to reduce the crime to manslaughter was of the very slightest character; and the jury, passing over murder in the second degree, not only found the defendant guilty of murder in the first degree, but imposed the extreme penalty of death, when it was in their discretion to assign the punishment of imprisonment for life. Under these circumstances we are of the opinion that the judgment should not be reversed for the alleged error here under discussion.

With respect to the charge of the court on the subjects of excusable homicide and insanity,[1] we deem it necessary to say, only, that in our opinion it

[1]The instruction referred to is as follows: "One of the defenses interposed, as I understand it, is the plea of insanity; or, in other words, under a plea of not guilty, the defendant may interpose several defenses. He may rely upon insanity existing at the time of the alleged offense, and at the same time he may rely upon self-defense, or that the act was excusable or justifiable, and it is for you to determine, from all the evidence in the case, the validity of any defense he may have interposed. All men have not the same mental force or characteristics, nor is the same man at all times in the same condition as to his mental force or physical strength. His faculties may be impaired or diminished by sickness or bodily ailment, or by certain causes calculated to disturb or influence his passions; yet, if he be in possession of his senses, and able to judge of the moral qualities of his acts, and of the particular act for which he is arraigned, and to distinguish between right and wrong in regard to it, he is morally and legally responsible for his conduct, and amenable to the laws of the land. It is claimed, as I understand it, on the part of the defendant, that if he killed this Martha A. Hood, as alleged in the information, that he was mentally unconscious of the act in which he was engaged, and legally irresponsible for it. Insanity is a valid defense, if satisfactorily shown by the evidence. If the defendant was not in the possession of his faculties, was at the time incapable of distinguishing between right and wrong in regard to the transaction, or of appreciating the moral qualities of his act, and the evidence satisfies you this is so, then he is not responsible, and should be acquitted. You are to judge of the character and quality of the defendant's acts, his state of mind, as evidenced by his conduct, declarations, acts, temperament, disposition, the influence which produces it, and all other circumstances which have been shown before you, and all

was not erroneous. This court has frequently warned the judges of trial courts against the dangers of lengthy and ill-considered instructions to juries in criminal cases. We here repeat the admonition,—with little hope, however, that it will be heeded.

Judgment and order denying a new trial affirmed.

I concur: PATERSON, J.

We concur in the judgment: SEARLS, C. J.; MCKINSTRY, J.

TEMPLE, J., (*dissenting.*) I dissent. I think the judgment should be reversed. I think there was harmful error in the instruction in regard to reasonable doubt. It is true, the jury were also fully and correctly instructed upon this subject; that is, the other instructions given would have been correct if they had not been qualified by the erroneous one complained of. I see no possible purpose in the instruction unless it was intended to direct the jury as to the proper understanding of those given at the request of defendant. It must have been understood, and it was probably intended it should be, as

are important subjects for you to consider in determining whether the defendant was sane or insane at the time of the commission of the alleged offense, if you find that he did commit it; and it is your duty, gentlemen, to bring your personal knowledge of human nature, the tendency of the human mind, to bear upon all the evidence in the case,—all facts proved or admitted before you, the acts and conduct of the defendant at the time, before, and subsequent to the alleged commission of the offense; and, in order to hold defendant criminally responsible, you must be satisfied that he has sufficient mental capacity to distinguish between right and wrong, as applied to the act he was about to commit, and was conscious that he was doing wrong. I will here state, gentlemen, that frenzy arising from the passion of anger, hatred, or revenge, no matter how furious, if not the result of a diseased mind, is not legal insanity. You must not confound anger or wrath with actual insanity; because, however absurd or unreasonable that may be, or a man may act when suddenly angered, if his mind is not absolutely deranged, it is not a legal excuse for the violation of the law. The law recognizes partial, as well as general, insanity; that is, that a person may be insane on one or more subjects, and sane as to the others, and that he may be laboring under a mental aberration in regard to some matter regarding a particular person or thing, and generally sane as to all other subjects. The law presumes everybody sane and responsible for his acts until the contrary is shown by the evidence; and, when insanity is set up as a defense to an alleged criminal act, the burden of proving it is upon the defendant to show, by a preponderance of evidence, that he was affected by insanity at the time of his act, to such extent that he did not know what he was doing was wrong. You will therefore understand, gentlemen, that where insanity is relied upon as a defense, that, as I have before stated, the burden of proof is upon the defendant, and the proof must be such in amount that, if the single issue of sanity or insanity should be submitted to a jury in a civil case, they must find that he was insane. A man may be of sound mind. He may be insane in many respects,—indeed, he may be a monomaniac on any given subject,—and yet his mind may be sane in all other respects. Such a man, though quite capable of judging between right and wrong in regard to an act of the nature of that of which he might be accused, cannot be said to be possessed of a sound intellect; yet he would be held responsible for the commission of a criminal act, except in a case where his peculiar unsoundness or monomania was involved. The law, therefore, does not require, as a condition on which criminal responsibility shall follow the commission of a crime, the possession of all the faculties with full vigor, or a mind wholly unimpaired by disease. But, to establish a defense on the ground of insanity on a criminal charge, you must be satisfied, as I have before remarked, by a preponderance of proof, that, at the time of committing the act charged, the accused was laboring under such a defect of reason from a diseased mind as not to know the nature and quality of the act that he was doing, or, if he did know it, that he did not know it,—that he did not know what he was doing was wrong. The law rejects the doctrine of what is called 'emotional insanity,' which begins on the eve of the criminal act, and leaves off and ends when it is committed. Insanity is a manifestation of a disease of the brain; and the doctrine that an individual can be entirely sane the moment before and after the act was committed, and yet insane at the instant the act was committed, is contrary to every principle of law and sense. In this state the law is well settled that a morbid state of passion, though unsettling the moral system, the

qualifying the other instructions upon the same subject. For instance, the jury were told that they must be satisfied of the guilt of the defendant beyond a reasonable doubt; that they must have an abiding conviction, to a moral certainty, of his guilt, etc., but also that such degree of conviction was consistent with a well-founded doubt, and with a *mere* probability of innocence, however reasonable, and that, after all, to be satisfied beyond a reasonable doubt only meant that they should be reasonably satisfied; that is, that the degree of certainty was only that required in civil cases, which merely consists in ascertaining the preponderance of evidence,—was, in fact, something less; was even consistent with a reasonable probability of innocence.

I readily admit that a case should not be reversed because the judge, in some part of his charge, has omitted a needed qualification of some proposition, if it has been elsewhere supplied, and we can see that on the whole the jury has not been misled. Here, however, I am unable to resist the impression that the judge intended to lessen the effect of the forcible, though correct, statement of the doctrine of reasonable doubt in the instruction asked for, and that it probably did have that effect. I presume the judge used the

mental faculties remaining meanwhile in a normal, healthy condition, does not excuse a relaxation. Indeed, emotional insanity, consisting of an irresistible impulse, coexisting with mental sanity, is no defense to a criminal charge. If you believe, from the evidence in the case, that the defendant was affected, and had an insane impulse to kill the deceased, but he could have successfully resisted it, he should have done so, and, if he did not do it, he is criminally responsible for the act. Whether he had any such impulse, and whether he could have resisted it, are questions for you, gentlemen, alone to determine. You are not to acquit the defendant on the ground of insanity unless you are satisfied, by a preponderance of evidence, that the killing of the deceased was produced by mental disease. It matters not, however, what the cause of the disease may be, if it is proved that the defendant did the killing in a moment of insanity. In such case he is not responsible or guilty. But if you believe, from all the evidence and circumstances in the case, that the defendant was in possession of a sound mind, and allowed his passion to escape control, he cannot claim from such acts the protection of insanity; for criminal laws are passed and enforced to restrain the evil passion of men, and it is no defense to an action to say that the defendant, though of sound mind, was carried away by rage and ungovernable passion. If his mind was not diseased to such an extent as to deprive him of self-control, he is bound to govern and control his actions, and if he gives way to his passions, and takes human life without cause, he must answer for his acts, and be held to strict accountability.

"Again, the law does not recognize a form of insanity in which the capacity of distinguishing between right and wrong exists, with the power of choosing between them. A criminal cannot be excused upon the ground of an irresistible impulse, when the offender has the ability to discover and exercise and see his legal and moral duty in respect to it. The law assumes and commands that one not insane can and must control his impulses, and holds him responsible if he does not. You will observe, gentlemen, from what I have already said, that in a criminal case, if the defendant relies upon insanity as a defense, the burden of proof is cast upon him; that the allegation of insanity is an affirmative proposition, which must be proved to your satisfaction, to overcome the presumption of sanity. Of course, you will understand that this may be established by a preponderance of proof. By a preponderance of proof I do not mean the greater number of witnesses on one side or the other which do not produce conviction in your mind, as against a less number whose testimony does produce such conviction; but by a preponderance of proof I mean and intend that you should understand the greater weight of evidence which satisfies your minds of the truth of the proposition in support of which it was given.

"And in conclusion, gentlemen, of this branch of our instructions, I will again say that the test of insanity in a case like the one at bar, and which will excuse the commission of a crime, is whether the accused, at the time of the commission thereof, was conscious that he was doing what he ought not to do; or, in other words, was the insanity of the defendant, if any such has been shown, such a diseased and deranged condition of the mental faculties as to render him incapable of distinguishing between right and wrong in relation to the act with which he is charged? If you are satisfied of this by a preponderance of the testimony, then he is not criminally responsible for any act which he may have committed. But, on the contrary, unless you are satisfied of this by a preponderance of testimony, then he is not relieved from any criminal responsibility of any act which he may have committed."

word "probability" of innocence by inadvertence, intending to say a "mere *possibility* of innocence." The judge's probable intentions, however, do not cure the error.

I do not think there was harmful error in the instruction in regard to manslaughter. The jury were told manslaughter is a homicide, not excusable, not justifiable, but yet not intentional. Other instructions fully and correctly defining manslaughter were also given. Applying the erroneous definition to the true one, as a qualification, they were told voluntary manslaughter is the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion, but is unintentional. Now, if this definition involves a contradiction in terms, it is still but a harmless one. It simply tells the jury that an unlawful homicide, without malice, in a sudden heat of passion, is not intentional. It creates no confusion, and leaves no doubt as to the nature of the acts constituting voluntary manslaughter.

But whether it can properly be said that no homicide is intentional, when committed without malice, under an irresistible passion caused by a sudden and sufficient provocation, when there has not been time for reason to resume its sway, is merely a question as to the use of words. If there had been sufficient time for the voice of reason and humanity to be heard, the killing will be attributed to malice. Does that not mean that the provocation, the irresistible passion, and the rapidity with which the act follows, preclude the idea of intention; that such intent, if it exist, has not been realized in the judging mind, or recognized by the conscience, and therefore does not, in law or reason, amount to an intent? The definition of malice in the Penal Code would seem to favor this view. Section 7, Pen. Code. One of the definitions of malice there given is, "an intent to do a wrongful act." If the killing be unlawful and intentional, it is difficult to comprehend how it can be otherwise than malicious. There certainly would be an intent to do a wrongful act.

At all events, it seems to me that it is merely a choice between different forms of expression, whether we say that voluntary manslaughter is intentional, but because of the irresistible passion, upon a sufficient provocation, and the lack of time for reflection, out of compassion for the weakness of human nature, the law attributes the act to the passion; or that the sudden heat of passion is followed so quickly by the act as to preclude the idea of intention. The essential elements of the crime are the same. I do not think the case should be reversed for that portion of the charge in regard to emotional insanity.

To my mind, however, it resembles more the testimony of a medical expert than the charge of a court. It is not a statement of the doctrine of the case of *People* v. *Hoin*, 62 Cal. 120. That case merely says irresistible impulse, *if it exists*, does not constitute the insanity which is a legal defense. The court there left the question whether it could exist to be determined as a fact from evidence. Here the court announces as a fact that one cannot be entirely sane a moment before and after the criminal act, and insane at the time. It is also announced that there may be a morbid state of passion which would unsettle the moral system, while the mental faculties remain in a normal and healthy condition. That may all be true, but it is not matter of law.

I think the judgment should be reversed for the reasons given.

THORNTON, J., (*dissenting.*) I dissent. We have examined the charge of the court upon the question of reasonable doubt, and are of opinion that it contains nothing which calls for a reversal. The direction on this point must be considered in its entirety; and if the whole charge, taken together, without giving a strained meaning to any portion of the language employed, harmonizes, and fairly and correctly presents the law bearing on the point, the judgment should not be disturbed because some of the words of the charge, taken by themselves, do not fully present the rule which is to be gathered

from the whole text of the direction. *People* v. *Doyell*, 48 Cal. 93. In this view, we find nothing contradictory in the direction given as to reasonable doubt.

The charge on the point above referred to is certainly, as to some expressions used in it, obnoxious to criticism. For instance, the learned judge of the trial court told the jury: "It is not every possible doubt, however slight, or *however well founded*, which should prevent a verdict of guilty; but a doubt, to have that effect, must be a reasonable one, arising from the evidence in the case,—that is, it must be founded in reason, arising out of the evidence, which leaves a rational uncertainty as to his guilt which nothing else in the case removes." Then follows this language: "The degree of conviction, in any mind, of the guilt of the defendant, should be something more than the mere probability of guilt outweighing the probability of innocence. Your minds should be able to rest *reasonably satisfied* of the guilt of the defendant before a verdict of that character is given." The court further said: "On the other hand, however, mere probabilities of innocence, or doubts, however reasonable, which beset some minds on all occasions, should not prevent such a verdict; but if the whole testimony in the case produces in your minds this degree of conviction of the guilt of the defendant,—that is, satisfies you beyond a reasonable doubt of his guilt,—it is your duty to say so by your verdict; if it does not, it is your duty to say, not guilty."

What is meant by a well-founded doubt, which should prevent a verdict of guilty, taken by itself, would present a singular question of law. But it is clearly explained by the clause which immediately follows. So also the words "*doubts however reasonable*" are clearly explained by the words which follow. The words "*reasonably satisfied*," conceding that they, by themselves, define only a preponderance of evidence, and that the jury were told that they could rest a verdict of guilty on such preponderance, such a gloss is removed by the language which follows, and the clear direction that reasonable doubt "is that state of the case which, after an entire consideration and comparison of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

It seems to us that the learned judge of the trial court used the expressions "doubts * * * *well founded*" and "doubts, however reasonable," with reference to doubts which might arise on a consideration of the evidence less than the whole,—on a consideration which might be called *partial*, and not embracing the testimony in the case in its entirety.

While we will not reverse for the expressions in the charge above given, and hold that the charge, as a whole, is not erroneous on the point of reasonable doubt, we feel bound to say that we cannot commend it. And we think it proper to admonish the judges of the trial courts to follow the beaten paths of the law, to instruct the jury in the formula of words well settled in this court, and refrain from the use of expressions in their directions which present questions on which appeals will be generally taken, and may sometimes demand a reversal of a judgment. It is safe to travel along the beaten paths, —*ire super antiquas vias*. It is dangerous to attempt to hew out a new one, when the old way lies patent before one. We are not convinced as yet that the directions as to reasonable doubt sanctioned by this and other courts can be improved; and we feel an abiding conviction, beyond a reasonable doubt, that this attempt to improve on the approved directions in this case was not a success.

It is contended that the court erred in giving the direction which follows: "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: *First*, voluntary, upon a sudden quarrel or heat of passion; *second*, involuntary, in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act, which might produce death in

an unlawful manner, or without due caution or circumspection. The distinguishing feature between murder and manslaughter is the presence or absence of malice. If malice enters into the unlawful act by which death is caused, it is murder; but if malice is wanting, it is manslaughter. In other words, gentlemen, manslaughter is a homicide, not excusable, not justifiable, but yet not intentional." The court, having thus given the definition of manslaughter in its phases as *voluntary* and *involuntary*, concludes on this point by telling the jury that "manslaughter is a homicide, *not excusable, not justifiable, but yet not intentional.*"

How the learned judge of the court below could say to the jury that manslaughter, a species of homicide, could be *voluntary*, and, if intentional, was not manslaughter, is a question defying solution. This latter direction, predicatory of manslaughter, that to constitute it the homicide must be unintentional, is in direct contradiction of the former portion of the direction that it could be voluntary, and contrary to the definition of it given by the Code, which is quoted in the first part of the direction, (Pen. Code, § 192,) which is as follows: "Manslaughter is the unlawful killing of a human being without malice," and one kind of it may be "voluntary, upon a sudden quarrel or heat of passion." To say that manslaughter must be "*not intentional*" is in effect to say that it cannot be voluntary. It cannot be *unintentional* if it is voluntary. A voluntary homicide, upon a sudden quarrel or heat of passion, is manslaughter. It must be with a will or volition to kill. When there is volition there is intention. To predicate of volition that it is unintentional is to say that volition must be involuntary, *i. e.*, *without volition*, which is, in terms, a plain contradiction and a solecism. This court has so held in *People* v. *Freel*, 48 Cal. 436, cited approvingly in *People* v. *Crowey*, 56 Cal. 42, 43.

In *Freel's Case*, the question arose on a direction to the jury in these words: "You will also observe that the difference between murder and manslaughter is that in manslaughter there is no intention whatever either to kill or do bodily harm. The killing is the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection." Of this direction the court said: "This is clearly erroneous. Whether the homicide amounts to murder, or manslaughter merely, does not depend upon the presence or absence of the intent to kill. In either case there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder." 48 Cal. 437.

But it is said that, conceding the instruction to be erroneous, the defendant was not injured by it, as the jury found him guilty of murder. Injury is always presumed from error, and it must be held that injury was done defendant, unless the record shows that it was not. That is not the case here. Though there is evidence of threats and of deliberation, still there is testimony which, in our judgment, calls for a proper definition of manslaughter. The testimony shows that defendant ordered the person slain out of his house, and that she refused to go; that he took hold of her to put her out, when she seized a hammer which he had in his pocket, and struck him on the head with it. Under these circumstances, we are of opinion that the defendant had a right to have the offense of manslaughter correctly defined to the jury, which was not done here.

This is no merely technical point. It is one of substantial importance. Indeed, it may have caused the conviction of the defendant, for the instruction given was equivalent to a direction to the jury that, if the killing was in-

tentionally done, it was murder. And as the evidence showed without a doubt the blows were intentionally given from which death resulted, the jury, if they obeyed the instruction, could have found no other verdict than that which affirmed that defendant was guilty of murder.

The court did not err in using this language to the jury in the connection in which it was used: "But the killing is not excusable, if it was apparent to the party killing at the time the act was committed, or would have been apparent to a reasonable man in his place and situation and stead, the crime resisted could have been prevented or arrested by other means." The words just quoted were employed to qualify the following, which preceded them: "The law authorizes the killing of one who is in the act of committing a forcible felony, and even one who appears to be in the act of doing so, for the purpose of prevention and not punishment, but the killing is not punishment." It is manifest here that the direction intended was in relation to the killing of a person to prevent his committing a crime, and in that view the language objected to was not objectionable.

A point is raised in regard to some of the language used in the charge in regard to the defense of insanity. The law as affirmed in it was correctly laid down and explained, in accordance with the ruling of this court in *People* v. *Hoin*, 62 Cal. 120. The rule of the case cited will be adhered to by this court, and should be by all courts. There was nothing objectionable in the language used by the court in regard to "what is called 'emotional insanity,' which begins on the eve of the criminal act, and leaves off and ends when it is consummated." The court said, and said properly, the law rejects the doctrine of emotional insanity, using the words quoted above. This is correct. The law does reject it, and casts it out of the temple of justice as one which should not be allowed to enter its precincts. It should ever be a stranger there. The law condemns such a defense as founded in fraud and folly, and, when permitted, is always used as a pretext by weak-minded jurors, unmindful of their oaths, to render a verdict of acquittal in cases where guilt has been incurred.

For the error of the court above pointed out the judgment and orders should be reversed, and the cause remanded, and a new trial ordered.

73 Cal. 154

STOKES *v.* BALAAM. (No. 11,663.)

(*Supreme Court of California.* July 27, 1887.)

1. CONDITIONAL SALE—CONVERSION—DAMAGES.

Where A. sold B. wood on A.'s land, to be cut by B., the wood to remain the property of A. until one dollar per cord was paid on it, and, before such payment was made, the wood was seized and sold upon attachment and execution against B.'s husband, *held*, in an action brought by A. against the sheriff for conversion, that A. retained, not merely a lien upon the wood for the payment of the one dollar per cord, but the title to it, and should recover the full value of the wood.[1]

2. SAME—EVIDENCE—RELEVANCY.

In such an action, such questions as, "How long did that wood remain there?" "How much is that wood worth that remains upon the premises after this wood that had been sold under execution had been taken away?" "How much stumpage is due upon that five or six hundred cords?" "How much stumpage is there due upon the wood that was sold by Mr. Balaam?" "How much of that 195 cords of wood is now on, or was at the time of the sale upon, your land?"—are irrelevant.

Department 2. Appeal from superior court, Tulare county.

Action for conversion of wood.

Atwell & Bradley, for appellant. *C. A. Webb* and *O. Sanders*, for respondent.

[1] See note at end of case.

THORNTON, J. The evidence in this cause shows plainly that the wood, for the conversion of which this action was brought, was cut under an agreement made with the plaintiff by Mrs. Rachael Bashore, under which the latter was to cut the wood on plaintiff's land, and when cut it was to remain the property of plaintiff until one dollar a cord was paid to plaintiff by Mrs. Bashore. This one dollar per cord was never paid. The wood was seized by the defendant as sheriff of Tulare county, as the property of the defendant, under a writ of attachment issued in an action brought by Ah Sing against John Bashore, who was the husband of Rachael Bashore. The wood was afterwards sold by the defendant under a writ of execution issued on a judgment recovered in the action above stated.

There was no controversy as to the value of the wood at the date of the conversion, which was put at $877.50. The evidence shows that the wood was the property of the plaintiff, and he was entitled to recover damages for the sum above mentioned.

The verdict, which was for $195, is not sustained by the evidence, and the judgment must therefore be reversed. There is no testimony on which to base a verdict on the theory that the plaintiff had only a lien for $195, the amount for which the verdict was rendered, and the directions of the court on such a theory tended to and must have misled the jury.

The following questions, allowed to be put to the witness, (Stokes,) were clearly irrelevant, and should have been ruled out: "How long did that wood remain there?" "How much is that wood worth that remains upon the premises after this wood that had been sold under execution had been taken away?" "How much stumpage is due upon that five or six hundred cords?" "How much stumpage is there due upon the wood that was sold to Mr. Balaam?" "How much of that 195 cords of wood is now on, or was at the time of the sale upon, your land?" All the above questions were entirely irrelevant to any legitimate matter of inquiry in the case.

The instructions in relation to a lien were erroneous, as not being founded on any testimony in the cause, and were misleading. In fact, it is evident from what occurred on the trial that the jury were actually misled by such instructions.

The bill of exceptions shows that the jury, after their deliberation, came into court and a juror said, "We have decided the ownership of the wood, leaving out any claim for damages." To this the court replied, "Yes; but the wood itself is worth something." The juror said further, "We find the plaintiff still owns the wood." The court said, "There is other wood there," etc. The jury again retired, and found a verdict for $195 and interest; whereas, if they had already determined that the plaintiff was the owner of the wood, they should have found the admitted value of the wood, $877.50, as damages in favor of the plaintiff. The verdict could only have been found on the idea that the plaintiff had nothing more than a lien on the wood for $1 a cord, and was therefore only damaged $195.

In accordance with the foregoing, the judgment and order denying plaintiff's motion for a new trial must be reversed, and the cause remanded for a new trial in accordance with the views herein set forth. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

NOTE.

A CONDITIONAL SALE, by which the title of chattels does not pass, is valid, as well against third persons as against the parties to the transaction. Harkness v. Russell, 7 Sup. Ct. Rep. 51; Gorham v. Holden, (Me.) 9 Atl. Rep. 894; Simpson v. Shackelford, (Ark.) 4 S. W. Rep. 165, and note; De Saint Germain v. Wind, (Wash. T.) 13 Pac. Rep. 753, and note. But see Loving Pub. Co. v. Johnson, (Tex.) 4 S. W. Rep. 532.

Where one to whom a conditional sale of personal property has been made, sells it to a third person, without the knowledge or consent of the vendor, such third person

acquires no better title, as against the original vendor, than the first purchaser had, and may be held liable to him for conversion. Baals v. Stewart, (Ind.) 9 N. E. Rep. 403. In such case the measure of damages for the unlawful detention of such property would be, ordinarily, the value of the use of the property from the time it was illegally refused to be surrendered to the vendor, till the rendition of the verdict of the jury, excluding any compensation for the use of the property while the vendee held it legally, and abating nothing from the damages because of payments made by the vendee to the vendor for the property, under the contract. McGinnis v. Savage, (W. Va.) 1 S. E. Rep. 746.

73 Cal. 157

GOLSON and others *v.* DUNLAP and others. (No. 11,512.)

(*Supreme Court of California.* July 30, 1887.)

1. FRAUD—SALE BY DEVISEE TO EXECUTOR.
 In an action by a devisee to set aside a sale made by him to the executor, in which the complaint alleges that the land sold aggregated in value more than four times the amount paid, the court must pass upon the question of adequacy of consideration, and, if no evidence is introduced, should find in accordance with the presumption which in such cases exists against the defendant.
2. SAME—INADEQUACY OF CONSIDERATION—EVIDENCE AND PRESUMPTION.
 In an action by a devisee to set aside a sale made to the executor, on the ground of inadequacy of consideration, mere proof of a valuable consideration having passed will not be held to rebut the presumption of an insufficient consideration raised in such cases by Civil Code Cal. § 2235, providing that all transactions between a trustee and his beneficiary, during the continuance of the trust, are presumed to be without sufficient consideration, but, the issue of inadequacy of consideration being raised, the facts must be found.
3. SAME.
 In an action by a devisee to set aside a sale made to the executor, it is not necessary, in order to establish the fact of adequacy of consideration, to show more than that a fair, reasonable value, and not necessarily the full value, at the time was paid for the property, and a subsequent advance will not be regarded as affecting the question.
4. JUDGMENT—ESTOPPEL—EXECUTORS.
 Where an executor buys land from a devisee, and a deed thereof is made to his wife, and afterwards the executors make a deed of the same property to her, under a power of sale in the will, and thereafter the property is distributed to her under a decree of the probate court, the executor cannot plead such order of distribution by way of estoppel to an action brought against him by the devisees to set aside the sale; the question of setting aside the deed not having been presented and considered upon the application for distribution.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

Smith & Hupp and *Chapman & Hendrick*, for appellants. *C. E. Thorn* and *Bicknell & White*, for respondents.

HAYNE, C. Action by devisees to set aside a sale to executors. The executors, who were old residents of Los Angeles, where the property is situated, caused their attorneys to write to Texas, where the devisees resided; that, after settling up most of the estate, there remained "certain odds and ends of land" which would have to be sold or divided; that it was for the best interest of the estate that these odds and ends should be sold together; and that they were willing to become the purchasers at a reasonable figure, but that an investigation must first be had by the parties interested, and requesting that an agent be sent out with power to act, and offering to advance the expenses of the trip. The devisees thereupon sent out an agent with power to act. This agent could neither read nor write. He was accompanied, however, by a friend who was a competent business man. It is not entirely clear as to what was the function of this latter. He did not hold the power of attorney, and testifies that he was not the agent of the devisees. He seems to have been some sort of relative of the decedent, and to have come along to advise the agent. After remaining a week in Los Angeles, a bargain was concluded, whereby the interests of the devisees were sold for $10,000. A deed was

thereupon made to Susan Dunlap, the wife of one of the executors. After this the executors, acting under a power of sale in the will, made a deed of the same property to Susan Dunlap. A week after this deed, the property was distributed to Susan Dunlap by decree of the probate court, and within a month thereafter she conveyed to the executors. It is admitted that she acted for the executors throughout the transaction.

The two conveyances to Susan Dunlap illustrate an important distinction with reference to attempts of trustees to acquire the trust-estate, which distinction has been frequently pointed out, but not always observed. Where the trustee is charged with the duty of selling the property, and he does not deal directly with the *cestui que trust* there, whether the trustee holds the legal title or not, and whether he takes a conveyance directly to himself, or acts through the intervention of a third person, the sale, although not, as a general rule, absolutely void, (*Blockley* v. *Fowler*, 21 Cal. 329; *Boyd* v. *Blankman*, 29 Cal. 19,) is voidable at the election of the *cestui que trust*, (*Blockley* v. *Fowler*, 21 Cal. 329; *Guerrero* v. *Ballerino*, 48 Cal. 118; *Tracy* v. *Colby*, 55 Cal. 71,) without reference to the question of the adequacy of the price, (*San Diego* v. *Railroad Co.*, 44 Cal. 106; *O'Connor* v. *Flynn*, 57 Cal. 293.) These decisions are in accordance with the great preponderance of authority elsewhere. See *Ex parte Bennett*, 10 Ves. 393; *Hamilton* v. *Wright*, 9 Clark & F. 123; *Michoud* v. *Girod*, 4 How. 503; *Wormley* v. *Wormley*, 8 Wheat. 441; *Davoue* v. *Fanning*, 2 Johns. Ch. 260, 261; *Van Epps* v. *Van Epps*, 9 Paige, 241; *Jewett* v. *Miller*, 10 N. Y. 405; *Brothers* v. *Brothers*, 7 Ired. Eq. 150; *Scott* v. *Freeland*, 7 Smedes & M. 418; *Romaine* v. *Hendrickson*, 27 N. J. Eq. 164, 165; *Thorp* v. *McCullum*, 1 Gilman, 626, 627. Whether an exception obtains where permission to buy is granted by the court, or by the *cestui que trust*, having full knowledge of the situation, need not be considered; there being no permission of the court in this case, and nothing to show that the devisees had any knowledge of the executor's deed. This deed from the executors to Susan Dunlap may, therefore, be dismissed from consideration.

The distinction between the above class of cases and those in which the trustee purchases directly from his *cestui que trust*, although not always observed, has been frequently pointed out. See Lewin, Trusts, 463; 2 Pom. Eq. Jur. § 957; *Ex parte Lacey*, 6 Ves. 626; *Cowee* v. *Cornell*, 75 N. Y. 100; *Brown* v. *Cowell*, 116 Mass. 465. In this latter class of cases inquiry will be made into the fairness of the transaction, and, under proper conditions, it will be sustained. In the language of Lord ELDON: "A trustee may buy from the *cestui que trust*, provided that there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, provided the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in the character of trustee." *Coles* v. *Trecothick*, 9 Ves. *247.

It is obvious that an investigation of questions of this kind is a very delicate and difficult affair, and courts of equity have emphasized the strictness with which such transactions should be viewed. As was said in *Whelan* v. *Whelan*, 3 Cow. 576, 577, by WOODWORTH, J., adopting the language of Sir SAMUEL ROMILLY: "If the court sees that any arts or stratagems, or any undue means, have been used; if it sees the least speck of imposition at the bottom; if there be the least *scintilla* of fraud,—this court will and ought to interpose." Nevertheless, it is well settled that under proper conditions the transactions would be sustained.

Applying this rule, can the sale from the devisees to the executors be allowed to stand? One of the important elements of this inquiry is as to the adequacy of the consideration. Was there inadequacy of consideration? This question is presented by the record in distinct outlines. The complaint alleges that

the odds and ends of land aggregated in value the sum of $47,008, of which the share of the devisees was $39,273. The court made no finding upon this issue, but simply stated that there was no evidence "from which the court is able to find the actual value of the residue of the estate at the time of the conveyance." This cannot operate as a finding. *Speegle* v. *Leese*, 51 Cal. 415; *Campbell* v. *Buckman*, 49 Cal. 367. If no evidence was introduced, the court should have found the fact against the parties upon whom was the burden of proof, or, in other words, in accordance with the presumption, which, in this instance, was against the defendants.

It is contended, in support of the judgment, however, that the issue was immaterial, and that, therefore, no finding upon it was necessary. This proposition is based upon section 2235, Civil Code, which is as follows: "Sec. 2235. All transactions between a trustee and his beneficiary during the continuance of the trust, or while the influence acquired by the trustee remains, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." The argument is that the words "sufficient consideration," in this section, do not mean an adequate consideration, but a consideration which is sufficient to support a contract between ordinary parties; and that, since it appears that there was a valuable consideration in this case, the court is not to inquire further.

It is to be observed of this proposed construction that it would place all trustees upon a level, and measure their obligations by the same standard. But the analogies of the law of trusts have been extended to so many classes of cases, and the term "trustee" is applied to so many persons whose obligations certainly vary in a considerable degree, that we think it could hardly have been intended to apply a Procrustes rule to them all. A fixed standard might gratify a love of symmetry, and be easy of application, but would not further the ends of justice. In our view, the words "sufficient consideration" mean, not sufficient to support a contract between ordinary parties, but sufficient to support the particular transaction. And, with reference to what consideration is sufficient to support the particular transaction, resort must be had to the rules of courts of equity. These rules were flexible in character, and adapted to the varying circumstances which chance or ingenuity might present. With respect to adequacy of consideration, no unbending rule, applicable to all cases, can be framed, because there are classes of cases which have features which prevent the operation of a fixed rule. The leading text writers speak of adequacy of consideration as essential. See 1 Perry, Trusts, § 195; 2 Pom. Eq. Jur. § 958; 1 Story, Eq. Jur. § 311. Compare, also, *Grosvenor* v. *Sherratt*, 28 Beav. 663; *Edwards* v. *Meyrick*, 2 Hare, *70; *Boyd* v. *Hawkins*, 2 Dev. Eq. 331; *Coffee* v. *Ruffin*, 4 Cold. 515; *Rose* v. *Mynatt*, 7 Yerg. 36; *Kisling* v. *Shaw*, 33 Cal. 440; *Rubidoex* v. *Parks*, 48 Cal. 220. But this is too sweeping. For there may be cases in which no valuable consideration is necessary. Thus, while a gift from a *cestui que trust* to his trustee is exceedingly difficult to sustain, (see *Hatch* v. *Hatch*, 9 Ves. *296,) it will in proper cases be upheld. See *Hunter* v. *Atkins*, 3 Mylne & K. *113; *Harris* v. *Tremenheere*, 15 Ves. 39; *Marshall* v. *Stephens*, 47 Amer. Dec. 604. The principle upon which such cases rest is that it was the intention of the *cestui que trust* to part with his property without consideration; and if a court of equity can clearly see that such intention was induced by laudable motives, and not by want of knowledge of the situation, or by undue influence or deceptive arts on the part of the trustee, it will allow the intention to prevail. So there may be cases where, owing to special circumstances, it is necessary for the *cestui que trust* to sell without delay, and no one can be found who will buy, and the trustee, acting in entire good faith, gives more for the property than any one else will give. In such case it is for the interest of the *cestui que trust* to allow the trustee to buy, and it would be hard measure to set aside the sale merely because the

sum which the trustee was able or willing to give was less than the value of the property,—the transaction being unexceptionable in other respects. It is too sweeping, therefore, to say that in all cases there must be an adequate consideration, if the word is to be used in any ordinary acceptation.

On the other hand, the element of adequacy of consideration is most important. The great object of the rule is to prevent imposition on the part of trustees; and, in one sense, this may be said to be to prevent trustees from acquiring the property of their *cestuis que trust* for an inadequate consideration. To disregard the question of inadequacy, therefore, is to attempt to apply a rule while shutting one's eyes to its object and purpose. The writers above referred to are not very far out of the way in speaking of adequacy of consideration as essential. It is safe to say that while mere inadequacy of price is not itself the ground upon which a transaction between trustee and *cestui que trust* is set aside, yet that any considerable inadequacy, taken by itself, raises a presumption of imposition by the trustee, which is only to be rebutted by clear proof of special circumstances showing the propriety of the transaction. It certainly cannot be ignored, and the transaction sustained without reference to it, as was done in the court below.

Nor can it be said that this is a mere matter of evidence. It rises to the rank of a probative fact, such as has frequently been held by the court to be proper in findings. The ultimate ground upon which transactions between trustees and *cestui que trust* are set aside is fraud, actual or constructive, as the case may be; and the rules of pleading require that the facts constituting the fraud (of which this is one) shall be set forth. Being properly pleaded, such facts must be found. For, under our system, whatever is properly in issue must be found, unless there are other issues which effectually and finally dispose of the case.

It is proper to say, for the guidance of the court below upon a retrial, that it is not the highest possible price that must be taken as the standard, but the fair, reasonable value of the property. Speaking of transactions with expectant heirs and reversioners, a class to whom, on grounds of public policy, the greatest protection is afforded, (compare 1 Perry, Trusts, § 188,) Judge Story says: "It is not necessary to establish in evidence that the full value of the reversionary interest or other expectancy has been given according to the ordinary tables for calculations of this sort. It will be sufficient to make the purchase unimpeachable if a fair price, or the fair market price, be given therefor at the time of the dealing." 1 Story, Eq. Jur. § 336.

As remarked in the foregoing extract, the time to be taken is the time of the dealing. A subsequent advance is not to be regarded. In the leading case of *Fox* v. *Mackreth*, 1 Lead. Cas. Eq. 115, Lord THURLOW would not give any weight to the circumstance that the trustee happened to sell at an advanced price, saying: "The money would be due, not in consequence of what Mackreth afterwards sold it for, but what Fox lost by it at the time." So, in *Coles* v. *Trecothick*, 9 Ves. 246, where the trustee had subsequently sold for a greater sum, Lord ELDON said: "Inadequacy of price does not depend upon a person giving a *pretium affectionis* from any peculiar motive, beyond what any other man would give,—the reasonable price. * * * Accidental subsequent advantage made of a bargain is nothing." The fair value at the time, under all the circumstances, must be the criterion.

Finally, it is contended that the decree of distribution to Susan Dunlap operates as an estoppel against the plaintiffs. But if we assume, in favor of the respondents, that this question of setting aside the deed for fraud could have been presented and considered upon the application for distribution, it nevertheless was not so presented or considered. And the rule is that a party having an equitable defense may let judgment go at law, and proceed in equity. *Lorraine* v. *Long*, 6 Cal. 452; *Hough* v. *Waters*, 30 Cal. 310.

It is unnecessary in the view we take to consider the other points made.

We therefore advise that the judgment and order appealed from be reversed and the cause remanded for a new trial.

BELCHER, C. C., concurs.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order reversed, and cause remanded for a new trial.

73 Cal. 176

CONNEAU *v.* GEIS. (No. 11,617.)

(*Supreme Court of California.* August 1, 1887.)

1. JURY TRIAL—JURORS' FEES.
Where in a civil action the defendant demands a trial by jury, but fails to deposit the jury fees required by the rules of the court to be paid in advance, the case may be tried without a jury.

2. ESCROW—SUBSEQUENT PURCHASERS.
Where a deed made in consideration of a prior indebtedness is deposited with a third party in escrow, to be delivered to the grantee in case the grantors do not sell and pay off the indebtedness within an agreed time, and they make a sale, but do not make the payment within the time, a purchaser with notice of the escrow obtains no right under a second deed made the grantors.[1]

Commissioners' decision. Department 2.

Appeal from superior court, Stanislaus county.

S. W. Geis, in pro. per., and *Frank H. Farrar*, for appellant. *Wright & Hazen*, for respondent.

HAYNE, C. The defendant demanded a trial by jury, but failed to deposit the sum of $24, which, according to its rules, the court required to be deposited with the clerk, as jury fees, before the commencement of the trial. The case was thereupon tried without a jury, and judgment rendered for the plaintiff. The first question is whether the court could rightfully require the advance of this sum. We think that the advance of the fees was a reasonable regulation of the mode of the enjoyment of the right of a jury trial, and that the making of such a regulation cannot be said to be a denial or impairment of the right.

The expense of a jury demanded by a party is expense incurred on his behalf, and at his instance. It is reasonable and just that he should bear this expense; and it always has been the law and the practice to collect it from one or the other of the litigants. The point is not and could not be that the court had no right to make the parties pay it, but that it could not be collected in advance. But if the court has the right to make the parties pay, it does not seem that the time of its collection is of such importance as to change the character of the requirement. A rule requiring the fee to be paid in advance is a reasonable precaution to prevent the jurors from being defrauded by unscrupulous parties, and to prevent the demand of a jury being used as a pretext to obtain continuances and thus trifle with justice. The right to bring suit, and the right to appeal to a higher court, are as fully secured by the constitution as the right to a trial by jury; yet it has always been the practice to collect the fees therefor before the suit is commenced or the record on appeal is filed. And we do not see how such a proceeding impairs the right in the one case any more than in the other. If the court has a right to require the payment of a jury fee in advance, the refusal to pay it is the refusal to have a jury trial, and, since this is the party's own act, he cannot be said to

[1] Where a deed is placed in the hands of a third person, to be delivered to the grantee upon the performance of a stated condition, a delivery to the holder of the deed, without the performance of the condition, is not a valid delivery. Daggett v. Daggett, (Mass.) 10 N. E. Rep. 311, and note.

be deprived of anything. Upon analogous principles it was held, even in a criminal case, that where, after a demurrer, a defendant refused to plead, such refusal was a refusal of a jury trial or any trial, and that judgment should be entered against him without further ceremony; the court, per SANDERSON, C. J., saying: "The intent of the constitution is to secure every person charged with crime a fair and impartial trial by jury, but not to place it in his power to evade a trial altogether." *People* v. *King*, 28 Cal. 266.

The authorities in other states bear out the proposition that the making of a reasonable regulation of the mode of enjoyment of the right of trial by jury is not a denial or impairment of the right. Thus in *Biddle* v. *Com.*, 13 Serg. & R. 410, the provision was for a trial in the first instance before a magistrate without a jury, but, upon complying with the requisite conditions, the party could appeal to a higher court, where the case was to be tried by a jury. The condition of the appeal was that the party should make affidavit that "he verily believed injustice had been done him, and that the appeal was not made for the purpose of delay." The court held that there was no impairment of the right of trial by jury, and TILGHMAN, C. J., delivering the opinion, said: "Laws such as these promote justice, and leave the substance of the trial by jury unimpaired, and that is all that is required by these expressions in the constitution." A similar ruling was made in *Keddie* v. *Moore*, 2 Murph. 45, in which case the condition was that the party should give a bond, the court, per LOCKE, J., saying: "The party wishing to appeal may be subjected to some inconvenience in getting security, but this inconvenience does not in this, nor in any other case where security is required, amount to a denial of the right." A similar ruling was made in *Beers* v. *Beers*, 4 Conn. 539, the court, per HOSMER, C. J., saying: "A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations as if the object had been openly and directly pursued. But, on the other hand, every reasonable regulation made by those who value this palladium of our rights, and directed to the attainment of the public good, must not be deemed inhibited, because it increases the burden or expense of the litigating parties. Such a degree of morbid sensibility may be excited on this subject as to generate an opinion that the legal requisition of a bond, the increase of jurors' fees, and other trivial changes, although imperiously demanded to promote justice and the general convenience, if they only operate to subject the trial by jury to a burden not unreasonable, are a violation of the constitution. * * * As the interests of a state, however, do not essentially depend on the existence of one right only, but on many, it is proper to preserve them generally, and not to sacrifice one important consideration to another equally important." And similar decisions have been made in other cases. See *Jones* v. *Robbins*, 8 Gray, 341; *Flint River Co.* v. *Foster*, 5 Ga. 195; *Morford* v. *Barnes*, 8 Yerg. 446.

The foregoing cases seem to us to proceed upon the principle above stated, viz., that a reasonable regulation of the mode of enjoyment is not a denial or impairment of the right, although, in the cases referred to, the regulation was not the prepayment of the jury fees. But in *Adams* v. *Corriston*, 7 Minn. 456, (Gil. 365,) the precise point was decided. The court below refused a jury trial, because the defendant declined to advance a jury fee of three dollars, and tried the case without a jury. On appeal, this was held to be proper, the court, per EMMETT, C. J., saying: "The objection to the jury fee we do not think is well taken. It is altogether too broad. It is not that the fee is so unreasonably high as to impede the due administration of justice, but because a fee is charged at all. We can see no valid objection to a reasonable fee of this kind. The constitution does not guaranty to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy

in the law, or impede the due administration of justice. And that a party who demands a trial by jury should be required to advance a small jury fee, whether it is considered as a tax on litigation or as a part of the expense which is necessarily incurred in his behalf, seems no more liable to a constitutional objection than is the requirement that the fees of the clerk, sheriff, and other officers shall be paid in advance when demanded. If the clause in the constitution means that we shall be permitted to litigate literally 'without price,' there is an end to all fees, from the issuing of summons to the entry of satisfaction of the judgment." And see, also, *People* v. *Hoffman*, 3 Mich. 248; *Randall* v. *Kehlor*, 60 Me. 44, 45; *Venine* v. *Archibald*, 3 Colo. 165.

If it be objected that a regulation might be made which would amount to a denial of the right, the answer is that, when such shall be the case, the court will doubtless afford the appropriate remedy.

Upon the merits, the case turned upon the delivery of a deed to the plaintiff. The deed, which was in consideration of a prior indebtedness, (*Schluter* v. *Harvey*, 65 Cal. 159, 3 Pac. Rep. 659,) was left with one Perley in escrow. There is a conflict in evidence as to what the condition was. One of the grantors testified, on behalf of the defendant, as follows: "The contract was that, if in thirty days I made a sale of the property, the deed was to be given to me, and, if I did not, it was to be delivered to Conneau." On the other hand, Perley testified as follows: "It was left with me by consent of all parties, to be delivered to Conneau in case Manning & Steffin failed to sell the land in thirty days *and pay the money.* * * * The transaction was a complete and fair understanding. The deed was delivered to me to remain in my possession for thirty days, and, in case they then failed to pay Conneau his mortgage within that time, it was to be delivered to him." In view of this conflict, it must be taken, from the findings in favor of the plaintiff, that the payment of plaintiff's indebtedness was part of the condition upon which the deed was to be ineffectual. And since the money was not paid, Manning & Steffin had no right to make a second deed to the defendant, who took with notice of the escrow.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order are affirmed.

73 Cal. 13

WARD *v.* MATTHEWS. (No. 11,590.)

(Supreme Court of California. June 30, 1887.)

1. RESULTING TRUST—PURCHASE OF LAND—FRAUD.

In an action in the nature of ejectment the court found as matter of fact that defendant, in June, 1881, made an agreement with a railroad company to purchase the land in question, the first payment of $225.28 to be made July 8, 1881, when a written contract should be entered into allowing defendant five years from the latter date for the payment of the balance of the purchase money; that on July 5, 1881, the plaintiff paid to the company the $225.28 for the use and benefit of defendant; that it was verbally agreed between the parties that the contract should be taken in the name of plaintiff as security for the sum advanced, and it was further agreed that the $225.28, with interest, should be repaid to plaintiff in one year; that plaintiff, within the year, extended the time of payment six months; that, before the six months expired, plaintiff paid the balance, $703, to the company, and took a deed to himself of the land; that this payment was voluntary on the part of plaintiff, and was unknown to defendant; that plaintiff had never demanded payment of any of the money advanced; that defendant had been ready to pay the amount due, but plaintiff had refused to make any statement or accept payment; that defendant, with the knowledge and approval of plaintiff, had resided on and improved the land since May, 1880; that plaintiff did not purchase from defendant his rights

under the contract of sale with the railroad company. *Held*, that the evidence established a resulting trust in favor of the defendant which the court would enforce.[1]

2. Trial—Issues—Findings—Resulting Trust—Reformation of Contract.
In an action in the nature of ejectment in which the defendant pleaded that he was the equitable owner of the lands; that he had contracted to purchase them from a railroad company, and applied to the plaintiff to advance the first installment of the price, agreeing to allow him to *retain the land contract as security;* and that the plaintiff did advance such installment, but falsely and fraudulently, and without defendant's knowledge or consent, induced the company to make the contract in his own name,—a finding of the court that it was *verbally agreed* that the contract of sale *should be taken in the name of the plaintiff* is within the issues, and does not amount to a reformation of the contract, which was not prayed for.

3. Statute of Frauds—Contract not to be Performed within a Year—Resulting Trust.
In such action it appeared that the defendant, not having the money to pay for certain lands which he had purchased, obtained an advance of the necessary amount from the plaintiff. The title to the lands was taken in plaintiff's name for his security, and it was agreed that the amount advanced should be repaid within a year. The arrangement was verbal, and, although (as both parties concurred in stating) it was agreed that the contract should be reduced to writing, this was never done. Before the expiration of the year the plaintiff agreed to extend the time of payment for a further period of six months. *Held*, that the fact that the contract had never been reduced to writing did not render it void, since it was originally intended to be performed within one year, and the extension had taken place before the expiration of that period, and that, therefore, the defendant was entitled to enforce the resulting trust in his favor.[2]

4. Contracts—Performance—Time as of the Essence.
Where B. agrees to advance A. the first installment of the purchase price of certain lands, which should be repaid within one year, the contract being taken in B.'s name for his security, and B., during an extension of such period of repayment, without A.'s consent or knowledge, pays the balance of the price, and obtains a title to the land in his own name by such payment of the balance, and B.'s refusal to afford A. any opportunity to pay the money he owed, either by a demand for payment, or by furnishing a statement when asked for by A., time ceases to be of the essence of the contract.

5. Equity—Decree—Deposit.
In an action in the nature of ejectment, the court found that the plaintiff had advanced the purchase price on behalf of the defendant, and that he held the legal title in trust for him, and ordered that, upon tender of the amount due, the plaintiff execute deed of the premises to defendant; and further directed that, should plaintiff refuse or neglect to execute such deed, the clerk of court was appointed commissioner with full power to make, execute, and deliver the same. *Held*, that the plaintiff could not object to the decree that, in the event of his refusal to make the deed, it deprived him of his security without his receiving the amount found due, as it was incumbent on the defendant to tender to and deposit the money with the commissioner before he was entitled to obtain a deed which would divest the plaintiff's title to the land.

Commissioners' decision. Department 1.

Appeal from superior court, Butte county.

Action to recover possession of certain real property, with damages for its detention. The defendant alleged that the plaintiff held the lands in trust for him; that he arranged to purchase the land from the Central Pacific Railroad Company; "that in June, 1881, or thereabouts, being required by said company to make the said first payment on said land, he made application to the plaintiff herein for money sufficient for that purpose, and said plaintiff thereupon agreed to advance for said defendant to said company the amount required to make said payment, in consideration of the defendant's promise to repay the same within one year, with interest at one and one-fourth per cent. per month. And it was further agreed by and between said plaintiff and defendant that, as security to said plaintiff for the repayment to him of the sum of money advanced, he was to receive and hold the contract thereafter to be

[1] See note 1 at end of case.

[2] See note 2 at end of case.

made by said railroad company to this defendant; that said plaintiff did advance for the benefit of this defendant, and did pay to said company, the sum of $225.28 on or about the eighth day of July, 1881; that by means of false and fraudulent representations, and without the knowledge or consent of this defendant, said plaintiff induced said company to make said contract in the name of the plaintiff, and said company did so make and execute said contract; that thereafter, and before the expiration of the year within which said sum of money was to be repaid to said plaintiff, said plaintiff, upon the request of defendant, extended the time of payment six months; that before the expiration of said time, and within the five years in which full payment could be made to the railroad company, the said plaintiff made to said railroad company full payment for said land without the knowledge or consent of this defendant, and received from said company a conveyance of said land."

"Wherefore defendant prays that the amount due the plaintiff from defendant by reason of the facts aforesaid be ascertained; that it be adjudged and declared that the plaintiff holds the title to the premises described in the complaint *in trust* for this defendant; and that he execute and deliver to the defendant a good and sufficient conveyance thereof upon the payment by this defendant, within such time as to this court may seem proper and reasonable, of the sum of money found due to the plaintiff as aforesaid, and for his costs of suit herein."

On trial in the superior court, judgment was rendered in the defendant's favor. The findings of the court are set out at length in the opinion. By the decree it was adjudged that there was due to the plaintiff the sum of $225.28, with interest thereon at the rate of 1¼ per cent. per month, and also the sum of $703, with interest thereon at the rate of 7 per cent. per annum,—said several sums amounting to the sum of $1,192.93; that the defendant pay or tender to the plaintiff the said sum of $1,192.93 within 20 days from the date of the decree; that if payment or tender of payment should not be made within the time herein specified, then the decree should be null and of no effect, and judgment shall be entered for plaintiff as prayed for in his complaint; that, upon the payment or tender of payment by the defendant to the plaintiff within the time herein provided, the plaintiff should execute and deliver to the defendant a deed of the premises; that if the plaintiff should refuse and neglect to execute and deliver such deed for the space of one day after such payment, or tender of payment, then the clerk of the superior court was appointed commissioner, with full power to make, execute, deliver, and have recorded such deed.

The plaintiff moved for new trial, but his motion was overruled.

Among the other errors specified was the following, viz.: That "finding four is contrary to the whole evidence, which shows that the verbal agreement there stated was to be reduced to writing, and signed by the parties thereto, and therefore such verbal agreement was invalid. Said finding four states the contract of sale should be taken in the name of plaintiff, to be held by him as security for the repayment to him, etc., which is in conflict with the allegation of defendant's answer declaring the verbal agreement to be otherwise; namely, that it was to be taken in defendant's name. Such allegation is the preponderating fact, concluding the court as to such condition in said defendant's agreement while such allegation stands. The evidence is also insufficient to justify said finding, or to show that on or about July 5, 1881, said plaintiff paid said railroad company the sum of $225.28 *for the use and benefit of defendant*, etc.; but, on the contrary, the evidence clearly shows that plaintiff refused to advance any money for Matthews, or, as he says in his letter, 'to make any debt with him,' and that Matthews, finding that he could not raise the money, voluntarily surrendered all his rights under said limited preference, upon an inchoate agreement, never completed, that Ward would buy the land, taking the contract of purchase in his own

name, and that if defendant paid him the $225.28, with interest at 1¼ per cent. per month within a year, that Ward would assign the contract of purchase to Matthews. The evidence further shows that on July 9, 1881, after Matthews' time to make a contract with the C. P. R. R. Co. expired, that said company made a contract with plaintiff in his own right."

Thereafter the plaintiff moved the court to determine that the defendant had made default in complying with the conditions of the judgment, and that the court cause judgment to be entered for the plaintiff. The defendant opposed this motion, on the ground that on the last day named in the decree he had offered the sum of $1,192.94 to the plaintiff at his house, and tendered him a deed for his signature, and plaintiff had refused to accept the money, or to sign the deed. The motion was overruled.

From the orders denying the motion for a new trial, and overruling the motion after judgment, the plaintiff appealed.

L. C. Granger and *J. W. Turner*, for appellant.

If any material part of the verbal agreement was to have been reduced to writing, until so done and signed said agreement was inchoate and incomplete. *Ewald* v. *Lyons*, 29 Cal. 550; *Farmer* v. *Grose*, 42 Cal. 169; *Fuller* v. *Reed*, 38 Cal. 99.

H. V. Reardon, for respondent.

It was not necessary that the agreement should have been in writing, although the parties agreed to do so and failed. Such might be the case where the agreement, if verbal, would be void under the statute of frauds; but, the verbal agreement here being valid, the failure to reduce it to writing does not invalidate it. *Ewald* v. *Lyons*, 29 Cal. 550, and *Farmer* v. *Grose*, 42 Cal. 169, are not in point.

FOOTE, C. This appeal is from an order denying plaintiff a new trial, and from an order made after final judgment, denying his motion for judgment as prayed for in his complaint. The action was brought by the plaintiff for the recovery of the possession of a certain tract of land, and damages for its detention. The defendant answered, denying all the allegations of the complaint, and setting up facts which went to show him entitled in equity to the title and possession of the land in controversy, which title he claimed the plaintiff held merely in trust for him.

The findings of fact were as follows: "(1) That in May, 1880, the land described in the pleadings herein was the property of the Central Pacific Railroad, and that at said time the defendant made application to said company to be permitted to purchase the same; (2) that in June, 1881, the said company recognized the right of the defendant to purchase said land, and at that time agreed with said defendant that, upon the payment, by said defendant, to it of the sum of $225.28 on or before the eighth day of July, 1881, it (the said company) would execute to said defendant a contract of sale of said land; (3) that, by the terms of said contract, the said defendant would have five years from and after the eighth day of July, 1881, in which to make payment of the balance of the purchase price of said land, upon the payment, annually in advance, of the interest on the deferred payment; (4) that on or about the fifth day of July, 1881, the said plaintiff paid said railroad company, for the use and benefit of said defendant, the said sum of $225.28, and at that time it was verbally agreed by and between said plaintiff and defendant that the contract of sale should be taken in the name of said plaintiff, to be held by him as security for the repayment to him by said defendant of the said sum of $225.28, with interest thereon at the rate of 1¼ per cent. per month, and it was also agreed between said parties that said sum, with the accrued interest, should be repaid in one year; (5) that the contract of sale of said land was made to said plaintiff by said railroad company; (6) that before the expiration of the year in which payment of the said sum of $225.28, with accrued interest, was

to be made, the plaintiff, at the request of the defendant, extended said time of payment six months; (7) that before the expiration of the six months, and in the month of July, 1882, and before the expiration of the five years specified in the contract of sale, the said plaintiff advanced and paid to the said railroad company the sum of $703, being the balance of the purchase price of said land, and received from said railroad company a deed for said land on the eighth day of August, 1882; (8) that the payment by said plaintiff of said sum of $703 was made without the knowledge of the defendant, and was a voluntary payment on the part of said plaintiff; (9) that said plaintiff never demanded payment of either the sum of $225.28 or $703, or both, from the defendant; (10) that the plaintiff never presented to defendant a statement of the amount due from him on the advance as made by plaintiff; (11) that defendant has at all times been ready and willing to repay to said plaintiff the amount due, when ascertained, but said plaintiff has declined and refused to make any statement or accept payment; (12) that in May, 1880, said defendant entered upon said land, and made improvements thereon, and has ever since resided upon said land, and has continued to improve the same, and said improvements were made with the knowledge, consent, and encouragement of said plaintiff; (13) that plaintiff did not purchase from said defendant his rights under the contract of sale with the railroad company."

We think that they were within the issues as made by the pleadings; that they are sustained by the evidence in the record, and are sufficient to uphold the judgment. A similar trust to this was enforced by this court in the case of *Walton* v. *Karnes*, 67 Cal. 255, 7 Pac. Rep. 676.

The trial court did not attempt to reform any contract made between the parties. It simply undertook and did determine, from all the evidence given upon both sides, what the contract actually was, as both parties to the record had diverse views as to that matter. Although an agreement existed to reduce the contract to writing for the protection of the defendant, yet the fact that it was never done did not have the effect of rendering the contract void, since in the *first* instance it was to have been performed within one year; and, *secondly*, since its extension for six months longer took place prior to the expiration of that year first agreed upon, and after that time was not of the essence of the contract between the parties, as the plaintiff, before the time fixed for its performance, advanced the largest portion of the purchase money for the lands without the knowledge of the defendant, and never afforded him an opportunity to pay the money he owed either by a demand for its payment or any statement as to its amount when it was asked for by the defendant, and refused to accept payment when the defendant was willing to make it.

According to the judgment rendered, if the plaintiff had received the money which was tendered him by the defendant, he would have been reimbursed, principal and interest, for all that he had paid out for the land in dispute for and on account of the defendant. He refused to accept the money thus tendered him, and which was all to which he was equitably entitled, and sought upon motion after judgment to have judgment rendered in his favor as prayed for in his complaint. This the court denied upon the ground that he had refused to accept the money tendered him on the day and in the exact amount ordered by the judgment or decree. And the plaintiff cannot complain; for, if his appeal here shall not be successful, it will still be incumbent on the defendant to tender to and deposit the money with the commissioner named in the decree, before he can obtain a deed to the land which will divest the plaintiff's title thereto.

We do not perceive anything in the affidavits presented on the motion for a new trial affecting the result of this controversy which due diligence might not have enabled the plaintiff to have presented on the trial, nor do we think such evidence would have changed the result.

There is no prejudicial error shown by the record, and the judgment and orders should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and orders affirmed.

NOTE.

1. In some states, when a conveyance is made to one person, the consideration for which moves from another, a trust results in favor of the latter. Bigley v. Jones, (Pa.) 7 Atl. Rep. 54; Donlin v. Bradley, (Ill.) 10 N. E. Rep. 11; Harris v. McIntyre, (Ill.) 8 N. E. Rep. 182; Springer v. Young, (Or.) 12 Pac. Rep. 400; Smith v. Brown, (Tex.) 1 S. W. Rep. 573; Bedford v. Graves, (Ky.) 1 S. W. Rep., note, 537. And such trust results, even though the consideration has been in fact advanced by the grantee for the other person, the grantee holding the title as security for such advances. Barroilhet v. Anspacher, (Cal.) 8 Pac. Rep. 804; Walton v. Karnes, (Cal.) 7 Pac. Rep. 676. But see to the contrary, In re Wood, 5 Fed. Rep. 443; Bear v. Koenigstein, (Neb.) 20 N. W. Rep. 104.

2. Where it is expressly agreed that a contract is to be performed within one year, extensions from time to time, by parol, for periods less than one year, will not be affected by the statute of frauds, Donovan v. Richmond, (Mich.) 28 N. W. Rep. 516; and, when the party employed has continued from year to year to perform the services, it will be presumed that both parties have assented to the renewal of the contract. Sines v. Wayne Co. Supt. of the Poor, (Mich.) 25 N. W. Rep. 485. A verbal lease of land until such time as the lessor shall pay the lessee a certain sum of money is neither an agreement that by its terms is not to be performed within one year from the making thereof, nor an agreement for leasing for a longer period than one year within the meaning of the statute of frauds of California. Raynor v. Drew, (Cal.) 13 Pac. Rep. 866.

For further discussion of that provision of the statute of frauds relating to contracts not to be performed within one year, see Treat v. Hiles, (Wis.) 32 N. W. Rep. 517, and note.

73 Cal. 153

BOYLE ICE-MACHINE CO. *v.* GOULD and others. (No. 11,776.)

(*Supreme Court of California.* July 27, 1887.)

MORTGAGE—OF MACHINERY AND LEASE—RECORDING—PRIORITY.

To secure the price of machinery bought, the purchaser gave his note, secured by mortgage upon the machinery and upon some land which he had leased for 10 years, and upon which he placed the machinery, which mortgage was recorded in the records of mortgages of real estate. *Held*, that a judgment creditor of the mortgagor who purchased the machinery and lease on judgment sale after the recording of the mortgage was in no better position than the mortgagor, and his interest was subject and subordinate to the mortgage.

Department 2. Appeal from superior court, Los Angeles county.

The defendants Gould and Sweeney, in March, 1884, purchased an ice-machine from the plaintiff, and about the same time they leased some land and buildings in Los Angeles for 10 years, for the purpose of carrying on the ice business. The machine purchased from the plaintiff was placed upon these leased premises. Gould then executed two promissory notes to the plaintiff corporation, and both Gould and Sweeney executed a realty mortgage, without acknowledgment, on the leasehold and machinery, as though they owned the land in fee-simple, to secure the payment of the two notes. This mortgage was recorded on the third of May, 1884, in the records of mortgages of real estate in Los Angeles. On the nineteenth day of June, 1884, C. H. Shillaber recovered judgment againt the defendant Gould in the superior court of San Francisco, for $16,000, and costs; that amount having been loaned to Gould to conduct the ice business, and Gould having failed to pay it back at the time agreed. Execution was regularly issued upon said judgment, and sent to the sheriff of Los Angeles, and on the twenty-ninth day of July, 1884, the machinery was sold as personal property upon execution sale to C. H. Shillaber for $5,000, she being the highest bidder, and the judgment was marked satisfied to that amount; and at the same time the lease was regularly

assigned to her for a valuable consideration. At this time, C. H. Shillaber had no knowledge of the mortgage. She took possession of the premises and machinery, and leased them; and upon her death, on the eighteenth day of February, 1885, the appellant herein, the defendant Cook, as special administrator of her estate, assumed possession and control of the property. On the twenty-seventh day of October, 1884, the plaintiff corporation brought suit to foreclose its mortgage, and made C. H. Shillaber a defendant, and upon her death the appellant Cook, as special administrator, was substituted as a party defendant in her place. Defaults were obtained against the defendants Gould and Sweeney, but the defendant Cook, as special administrator, answered, setting up as separate defenses the purchase for value, without knowledge of any incumbrance, of the lease by assignment, and of the machinery by purchase on execution sale. A demurrer was interposed by plaintiff to these separate defenses on the ground that the facts stated constituted no defense. This demurrer was sustained, and judgment and decree of foreclosure made, entered, and recorded, and this appeal is taken to this court from that judgment.

Wm. Hoff Cook, for defendant Cook, appellant. *Bicknell & White*, for respondent.

BY THE COURT. We find no error in the record. The demurrer to the answer of Cook, special administrator, was properly sustained. The defendant occupied no position superior to that of the mortgagor, Gould, and whatever interest he acquired by his purchase was subject and subordinate to the mortgage of plaintiff. Judgment affirmed.

73 Cal. 29

GREEN and another *v.* STATE. (No. 11,169.)

(*Supreme Court of California.* June 30, 1887.)

1. STATES—SUITS AGAINST—WAIVER OF IMMUNITY.
 When the state permits itself to be sued, the case is simply referred to the court to determine whether the claim constitutes a lawful demand against the state, and the only questions for determination are, what has been done, and what are the legal principles by which the responsibility of the state is to be measured, and whether upon these principles the state should be held liable.[1]
2. SAME—CONSTRUCTION OF STATUTE—LIABILITY.
 By California act approved March 12, 1885, plaintiffs were authorized to sue the state for damages alleged to have been suffered by them by reason of certain canal improvements made by the state, and to have judgment therefor "if it appears upon the trial * * * that damage has been done [to the plaintiffs] by any act for which the state is legally liable." *Held*, that the language of the act excludes the idea that any liability was admitted, or any defense waived, except that of immunity from suit. The state may still interpose the defense that it was engaged as a state in a public work for a common good.
3. CONSTITUTIONAL LAW—EMINENT DOMAIN—"TAKING" FOR PUBLIC USE.
 Under the language of the California constitution as it existed prior to 1879, where the state, for public purposes, turns or straightens the channel of a river where it empties into another river, so that the land on the opposite side is, five years afterwards, injured or destroyed by the increased velocity of the current, such damage is not a *taking* of land for public use, and does not entitle the owner to compensation. THORNTON, J., dissenting.

In bank. Appeal from an order of the superior court, Sacramento county, sustaining demurrer to complaint in an action brought by appellants, Green and Trainer, against the state in pursuance of an act of the legislature, approved March 12, 1885, entitled "An act to enable John Hoagland, James Reid, Mrs. Rebecca C. Hoagland, George Cooper, William B. Todhunter, Mrs.

[1] Respecting the immunity of states from suit, see Lowry v. Commissioners Sinking Fund, (S. C.) 1 S. E. Rep. 141, and note.

Mary W. G. Van Arsdall, Henry Lienberger, Christopher Green, and Charles Trainer to sue the state of California" to recover damages alleged to have resulted to them in consequence of the straightening of the channel of the American river at its mouth or point of confluence with the Sacramento river, by the city levee commissioners of the city of Sacramento, done by them in the year 1862, in pursuance of an act of the legislature entitled "An act concerning the construction and repair of levees in the county of Sacramento, and the mode of raising revenue therefor," approved April 9, 1862. St. 1862, p. 151. The straightening of the American river is alleged to have been done in the year 1862. The damages resulting to the lands, etc., of appellant therefrom, are alleged to have occurred December 25, 1867. That the appellant owned lands on the west bank of Sacramento river, in Yolo county, and opposite the mouth of the new-made channel of the American river, through which the waters of said river were conveyed into the Sacramento with such force and volume as to press the waters of the Sacramento against its west bank, cause them to break over and through the natural and artificial barriers there, and overflow, undermine, and wash away the lands of appellant, etc.

The grounds of demurrer assigned were: (1) That the court has no jurisdiction of the person of the defendant, or the subject of the action; (2) that the complaint herein does not state facts sufficient to constitute a cause of action; (3) that plaintiffs have no authority to sue the state, and the act of the legislature approved March 12, 1885, authorizing them to sue, is unconstitutional; (4) that whatever cause of action is stated in the complaint is barred by the provisions of sections 336, 337, 338, 339, 340, and 343, Code Civil Proc.

A. L. Hart and *C. T. Jones*, for appellants. *E. C. Marshall*, Atty. Gen., and *John T. Carey*, for respondent.

TEMPLE, J. This appeal has already been twice decided,—once in department, (11 Pac. Rep. 602,) and once by the court in bank, (12 Pac. Rep. 683.) In each decision the judgment was affirmed on the authority of *Green* v. *Swift*, 47 Cal. 536. The court held that, inasmuch as the question was there determined by the highest judicial tribunal existing under the former constitution, and as the former constitutional provision involved has been changed, they would not reconsider the conclusion there reached.

The last rehearing was granted because the court was impressed by the positive and confident assertion of counsel that the court had entirely misconceived or misunderstood the point upon which appellants mainly relied. Counsel asserted: "It is not and has not been contended that the act authorizing the commencement of the action against the state operated to create any new liability on the part of the state, or any which had not previously existed, nor is it contended that the act of March 12, 1885, amounted to a concession of the state's liability." It is said: "The real point upon which appellants rely is that when the state authorizes itself to be sued, and there is no statutory or constitutional provision fixing a different liability, its measure of responsibility is to be determined by the same rule as that which determines the liability of one of its own citizens."

Properly understood, we accept this rule as correct. A state cannot be sued, because it is sovereign. It is supposed that one has but to make his grievance known; and, if he has a lawful demand against the state, it will at once be satisfied. But, when the state permits itself to be sued, the matter is simply referred to the courts to determine whether the claim does or does not constitute a lawful demand against the state, and in such a case the only questions for the determination of the courts are, what has been done, and what are the legal principles by which the responsibility of the state is to be measured, and whether, applying these principles, the state should be held responsible. It consents to go before its courts, and permit the claim

against it to be determined upon those settled rules of law upon which the responsibilities of ordinary parties litigant are determined; that is, as already stated, whether it has committed the act complained of, and, if so, whether, according to established rules of law, it is responsible in damages.

Appellants contend that the liability of the defendant should be that of a citizen who straightened a stream on his own farm, diverting it from its natural channel in such manner as directly to produce the injury. But why? Such is not the fact. It was legally possible that the state should have been a proprietor, and that as such it should have straightened the stream. In such a case, no doubt, those considerations would determine the liability. But what is there in the act to force the state to trial upon an assumed case which is not true? If it had been a proprietor merely, it might have defended as such, and perhaps have claimed some right with reference to the property of defendant; but having in fact no other claim than that it is a state, and was engaged in a public work for the common good, if it cannot set that up because it waived its sovereignty so that it could be sued, then it must admit that it is without defense, and the act must be considered a concession of the state's liability, which appellants say they do not claim.

Some force must be given to the language of the act which expressly refers the matter to the courts to ascertain if it is legally liable. The language is: "If it appears upon the trial of any said actions that damage has been done to the plaintiff by any act for which the state is legally liable," etc. This language industriously excludes the idea that the liability was admitted, or that any legal defense was waived except that of immunity from suit. If, as is practically claimed, it waived not only its sovereignty, so that it could be sued, but also its only possible defense, that as a state it was engaged in a public work for the common good, it is difficult to see how any question of liability was involved to be referred to the courts.

It now remains to consider whether, under the settled rules and maxims of law, damage, such as the plaintiffs allege they have sustained, can be recovered. We are not, however, to approach this question admitting that the state is a wrong-doer. It is not to be assumed that the liability is that of one who, without claim of right, has changed the course of a stream and washed away the land of another. The complaint avers that the canal was a public work, constructed by the state for public uses. Is damage like this, occasioned by such work, actionable?

The canal was on the opposite side of the river to plaintiffs' land, about 150 yards above. The width of the river is not given, but we know the Sacramento to be a large, navigable stream. The work did not approach the land of plaintiff within 200 or 300 yards. There was no appropriation, occupation, or use of the land. The damage did not occur until five years after the work was completed. It could not have been known that any such injury would follow. The state could not then have condemned the land, and, admitting that it could, the damage could not have been determined. It is held that, to take land, compensation must be made, or at least provided in advance. Furthermore, a law which provides for a taking of private property for a public use without making provision for such compensation is void. Here, then, the state could not take, by any lawful method, what it is now contended, for the purpose of holding it liable for damages, it did in fact take at the time the work was constructed.

It is evident that those cases (if there be such) which hold that mere consequential damages is a taking within the limitation upon the power of eminent domain, use the word in an unusual and extended sense, and the reason for such extended sense is not hard to find. Of course, primarily the word was used in reference to the necessities of the government to use the property sought. But it has been held that the clause in the constitution, "property shall not be taken without compensation," is not a grant of power, but a lim-

itation. Therefore the state is liable only to pay for property taken for public use. Hence the meaning of the word was extended to cover cases which, though not within the letter of the limitation, were within its spirit and meaning.

Most of the cases, however, in which it has been held that property *so* damaged is taken to that extent, are cases of corporations engaged in the public service in the sense that they can be authorized to use the power of eminent domain to condemn land, but yet which are engaged in business for the gain and profit of their stockholders. It is merely held here that the delegation of the power of eminent domain does not relieve the corporation from ordinary liability for damages caused by carrying on its business. It was granted the power to take, because of its public utility, but that did not confer the right to damage. Though performing a public service, it is yet not the state, which only acts for the public good, and which is only responsible as provided in the constitution.

If there can be found a case in the books which holds that under such facts as are alleged in this case the *state* is liable, our attention has not been called to it. The damage is plainly not the natural consequence of the work which could and ought to have been anticipated and expected as the result. It was remote and consequential,—a purely incidental and unexpected effect. There was not enforced occupation of the property or interference with it. The owner was left in full possession, and there was done to the land or left upon it nothing to obstruct its use.

The case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, is most relied upon, and it is a case by which the right of the parties here may well be tested; for the opinion in that case seems to admit that the doctrine there announced, if not opposed to the current of authority upon the subject, at least modifies the rule as to the particular circumstances of that case. It is admittedly an extreme case in that direction. The court there says, speaking of this very point: "We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to property of the individual, arising from the prosecution of improvement of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of the opinion that the decisions referred to have gone to the uttermost limit of judicial construction in favor of this principle, and in some cases beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, and other material, or by having an artificial structure placed upon it, so as to effectually destroy or impair its usefulness, it is a taking."

It is evident there is nothing in this case in conflict with the doctrine of *Green* v. *Swift*. In the case from 13 Wall., a dam was built, which caused the water to continuously and permanently cover the land of plaintiff. If it was physically and permanently occupied by a foreign body, placed there by the defendant when the dam was built, it was easy to ascertain how much would be thus occupied. It was the natural, certain, and immediate consequence of the act. The land was really used by the defendant. There was no such state of affairs here. But that court has itself declared the case of *Pumpelly* v. *Green Bay Co.* to be an extreme case, and explained, if it has not modified, its meaning. The case of *Transportation Co.* v. *Chicago*, 99 U. S. 635, was an action on the case for damages sustained by reason of the construction of a tunnel by the city, under the authority of an act of the legislature. After saying that no action would lie at common law, the court says: "The decisions to which we have been referred were made in view of

magna charta, and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair their use, are universally held not to be a taking within the meaning of the provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him a right of action. This is supported by an immense weight of authority. Those who are anxious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542, and notes. The extremest qualification of the doctrine is to be found perhaps in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, and in *Eaton* v. *Boston, C. & M. R. R.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a taking. In those cases there was a physical invasion of the real estate of the owner, and a practical ouster of his possession. But in this case there was no such invasion. No entry was made upon the plaintiff's lots. All that was done was to render for a time its use more inconvenient. The present constitution of Illinois took effect on the eighth of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be taken or damaged for public use without just compensation. This is an extension of the common provision for the protection of property."

The case of *Eaton* v. *Boston, C. & M. R. R.*, commented upon in the above extract is a very elaborately considered case, and strong ground was taken in favor of the proposition that, when property is damaged in any way, it is taken within the meaning of the constitutional limitation. There the injury was more like that complained of here than in the other cases. After a very full discussion and citation of authorities, the learned judge says: "The defendants do not stand in the position of public bodies constituted for the sole purpose of executing a public trust or duty, in the performance of which they have no other interest than that which every citizen has. True, the public benefit may be so promoted by works authorized to be made by such corporation that the property of individuals taken by them by virtue of their charters may be deemed to be taken for public use within the constitutional provision on that subject. Still they exercise their corporate privileges under a grant of the legislature conferring upon them specific powers for their own direct and private advantage." "They are trustees of public interests for their own benefit." "The defendants voluntarily accepted their charter with a view to their private emolument, and do not occupy the position of a municipality, invested, without their consent, with powers to be exercised solely for the public benefit." That is to say it is carrying on business for private gain, and should be held responsible for injuries resulting from its mode of doing business, like any one else.

Now, these are the extreme cases upon this subject. In each case it is expressly said that the weight of authority is apparently the other way. Neither case is inconsistent with the conclusion arrived at in *Green* v. *Swift*. Our constitution has now been amended so as to require compensation for property taken or damaged. This is itself an admission that property simply damaged is not taken. The question as here presented is no longer a vital one as to constitutional construction. We still adhere to our former opinion.

Coming to the conclusion we have, it has not been deemed necessary to discuss the objections to the act under which the action is brought, on the ground of unconstitutionality. Had we determined that it was intended to allow the plaintiffs to recover damages for which the state was not legally liable, it would have been necessary to inquire whether the act did not give cause of action where none existed before, and whether this were not a gift prohibited by section 31, art. 4, Const.

We have assumed merely that the act intended to refer to the courts the inquiry whether the state was liable according to the rules and principles of law applicable to the subject. That is practically, in this case, whether the damage is a *taking* within the constitutional limitation. This involves the assumption that the non-liability of the state does not depend upon its immunity from suit, but upon the nature of the injury as remote and consequential. There are careless expressions in some of the opinions which seem to indicate that the non-liability did depend upon the fact that the sovereign cannot be sued. But this is plainly contrary to the tenor and *rationale* of all the opinions, including those in which the expressions are used, which all make the solution turn upon the inquiry as to whether the damage was a taking of private property for public use, and therefore one for which the state must pay under the limitation. If we suppose a valid contract with the state under which materials have been furnished to the state for which no appropriation has been made, no one would hesitate to say that the state was legally liable; and, if it declines to pay, all would agree that it took advantage of its immunity from suit to avoid a legal obligation. See *Bass* v. *State*, 34 La. Ann. 500.

Judgment affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

MCKINSTRY, J., (*concurring.*) I concur in the judgment. I concur in Mr. Justice TEMPLE'S construction of the act of March 12, 1885, and in his conclusion that the act did not deprive the state of its right to rely upon any defense to this action which it had as *the state*, other than the right to claim that the state could not be sued, and that the act does not purport to do so. I decline to express any opinion as to whether the plaintiffs' property was "damaged." Section 14, art. 1, Const. 1879. The property of the plaintiffs, if "taken" at all, was taken prior to the adoption of the present constitution. I adhere to the views expressed herein in department 1, 11 Pac. Rep. 602.

The question whether the damages caused by the work done under the direction of the commissioners, appointed by the act of 1862, was a taking of private property, within the meaning of the provision of the former constitution prohibiting a taking of private property without compensation, was fully decided, adversely to such contention, by the highest judicial tribunal under that constitution. The questions involved in the judgment in *Green* v. *Swift*, 47 Cal. 536, must be considered as closed upon the doctrine of *stare decisis*.

THORNTON, J., (*dissenting.*) I dissent from the foregoing opinions. I think there was a taking of the property of plaintiffs here for which the state was legally responsible. See cases cited in notes to section 243, Gould, Waters.

73 Cal. 73

TODHUNTER *v.* STATE. (No. 11,283.)

(*Supreme Court of California.* July 2, 1887.)

In Bank.

BY THE COURT. The judgment of the court below is affirmed upon the authority of *Green* v. *State*, *ante*, 610, (No. 11,169, opinion filed June 30, 1887.)

THOMASON *v.* ASHWORTH. (No. 12,094.)

(*Supreme Court of California.* July 2, 1887.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS.

The California act of April 1, 1872, in relation to street improvements in the city and county of San Francisco, providing a general plan of street work by contract,

such contract to be entered into and the work performed before the collection of the money, was repealed by section 19, art. 11, Const. Cal. 1879, providing that "no public work or improvement of any description whatsoever shall be done or made in any city, * * * the cost and expense of which is made chargeable, or may be assessed, upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."

2. SAME.

The California act of March 18, 1885, providing for work upon streets, sewers, etc., within municipalities, is constitutional, although it does not provide for the assessment and collection of the cost before the performance of the work.

3. CONSTITUTIONAL LAW—SPECIAL LAWS.

That act is not a special law within the meaning of section 6, art. 11, Const. Cal., enacting that "corporations for municipal purposes shall not be created by special laws, but the legislature by general laws shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns," but is a general law, and therefore constitutional and in full force within the city and county of San Francisco.

4. SAME—AMENDMENT.

The amendment of section 19, art. 11, Const. Cal., proposed by the legislature of 1883, and adopted by vote of the people in 1884, removing the restriction as to performing street work before the collection of the money, and leaving it to the legislature to pass such laws in that regard as it might deem expedient, subject only to such prohibitions as might exist regarding the application of such laws to existing charters, was constitutionally adopted, notwithstanding that such amendment was entered at large on the journal of the house, (Const. Cal. art. 18, § 1,) only by an identifying reference.

McKINSTRY and SHARPSTEIN, JJ., dissenting.

In bank. Appeal from superior court, San Francisco.

J. C. Bates, John F. Swift, and *J. M. Wood,* for appellant. *George Flournoy, Jr.,* and *T. V. O'Brien,* for respondent.

THORNTON, J. Application for writ of mandate to the defendant, as superintendent of streets, commanding him to enter into and sign a contract under the street law for the city and county of San Francisco, passed April 1, 1872. The contract, the execution of which is sought to be compelled herein, is one to be entered into in advance of the assessment and collection of the money to be paid for the work done under it, under the provisions of the act of 1872, and in this regard this act may be held to be done away with by the provisions of the constitution. This we consider as settled in this court by the cases of *McDonald* v. *Patterson,* 54 Cal. 245, and *Donahue* v. *Graham,* 61 Cal. 277.

Since the adoption of the constitution, and on the sixth of March, 1883, the legislature enacted an act entitled "An act to provide for the improvement of streets, lanes, alleys, courts, places, and sidewalks, and the construction of sewers within municipalities." St. 1883, p. 32. This act was passed in conformity with the portion of section 19 of article 11 of the constitution relating to works on and improvement of streets, which is quoted in the opinion of the court in *McDonald* v. *Patterson, supra,* and repealed all acts or parts of acts in conflict with any of its provisions. See section 36 of the act above cited, (St. 1883, p. 47.) Thus such parts of the act of 1872 which remained in force after the adoption of the constitution as are in conflict with the act of 1883 were repealed by it.

Subsequently, and on the eighteenth day of March, 1885, a statute was passed and approved, with a title substantially the same as that of the act of 1883. St. 1885, p. 147. By the thirty-sixth section of this act, the act of 1883 was repealed, except as to work commenced under it prior to the passage of the repealing act. St. 1885, p. 165. The last-named act, like the act of 1872, did not provide for the assessment and collection of the money to pay for the street work done under it, until after the work was completed; and in this respect it was violative of section 19 of article 11 of the constitution as that

section was originally passed. But according to the ruling of this court in *Oakland Paving Co.* v. *Tompkins*, 12 Pac. Rep. 801, the section of the constitution above mentioned had been amended before the act of 1885 was passed, by which the objection of unconstitutionality to the latter act, on the ground that it was violative of the section referred to, was removed. We consider the decision in the case just above cited as settling finally the question as to the constitutionality of the amendment of section 19 above referred to.

But there is another objection urged to the constitutionality of the acts of 1883 and 1885. It is argued that, under section 6 of article 11 of the constitution, neither of the acts above mentioned could become laws, for the reason that they are special laws, and therefore beyond the power of the legislature to enact; and, further, that the legislature did not have the power to pass a general law affecting the charter of the city and county of San Francisco, without the consent of such city and county.

The sixth section of article 11 of the constitution is as follows: "Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

The entire legislative power is by the constitution vested in the senate and assembly, designated as the legislature. Any restriction of this power must be found in the constitution of the state, or in the constitution of the United States, and laws passed in pursuance thereof. Our attention has been called to no restriction in the constitution of the United States or the acts of congress in regard to the question to be herein considered. The restrictions in the sixth section of article 11 are as follows: (1) Corporations for municipal purposes can only be created by general laws. Prior to the adoption of the present constitution, the legislature could create a corporation for municipal purposes by a special law. This cannot be done since the present constitution became operative. (2) Prior to the adoption of the present constitution the legislature was not only competent to create a corporation for municipal purposes by a special law, but could compel a community of persons to accept a charter so created. As the constitution now stands, and since its adoption, a corporation can determine by a vote of its electors whether to accept a new charter or not, and such new charter or organization is accepted only when voted for by a majority of its electors voting at a general election. (3) A charter cannot be amended by a special law. But, while these restrictions exist, the legislature has the power to control the charters of all corporations by general laws. The restrictions above pointed out do not at all affect the power to control or regulate the charters of all municipal corporations by laws general in their character. This power is expressly recognized by the last clause of section 6 above cited, where it is declared that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

On reading the constitution it will be observed that its framers were particularly careful to restrict the legislature from passing local or special laws. See article 4, § 25; article 11, §§ 4, 5, 11, 12, 14; article 12, §§ 1, 5, 11; and article 10, § 11. Where legislative powers are conferred on counties, cities, towns, or townships by the constitution, such powers are still made subject to and liable to be controlled by general laws.

So it will be observed that the meaning attributed to the last clause of section 6 of article 11 is in accordance with the general plan on which the constitution is framed; that is, the inhibition of special or local legislation, and the allowance of general legislation. Evils constantly arise from special legislation,—and such evils it was the intention of the constitution makers to prevent. The evils of general legislation are such as spring from the imperfection of all things human and the abuse of power; but the abuse, or liability to abuse, affords no argument against the existence of such power. To prevent such abuses reliance must be had on the intelligence and fidelity of the representatives of the people, their accountability to their constituents, and the power to repeal statutes when found to be hurtful.

The acts of 1883 and 1885 include all municipal corporations in the state. This plainly appears from the first section of each act. Is it not, then, a general law? As the foregoing statutes each apply to all municipal corporations in the state, if they are not general laws it would be impossible to frame one which is general. The above view as to a general law accords with *Brooks* v. *Hyde*, 37 Cal. 376; *Wheeler* v. *Philadelphia*, 77 Pa. St. 348; *Kilgore* v. *Magee*, 85 Pa. St. 401; *Knickerbocker* v. *People*, 102 Ill. 218; *Hymes* v. *Aydelott*, 26 Ind. 431; *Chicago R. Co.* v. *Iowa*, 94 U. S. 155; *McAunich* v. *Railroad Co.*, 20 Iowa, 343. In *Knickerbocker* v. *People*, *supra*, it is said: "A law applicable to all counties of a class, as made or authorized by the constitution, is neither a local nor special law. If it applies to all the counties of a class authorized by the constitution to be made, it is a general law, and whether there may be few or many counties to which its provisions will apply, is a matter of no consequence." It is said in *Wheeler* v. *Philadelphia*, above cited: "A statute which relates to persons or things as a class is a general law."

It is argued that, according to the views herein expressed a city may have its charter totally changed without its consent. This is a proper deduction from the ruling herein, but this cannot be done by a special or local law applicable alone to a particular charter. The result can only be reached by a general law affecting all municipal corporations, or may be all of a class, and we can see no probability that a city can be injured by general legislation. When such legislation is allowed, corporations are put on the same footing with individuals as to protection against special or local legislation, and liability to be affected by general legislation. Whatever the danger may be from such legislation, the constitution is so written as to allow it, and thus we must interpret it.

It follows from the above—*First*, that the act of 1872 was entirely done away with by the constitution; *second*, that the act of 1883 was constitutional when passed, and repealed all portions of the act of 1872 in conflict with it; *third*, that the act of 1885 is a constitutional act under the constitution as amended; that the act of 1885 repealed the act of 1883, and has been and is now in force since its passage, on the eighteenth day of March, 1885.

The judgment must be affirmed. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.

MCKINSTRY, J. 1. I dissent. Section 19 of article 11 of the constitution of 1879–80, as the same stood prior to its amendment, reads: "No public work * * * shall be done or made, in any city, in, upon, or about the streets thereof, * * * the cost and expense of which is made chargeable *or* may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment, in proportion to the benefits on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized."

I have heard or read no argument which ought to induce a modification of my views with respect to the non-effect of the provision of the constitution above quoted upon the street law of 1872; the same being part of the consolidation laws of San Francisco. I adhere to the views expressed in the dissenting opinion in *Donahue* v. *Graham*, 61 Cal. 276, and still believe the provision of the constitution prohibits the *legislature*, created by the constitution, in any general law for the future organization of municipal corporations, passed in pursuance of the mandate in the first sentence of section 6, art. 11, from enacting that public improvements may be made or street work done until after the cost shall have been estimated and assessments therefor levied and collected. The prohibition also extends to provisions for street work, without previous assessment, in any charter framed for San Francisco in the manner laid down in section 8, art. 11.

Nor is this court estopped from reconsidering the question passed on in *Donahue* v. *Graham*. The conditions which would seem to prevent a review of *Green* v. *Swift*, 47 Cal. 536, were more formidable than any obstacles herein apparent to a reconsideration of *Donahue* v. *Graham*. A change in the constitution had extended and enlarged the provision prohibiting the taking of private property for public use without compensation. *Green* v. *Swift* did not purport to construe the meaning of a constitutional clause ("private property shall not be *damaged* without due compensation," etc.) which did not then exist. The decision applied only to events which occurred prior to the enactment of that clause, and it was made by the supreme court which expired with the constitution that gave it life, and whose provisions it interpreted. Except as to the parties in interest, no consequence of the judgment in *Green* v. *Swift* flowed this side of the adoption of the present constitution. Yet in *Green* v. *State*, *ante*, 610, (No. 11,169, filed June 30, 1887,) this court again inquired into the meaning of a section of the defunct constitution which, in *Green* v. *Swift*, had been construed by the appellate tribunal created by that constitution.

No property rights could have grown up under the judgment in *Donahue* v. *Graham*. Surely, there is no judicially recognized application of the doctrine of *stare decisis* which precludes us from returning to the true interpretation of a provision of the constitution, (set aside and annulled by the people, and the people's representatives, since the decision in *Donahue* v. *Graham*, and perhaps because of that decision,) and by the misinterpretation of which by this same court we have been led into the grave dilemma that we are called on to hold, either that there is no law for the reparation of streets in the great city of San Francisco, or that the legislature may change the entire chartered government without the consent of the people of the city and county.

Moreover, section 19 did not in terms purport to repeal any part of the charter of a city previously existing, nor did it supply a method of estimating the cost of street work within a city, or of assessing private property therefor. The constitution, even if self-operating, only prohibited in the future the letting of a contract for or the commencement of a public work or improvement, unless, etc. It might be argued, plausibly at least, that the prohibition was pointed at future action under a charter, and did not repeal the portion of the charter which originally authorized such action. No portion of the charter having been repealed when the constitutional prohibition ceased, street work could be proceeded with in the manner prescribed in the charter. *Board Com'rs Funded Debt, etc.*, v. *Board Trustees*, 12 Pac. Rep. 224.

2. Sections 6 and 8, art. 11, of the constitution, read as follows:

"Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns

heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

"Sec. 8. Any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a board of fifteen freeholders, * * * to be elected, * * * whose duty it shall be * * * to prepare and propose a charter for such city. * * * Such proposed charter * * * shall be submitted to the qualified electors of such city at a general or special election; and, if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or rejection as a whole, *without power of alteration or amendment;* and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, or, if such city be consolidated with a county, then of such city and county. * * * The charter so ratified may be amended at intervals of not less than two years, by proposals therefor, submitted by legislative authority of the city to the qualified voters thereof, * * * and ratified by at least three-fifths of the qualified electors voting, and approved by the legislature as herein provided for the approval of the charter."

The mandate that general laws shall be passed under which corporations may be formed is of modern date. The provision in state constitutions requiring such laws, and prohibiting special charters, was manifestly inserted to prevent abuses which experience had proved clung about the legislative practice of creating corporations and granting franchises by special act. Bouvier says of legislative charters of corporations that a charter is an act of the legislature creating a corporation. Strictly speaking, a general law under which they may be formed does not *create* the corporations. It provides the mode by which they may subsequently be brought into being. After a corporation is formed, the general law may not improperly be said to be the charter defining its powers, but the legislature does not confer the franchise directly upon individuals, or on the community. It is derived indirectly through the subordinate agency of the corporators themselves. The distinction is immaterial except as it may aid to explain the last clause of section 6, art. 11, Const. It might seem at first glance that "charters framed by authority of this constitution" are spoken of as things different from "cities and towns hereafter organized." But the only section of the constitution which speaks in those terms of *framing charters* is section 8, art. 11, which provides for the election of 15 freeholders to frame a charter for San Francisco, the city in the state containing more than 100,000 inhabitants. It would appear the clause as to "all charters framed," etc., was inserted *ex abundanti cautela*, lest it might possibly be supposed that by framing a charter, and securing its approval by the legislature, the people of San Francisco could remove themselves beyond the control of the general laws of the state. Moreover, all cities and towns organized prior to the adoption of the present constitution, and, in a certain sense, all organized afterwards, were or will be created by charter. The terms "cities and towns organized" and "city or town charters" may be used interchangeably, and are used in the last clause of section 6, art. 11, as designating the same thing. That clause may be read: "And cities and towns heretofore or hereafter organized shall be subject to and controlled by general laws;" the words: "and all charters thereof framed or adopted by authority of this constitution" being omitted as not actually modifying the sense.

3. I do not understand it to be seriously disputed that the street law of 1872 constituted a very material portion of the charter of San Francisco as

the same existed when the present constitution was adopted. An independent act creating commissioners to fill up sloughs within the limits of a city, and an act creating park commissioners, have been held to be corporations for municipal purposes. *St. Louis* v. *Shields*, 62 Mo. 247; *People* v. *Salomon*, 51 Ill. 37. Municipal improvements, including work done "upon, in, or about" the streets, are matters particularly within the province of the city government, and have been so treated and considered. Provisions for street work, to be based on municipal ordinances, and done under the supervision of a street superintendent elected by the qualified voters of the city and county, were inserted in the "Act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof," approved April 19, 1856, and in amendments thereof enacted prior to the act of April 1, 1872, the last act being itself amendatory of the consolidation act, and its previous amendments.

Nor do I understand it to be at all disputed that the street law, so called, of 1885 (supposing that law to be a substitute for the street law of 1883, and the charter provisions as to street work in San Francisco to have been in force after the adoption of the constitution of 1879, or after the repeal of the first sentence of section 19, art. 11, Const.) does annul the material portion of the charter of San Francisco relating to work upon streets.

On the thirteenth of March, 1883, (seven days after the approval of the act "to provide for the improvements of streets," etc., "within municipalities,") an act was approved entitled "An act to provide for the organization, incorporation, and government of municipal corporations." The last act is a general statute providing for the incorporation, organization, classification, and government of cities and towns, and was unquestionably intended to be a compliance with the mandate of the first clause of section 6, art. 11, Const. It provides for the election of a superintendent of streets, and prescribes his duties, which are such as the title of his office would imply. Among the powers of the municipal council is enumerated the power of opening, altering, constructing, repairing, etc., streets, highways, etc., and in subsequent sections is supplied an entire scheme for street work. If both these statutes were valid, the provisions of the act of March 13th were substituted for those of the act of March 6, 1883,—at least so far as street work done in cities and towns organized under the act of March 13th is concerned. This would leave the act of March 6, 1883, operative, if operative at all, only within municipalities organized prior to the present constitution; that is, a law claimed to be "general," because operative upon and within all cities and towns, is operative only upon and within some cities and towns. Will it be contended that the act of March 6, 1883, was intended to apply *only* to San Francisco, and other cities or towns organized prior to the taking effect of the present constitution? Or that, after it was repealed as to corporations subsequently organized, it continued in force as to those organized previously?

At all events, the passage of the act of March 13, 1883, was clearly a legislative recognition that the matter of the construction and repair of streets, alleys, etc., constituted a proper part of the organized government of cities and towns.

4. But the act of *eighteen hundred and eighty-five* was an amendment of the act of March 13, 1883, or an entire revision and consequent repeal of those provisions of that act relating to "work upon streets, alleys," etc., within municipalities formed under the general law. If a general law at all, it was a general law because a law amending a general law for the incorporation, organization, and classification of cities and towns, passed in conformity with section 6, art. 11, Const. It was a substitution of one system of street work for another system. If operative at all, it made an end of the provisions of the general law of 1883, relating to street work. Even if there can be no repeal by implication under the present constitution,—and it has not been so

decided,—yet a statute which, to be of force, must be held to have done away with a former statute, cannot be sustained as operative, while at the same it is held not to amend, revise, or repeal the former statute because not passed in the manner or with the forms required by section 24, art. 4, Const. If the failure to comply with the forms of that section has any effect, its effect is to render the last statute invalid.

Considering the act of 1885 as an amendment or revision and repeal of the act of March 13, 1883, so far as relates to street work, it would be a strange result if, while the general law of March 13, 1883, could not be made operative within the city of San Francisco without the consent of the citizens, expressed in the manner provided in the section 6, art. 11, Const., the law amending and revising the general law became at once binding upon the city and citizens.

5. As we have seen, when, if ever, the city of San Francisco shall organize in pursuance of a charter framed and adopted in the manner prescribed in section 8, art. 11, Const., it will be a city organized after the adoption of the constitution, and will be "subject to and controlled by general laws." Art. 11, § 6. Now, the words "general laws" in the last clause of section 6, whether applied to cities organized before the constitution was adopted or organized afterwards, *must mean precisely the same thing.* Observe how carefully the constitution has guarded against legislative interference with any charter which shall be adopted in the manner provided in section 8. Such a charter (which by section 6 will undoubtedly "be subject to and controlled by general laws," whatever the phrase may mean) can only be amended "at intervals of not less than two years." Each amendment must be submitted to the local electors, and must be ratified "by at least three-fifths of the qualified voters." To become operative it must then be approved by a majority of all the members of the legislature "elected to each house."

Verily, if a new charter, which may be adopted for San Francisco by San Francisco can be amended out of existence by statutes passed in the legislature by a majority composed in no part of members representing San Francisco,—as it may be, if the present charter can be so amended,—the laborious efforts of the constitution makers to prohibit amendments except with the consent of three-fifths of the qualified electors of the city have been of very little avail. With all respect, such a result seems to me *reductio ad absurdum.*

6. The act of 1885, "to provide for work upon streets," etc., "in municipalities," if a general law in any sense, is a general law changing in essential particulars the governmental organization of the municipal corporation known as the city and county of San Francisco. "Cities and towns heretofore organized may become organized under such general laws [those commanded in the same section] whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith." Const. art. 11, § 6. If anything is due to the strongest implication, the general laws under which municipal corporations may be formed cannot be made applicable to San Francisco without the consent of the citizens. They cannot be enforced *anywhere* except upon communities which shall first voluntarily subject themselves to them.

In *Desmond* v. *Dunn*, 55 Cal. 242, this court held that the charters of cities and towns created before the present constitution took effect remain in force in each case until a majority of the electors shall determine to become organized under general laws, or, in the case of San Francisco, to frame a charter for their own government.

7. But, it is asked, is the legislature deprived of all power to amend the corporate organization of a city? Must the people of a city created before the constitution of 1879 suffer under a bad or unfortunate provision in their charter until they organize under the general law, which itself may be inapplicable to their peculiar wants? The constitution provides for a classification of

cities and towns in proportion to population, and it is not to be supposed that the people of any one city or town containing the same population as others of its class are surrounded by such peculiar conditions as to require a different local government. The same question might be asked and the same difficulty urged as a reason for annulling the constitutional prohibition of special statutes creating municipal corporations. It was because it had appeared in the past that special acts amending a particular law creating a municipal corporation were very often *not* sought or desired by the tax-payers and others comprising a majority of the voters that the framers of the constitution prohibited amendments of charters formed before the adoption of that instrument. The constitution declares the public policy, "corporations for municipal purposes ought not to be created by special laws, but ought to be organized under general laws." To prevent confusion, however, and to consult so far the wishes of the people within the limits of corporations already formed, it continues such corporations until the citizens thereof shall choose to come in under the general laws, or, in the case of San Francisco, until a new charter shall be framed in the manner provided in section 8 of article 11. Ever since, if not before, the decision in *People* v. *Lynch*, 51 Cal. 15, attention has been drawn to the evils of special legislation affecting the government or people of a particular municipality, and it would certainly seem that the framers of the constitution of 1879, and the people who ratified it, intended to prevent all special legislative interference with existing charters, except with the consent of the citizens. This was sought to be accomplished by commanding general laws for the incorporation of cities and towns, just as the former constitution provided for general laws under which private corporations could be formed, and had prohibited special acts creating such. It was not intended that a special charter could be created for a particular municipality under the specious pretense of amending the charter previously created. It was undoubtedly supposed that wise and just legislators could perfect a general and uniform system which would secure an efficient local government to every municipality. If it be true that an amendment of a particular charter may render it satisfactory to the people of an existing city, this is no reason why the people of all other existing cities should be subject to a "general law" changing their charters in a manner which may *not* be satisfactory to them. The argument goes the whole length of demanding that special laws should be passed amending particular charters. It needs but a glance at the special acts for city and town charters passed before the adoption of the present constitution, and the widely different methods for street work—adapted in each case to population and supposed peculiar conditions—to see how violent is the presumption that the citizens of all demand a still different system of street work which disregards any "classification in proportion to population."

8. Whatever may be the meaning of the words "general laws," as used in the latter portion of section 6, art. 11, Const., I think it perfectly clear they do not mean laws which affect, alter, or amend the corporate organization of any city or town created before or after the constitution took effect. As to corporations organized under the general laws for municipal purposes, commanded in the first clause of the section, the expression, as applied to such, if meaning the same thing, would be a mere repitition; for the section has already provided that *such* general laws "may be altered, amended, or repealed." As to a corporate organization for San Francisco brought into existence in the manner laid down in section 8 of article 11, we have seen how prudently that section guards against alterations without the consent of the people. As to the corporations in existence when the constitution was adopted, the "general laws" applicable to them are the same kind of general laws to which corporations formed under general laws for municipal purposes, and any corporation organized in pursuance of section 8, are subject, etc., and by which they are controlled. And section 6 itself provides that corporations existing prior to

the constitution shall be subject to the general laws mentioned in the first part of that section (and, of course, to general laws amending such general laws) only with the consent of the people residing within the territorial limits of such corporations.

What are the general laws mentioned in the last clause of section 6? Cities are composed of citizens, and it seems to me hypercriticism to say that "general laws" which control cities, or to which they are subject, cannot include general laws of the state directly controlling, or to which are directly subject, the people living in a city; the more especially as it appears from the context and other portions of the constitution that the term was not intended to apply to laws which changed the powers or obligations of incorporated municipalities.

State laws have sometimes been said to be general when they apply to all of a class of individuals as distinguished from special laws applicable to an individual. I find it difficult to apprehend that a statute is general, in the sense mentioned, which is not a general statute under which cities may be organized, the alteration of which is reserved to the legislature by the constitution, but which changes the government of two or more cities organized under separate charters. However this may be, the word "general" is not alone employed to distinguish statutes binding on a class of persons from those binding on a single person. Statutes are not merely public or private, and a statute affecting the government of a single city is public. Statutes are general or *local*, having operation throughout the state, or in a particular place or places. The very autonomy of the cities would seem to emphasize the statement that laws operative in the cities alone are *local laws* as distinguished from laws operative everywhere within the territorial limits of the state, whether such local laws are enacted by the state legislature, or by the legislative body of the city within the powers conferred by its charter.

In view of the very extended powers conferred on the municipalities, and in harmony with the policy apparent throughout the instrument, the constitution leaves, as far as possible, the management of matters of local concern with local governments, but declares that the residents of cities must not be deemed to be beyond the control of general laws affecting them in common with all the people of the state. The people of San Francisco owe allegiance to the state, as well as obedience to ordinances within the legislative power granted the city, and they are subject to all general laws of the state. Such are laws relating to the organization of the superior courts, laws defining crimes and civil rights, regulating the mode of contracting,—perhaps all laws which confer rights or impose duties upon all the people, or, it may be, a portion of the people, of the state, but which are not local in that they apply only to the people within particular places less than the whole state.

It may be added that in a certain sense a municipal corporation—not the abstract entity, but the officers thereof—is subject to and controlled by general laws of the character referred to. The local legislature has no power to pass ordinances which conflict with the general statutes of the state, nor any power to pass an ordinance in conflict with the general unwritten law of the state, as an *unreasonable* ordinance, unless, at least, expressly authorized by its charter.

It may be that the foregoing enumeration of "general laws" operative everywhere within the boundaries of the state, as distinguished from laws local in their character because of force only within the cities, is imperfect or even inaccurate. I am only required, however, to say that the act of 1885 is not such a general law.

The question "What are not general laws?" (within the meaning of the last clause of section 6, art. 11, Const.) was fully answered by Mr. Justice SHARPSTEIN in *Staude* v. *Election Com'rs*, 61 Cal. 325, where that learned judge

said: "It is clear to my mind that, when the constitution declares that cities organized before its adoption shall be subject to and controlled by general laws, it means laws as to matters not specifically provided for in charters which existed at the date of the adoption of the constitution. Otherwise they would be subject to and controlled by general laws passed for the incorporation of cities and towns, without having first voted to organize under such laws; and that was the contention of plaintiff's attorney in *Desmond* v. *Dunn*, 55 Cal. 242."

SHARPSTEIN, J. I concur in the views expressed by Mr. Justice MCKINSTRY.

73 Cal. 125

LAMB v. RECLAMATION DIST. NO. 108. (No. 11,057.)

(*Supreme Court of California.* July 13, 1887.)

1. RIPARIAN RIGHTS—LEVEES—OVERFLOWS.
A municipal corporation organized and existing for the purpose of reclaiming swamp lands granted to the state of California has the right to erect a levee on the bank of the Sacramento river to protect such lands from overflow at times of high water, and is not liable in damages to an owner of land on the other side of the stream for an overflow caused by said levee.[1]

2. SAME.
Whether the damming, caused by a levee, of a slough through which water flowed from the Sacramento river at times of high water, violates the law that one land-owner on "a water-course" cannot dam it so as to flood the land of his neighbor above, cannot be questioned in an action brought by the owner of land on the river two miles below said slough.

3. EMINENT DOMAIN—"PUBLIC USE"—OVERFLOW CAUSED BY LEVEE.
An overflow of lands on the Sacramento river, caused by a levee built on the other side of the stream, two miles above the lands flooded, when the overflow comes seven years after the erection of said levee, is not a taking for public use so as to entitle the owner to compensation therefor.

In bank. Appeal from superior court, Colusa county.

J. C. Ball and *A. L. Hart*, for appellant. *A. C. Adams*, *Jackson Hatch*, and *W. B. Treadwell*, for respondent.

MCFARLAND, J. This is an action to abate and remove as a public nuisance a levee erected by defendant along the west bank of the Sacramento river, and across a place on said bank called "Wilkins' Slough," and to recover damages for the overflowing of plaintiff's land on the other side of the river, about two miles below, alleged to have been caused by said levee. The case was submitted on certain parts of the pleadings taken as true. The court below gave judgment for defendant, and plaintiff appeals from the judgment.

The Sacramento river is a large navigable stream, having its sources near the boundary line between the states of Oregon and California, and running for several hundred miles through the northern and central parts of the latter state to the bay of San Francisco. In times of high water it frequently overflows its banks. A great deal of the adjoining land is lower than the banks of the stream; and at times of overflow the surplus water runs down to and over such land, where it remains until it evaporates, or later in the season, when the river is at a lower stage, runs back into the stream. The water at some places pours over the entire bank in continuous sheets for considerable distances; but more commonly finds its way out through the lower parts or depressions of the banks, which, of course, have gradually been worn down deeper and wider by the action of the water. These short depressions by which the water gets through the banks into the lower lands beyond are called "sloughs," and Wilkins' slough, mentioned in the complaint, is quite a large

[1] See Montgomery v. Locke, (Cal.) 11 Pac. Rep. 874, and note.

depression of that character, and affords means of escape, during overflows, for a considerable quantity of water. The lands thus overflowed, and for the protection of which respondent claims the right to maintain said levee, are a part of that large body of swamp and overflowed land acquired by California from the United States by virtue of the act of congress of September 28, 1850, generally known as the "Arkansas Act."

The respondent, Reclamation District No. 108, is a public corporation organized and existing under the laws of this state relating to swamp and overflowed lands. The district includes over 40,000 acres in the county of Yolo, and about 33,000 acres in the adjoining county of Colusa, all lying west of the Sacramento river. The district having been regularly and legally organized, and engineers employed by its trustees having performed their duties as required by law, the plan of its proposed work, with estimates of cost, expenses, etc., was duly adopted and reported to the boards of supervisors of said two counties on the twenty-eighth day of September, 1870. The plan was, in substance, by a continuous levee, wherever necessary, along and upon the west bank of the river from the Upper Sycamore slough to Knight's Landing, a distance of over 40 miles, and which, of course, included the filling of all depressions or sloughs, to prevent the water of the river from flowing over its banks and flooding the lands of the district. It mentioned by name the place called "Wilkins' Slough." The respondent thereafter commenced to construct its works in accordance with the said plan, and completed the same on the first day of December, 1872; and from that date it has continuously maintained its levee, except that in 1879 that portion of it which was across said Wilkins' slough was partly washed away, but was immediately—that is, in the next month—rebuilt to its original height. It is admitted that this levee, including that part of it constructed across Wilkins' slough, is necessary and indispensable to the protection of the lands of said district from overflow; and that, without such protection, the overflow would render said lands unfit for cultivation, and uninhabitable.

The complaint, taken as true, avers in substance that on December 22, 1879, plaintiff was the owner and in possession of a tract of land fronting on the opposite or east side of said Sacramento river; that on the twenty-third of said month he resided on said land with his family; that it was a safe and suitable dwelling-place, and valuable for agricultural purposes; and that, on or about the twenty-sixth of said month, he had prepared, cultivated, and seeded with wheat about 200 acres of said land, and that the remainder was used for alfalfa and grass. It then describes the said Wilkins' slough as situate about two miles above said land, and on the west side of the river, and avers that, when unobstructed, it divides the water in times of flood, and carries large quantities of it to the south-westward, away from the land of plaintiff, to a natural basin. Further averments are that on or about January 15, 1880, defendant completely obstructed said Wilkins' slough by placing a dam and levee across its head, and thus prevented any water from passing into or through the same, and that by reason of said obstruction, on or about the sixth day of April, 1880, the water did so accumulate in said Sacramento river as to overflow, and did overflow the easterly bank thereof, and did flood and inundate plaintiff's said land on said easterly bank, and did destroy his said growing wheat, grass, fences, etc., to his damage in the sum of $5,000. It is further averred that defendant continues, and intends to maintain, said levee, and that in times of flood it will cause the easterly bank to be overflowed, and plaintiff's land to be damaged as aforesaid.

It does not appear when or from what source plaintiff got title to or possession of his land. It only appears that he was there in December, 1879, and that the alleged damage occurred in April, 1880, which was between seven and eight years after the erection of the levee.

The questions to be determined in the case are: Did respondent have the

right to construct the levee which it completed in 1872, notwithstanding the damage which was caused thereby, several years afterwards, to appellant's land, and has it the right to maintain said levee notwithstanding any damage which it may possibly or probably cause to said land hereafter, as apprehended by appellant and described in his complaint? It may be remarked that the conclusion that respondent had or has no such right does not follow from the mere fact of damage to appellant's land. The phrase "*damnum absque injuria*" is just as well recognized as a statement of a legal condition, as the maxim *sic utere*, etc., is as the statement of a limitation of rights to property. And the words "*damnum absque injuria*," include a direct declaration in terms of the proposition that there *may be* damage without legal injury. Therefore the reiteration of one or the other of these Latin phrases affords but little aid in the solution of any question. This is well expressed in the text of Wood's Law of Nuisances, (page 21,) as follows: "But, when no right has been violated, it cannot, by any process of reasoning, be established that there is a legal injury or damage. The instances of *damnum absque injuria* are very numerous, and are always injuries that result from a lawful act, for the law never recognizes an injury arising from a lawful act as imputing damages. * * * In giving force to the maxim *sic utere*, etc., the courts are always met by the right of parties to use their own property in every reasonable way, and neither justice nor public policy would tolerate the idea that a person should be made liable for damages resulting from a reasonable use of his property. Therefore, in determining whether or not an injury has been done amounting to a nuisance, it is necessary to balance the rights of the parties, in view of all the circumstances, and say whether or not the use of the property in the manner complained of is reasonable, and in accordance with the relative rights of the parties."

The real question in such cases is: Had the party sued the right to do the thing complained of? Respondent has, at least, as much right to maintain the levee as a natural person owning lands of a character similar to those of respondent's district would have; and its counsel bases its defense (1) upon the right of a natural person to protect his lands from overflow, upon the principle of self-defense, as held in *Rex* v. *Commissioners*, 8 Barn. & C. 355; and (2) upon its right as a public municipal corporation organized under the laws of the state, exercising the police powers of the state, and acting as a public instrumentality of the state in providing for the public welfare, and in complying with the conditions upon which the grant of swamp and overflowed lands was made to the state by the general government.

In *Rex* v. *Commissioners*, above noticed, the facts were these: The commissioners of the levels, for the purpose of protecting the property intrusted to their care against the inroads of the sea, erected certain groynes and other works which caused the water to flow with greater force against the lands of one Cosens, and to injure them, and to gradually wash a portion of them away. The lands of Cosens fronted on the sea-shore, and were adjoining and to the eastward of the levels on which the works of the commissioners were erected. The question was whether or not the commissioners could be compelled to pay for the damages done to the lands of Cosens, or to erect other works to prevent further injury to said lands. The court decided that the commissioners were not liable, and that Cosens would have to protect his own lands by works similar to those of the commissioners. Lord TENTERDEN, C. J., in delivering the opinion of the court, said, among other things, as follows: "But the sea is a *common enemy* to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any *individual proprietor*. Now, is there any authority for saying that *any* proprietor of land exposed to the inroads of the sea may not endeavor to protect himself by erecting a groyne or other reasonable defense, although it

may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. * * * I am therefore of opinion that the only safe rule to lay down is this: that *each* land-owner, *for himself*, or the commissioners acting for several land-owners, may erect such defenses for the land under their care as the necessity of the case requires, leaving the others in like manner to protect themselves against the common enemy." And BAYLEY, J., says: "I am entirely of the same opinion. It seems to me that every land-owner exposed to the inroads of the sea has the right to protect himself, and *is justified* in making and erecting such works as are necessary for that purpose. * * * If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title two things must occur,—*damage* to himself, and a *wrong* committed by the other. That he has sustained damage is not of itself sufficient. Now here, Mr. Cosens may have sustained damage, but the commissioners have done no wrong. The *dictum* of Justice WILMOT was cited to show that when there is a right this court ought to find a remedy. But the right that Mr. Cosens and each land-owner has, is *to protect himself*,—not to be protected by his neighbors. To *that* right no injury has been done, nor can any wrongful act be charged against the commissioners."

Logically, this principle would seem to be applicable to the waters of large navigable American rivers subject to extensive overflows. And it has been thus made applicable in a number of adjudicated cases. *Hoard* v. *City of Des Moines*, 52 Iowa, 326, 17 N. W. Rep. 527; *Shelbyville & Brandywine Turnpike Co.* v. *Green*, 99 Ind. 205; *Cairo V. R. Co.* v. *Stevens*, 73 Ind. 283; *Dubose* v. *Levee Com'rs*, 11 La. Ann. 165; *Bass* v. *State*, 34 La. Ann. 494. But inquiry on this branch of the subject need not here be further prosecuted, because counsel for appellant have argued the case almost entirely upon the theory that respondent is a municipal corporation acting under the authority of the state; and that, therefore, although exercising the power of the state, it is bound, like the state, by the constitutional limitation that private property cannot be taken for public use without compensation. This view of the case rests upon the assumption that building the levee, and thereby subsequently causing the damage complained of, was done under the power of eminent domain; and that, therefore, appellant was entitled to compensation for the "taking" of his land. But, assuming the theory to be correct, the position is clearly untenable. In the first place, when respondent built the levee, it could not possibly have condemned appellant's land under the power of eminent domain. It could not have shown that it had any use for said land, or intended to use it, or even to damage it, or to interfere with it in any way; and then the subsequent damage which happened years afterwards, was not a "taking" within the meaning of the most extreme cases on that subject. It was in the extreme sense, indirect, remote, and consequential. There was no physical directness between the act and the damage. It cannot be claimed that the water which the levee prevented from going over and through the west bank of the river was the *very water* which afterwards flowed onto appellant's land. It was remote and indirect in point of place and distance; it took place two miles away, and on the opposite side of a large navigable river. It was indirect, remote, and consequential in point of time; it took place more than seven years after the act complained of. And there was nothing in the nature of a permanent use or occupation of the land; it was a mere temporary overflow, which occurred once in seven years, and it is impossible to know when, if ever, it will occur again, or with how small an effort appellant could make its recurrence improbable or impossible. It is therefore one of the plainest cases for the application of the well-established rule that the state is not liable for remote and consequential damages caused by the erection of public works. That rule has been held to go much further than it is neces-

sary to extend it here, in the cases of *Green* v. *Swift*, 47 Cal. 536, and *Green* v. *State*, *ante*, 610, (No. 11,169, opinion filed June 30, 1887,) which two cases are, we think, determinative of the case at bar in favor of respondent.

Under these views, it is unnecessary to discuss the distinction made by counsel for respondent between "eminent domain" and the "police powers" of a state. The right and duty of the state, acting for the public benefit and the general welfare, and by means of municipal corporations like respondent, to reclaim the swamps and overflowed land granted to it by the Arkansas act, we do not understand to be disputed. *Kimball* v. *Reclamation Fund Com'rs*, 45 Cal. 344; *Hagar* v. *Yolo Co.*, 47 Cal. 222; *People* v. *Reclamation District* 108, 53 Cal. 346; *Dean* v. *Davis*, 51 Cal. 406. And counsel for respondent argues that this right is exercised under the police powers of the state, and that, therefore, appellant would not have been entitled to compensation even if his property had been "taken." But, as the land of appellant was not taken, we need not follow the point here made by respondent. Under either view, respondent is not liable for the remote and indirect damage.

With respect to the matters involved in this case, it may be remarked that the Sacramento very closely resembles the Mississippi river, the difference being in magnitude, not in character. And it has been held in states bordering on that river that the state may not only control and levee its banks for the purpose of preventing the adjoining country from overflow, but may compel riparian owners to maintain such levees at their own expense. *New Orleans Drainage Co.'s Case*, 11 La. Ann. 370; *Bass* v. *State*, 34 La. Ann. 494; *Dubose* v. *Levee Com'rs*, 11 La. Ann. 165. And it is a matter of common knowlege that, since the settlement of California by Americans, it has been the custom of cities, towns, and private riparian owners along the Sacramento river to protect their lands from overflow by building levees on its banks. If the works of respondent can be declared a nuisance, then the levees in front of the cities of Colusa and Sacramento, which preserve millions worth of property, including the capitol buildings and grounds of the state, can be removed at the suit of any owner who will not protect himself, and who can show that the swell of the river is increased in times of flood by levees either above or below him, and the whole system of reclamation can be defeated.

Counsel for appellant contends that Wilkins' slough is within the legal definition of a "water-course," and argues for the application here of the doctrine that one land-owner on a water-course cannot dam it so as to flood the land of his neighbor above. But, in the first place, appellant is not a riparian owner upon Wilkins' slough. His land is two miles away, and divided from it by a large navigable river. He has no interest in whatever rights land-owners on Wilkins' slough, if there were any, might have as between themselves. In the second place, we do not think that Wilkins' slough, as between appellant and respondent at least, is to be treated as a water-course within the legal meaning of that word. It occasionally happens that a river, in its course from its source to its mouth, divides into two main, permanent channels, each carrying continuously a large part, if not a moiety, of its waters in all stages, and either uniting with the other at a lower point, or continuing to the sea, leaving a delta between the two. But there is nothing here resembling that condition. Wilkins' slough is not a channel or fork, continuously carrying a large part, or any part, of the waters of the Sacramento river. It carries no water at all except "in times of flood," and then the amount which it carries, when compared with the volume of water in the river, is insignificant. In fact, it has no original water of its own at all, but is simply a conduit by which occasionally some of the flood-water of the river escapes into the lower lands adjoining. This same office is performed by every other low place along the bank; and every other part of the levee could be removed as a nuisance if that part of it which is at Wilkins' slough can be so removed. Upon this point we cannot distinguish the case at bar from the

case of the *Shelbyville & Brandywine Turnpike Co.* v. *Green*, 99 Ind. 205, where it was held that plaintiff could protect his land from overflow of the Big Blue river by erecting a levee on its bank at a place where there was "a *depression* washed out across the lands of plaintiff," and where, "when there was a rise in said river, the water passed out over said lands of plaintiff," although it caused a greater overflow on the premises of defendant, to its damage.

Considering, therefore, all the facts and circumstances of this case, and confining our opinion to the case here made, we think that the works of respondent complained of by appellant do not constitute a nuisance, and that respondent is not legally liable for the incidental damage caused thereby, as above described.

Judgment affirmed.

SEARLS, C. J., concurred.

TEMPLE, J., (*concurring.*) I concur in the judgment and in the opinion, but I do not agree to the construction apparently placed upon the case of *Green* v. *Swift*, 47 Cal. 536, and upon the case of *Green* v. *State*, *ante*, 610, (recently decided.)

PATERSON, J., (*concurring.*) I concur in the judgment on the ground that the character, size, and operation of the slough which was obstructed cannot be satisfactorily determined from the pleadings upon which the cause was submitted and decided. Before a court of equity would be authorized in declaring the levees and dams of a reclamation district to be nuisances, and ordering them abated as such, something more should be shown than that the slough obstructed does at all times, when unobstructed, "divide the waters of the river *in times of flood*, and carry and conduct large volumes thereof to the south-westward, away from the lands of plaintiff *to a natural basin.*" It is true, the complaint alleges that said slough was a natural water-course, but other allegations of the complaint and answer (which must be taken as true) leave that matter very doubtful and unsatisfactory.

The state and its grantees are charged with a great trust with respect to swamp and overflowed lands under the laws by which they are granted, and it is by no means clear that that trust can be executed if we apply strictly the common-law rules applicable to nuisances caused by the obstruction of natural water-courses. It may be necessary, under our peculiar conditions as to seasons, water-sheds, river systems, and swamp lands, to find a new definition for the term "natural water-course" if we are to apply old principles to the innumerable sloughs which are found in our overflowed districts, and which have well-defined banks and beds. There are channels in this state, not well defined in bank and bed, without water in them during certain months of the year, yet so important in operation during high water that to dam them would be disastrous to life and property, and there are sloughs running out from the rivers in the lowlands, with well-defined banks and beds, and with water running bank-full every month in the year, yet so unimportant in their operation that to close them would have no appreciable effect upon the river or its tributaries, except to improve the same for navigation, but so numerous in the overflowed districts that to restrain the obstruction of them simply because they are within the accepted definition of a natural water-course would in many instances prevent the reclamation of large and valuable tracts of land which the state and its grantors have undertaken and are in duty bound to reclaim. The dam and levee complained of were constructed in 1872, and have ever since been maintained. This action was commenced January 20, 1883, to procure an abatement of the levee and dam, and recover the sum of $5,000 damages alleged to have been caused by the destruction of plaintiff's growing crops, fences, and other improvements, and it does not appear that any complaint was made prior to the last-named date.

If the slough is one which, considering the end to be accomplished by defendant and with due regard to the property rights of others, could not lawfully be obstructed, it may be fairly inferred that plaintiff would have discovered the fact, and proceeded to have the obstruction abated, long before the commencement of this action. The delay in bringing the suit adds to the uncertainty arising from the complaint and answer concerning the equity of plaintiff's prayer for the abatement of the levee and dam as a nuisance.

2 Cal. Unrep. 780

HOUGHTON *v.* ALLEN. (No. 12,047.)*

(*Supreme Court of California.* August 5, 1887.)

MORTGAGE—VALIDITY—MORTGAGEABLE INTEREST—CONTRACT FOR TITLE.

J. and R. entered into an agreement to sell A. certain lots, the consideration to be paid part in cash, and the balance in installments at one and two years. By the contract it was provided that, if A. failed to pay either installment when due, J. and R. would be released from performance on their part,—time being of the essence of the contract; but in such case it was the duty of J. and R. to sell the lots at auction to the highest bidder, and out of the money received to pay off the amount still due on the contract, and expenses. A. went into possession of the lots, built a house thereon, and occupied them for over a year. Some months before the first installment became due, A. mortgaged the lots to H. The mortgage was duly recorded. About five months after the execution of the mortgage, A. gave possesion of the lots to D., and requested J. to make the deed for them to D., which he did. In an action by H. to foreclose his mortgage, *held*, that A. had a mortgageable interest in the lots, and that D. took them subject to the mortgage; J. and R., by conveying to him on A.'s request, having waived any breach of the contract.

Department 1. Appeal from superior court, San Francisco.

Beatty, Denson & Oatman, for appellant. *A. P. Catlin*, for respondents.

PATERSON, J. On August 22, 1870, Jackson and Rulofson, being the owners of lots 6, 7, and 8, in block 1, in the town of Davisville, executed and delivered to defendant, Allen, a contract agreeing to sell said lots to him for the sum of $250, and to convey the same on the twenty-second day of August, 1872. The sum of $50 was paid down, and the balance was to be paid in two installments of $100 each,—one August 22, 1871, the other August 22, 1872. It was provided that, if Allen failed to make either of said payments, then the said parties of the first part should be wholly released from performance on their part; time being of the essence of the contract. "But in that case," the contract reads, "it shall be the duty of the parties of the first part to sell the above-described premises at public auction to the highest bidder for cash, and out of the moneys received from such sale to pay and discharge the amount remaining due upon this contract, and the expense of such sale, rendering the overplus, if any, to the said party of the second part, his executors or assigns." In default of payments, Allen was to peacefully surrender possession of the property, but until breach of the contract he was to occupy and enjoy the use of the premises. The agreement was not recorded until July 9, 1872; but immediately after the execution and delivery of the contract Allen went into possession of the property, placed a house thereon, and continued to occupy and enjoy the premises until on or about January 12, 1872. On April 6, 1871, Allen executed and delivered to plaintiff the mortgage referred to in the complaint, and which includes the said lots 6, 7, and 8. This mortgage was recorded April 7, 1871. Allen made no payment of the purchase price except the first one, $50.

On or about the twelfth day of January, 1872, the defendant Allen surrendered the possession of the said lots 6, 7, and 8 to the defendant William Dresbach, and wrote a letter to the said J P. Jackson, requesting him to convey the said property to William Dresbach instead of to him, (Allen;) and on the twelfth day of January, 1872, the said Jackson made, executed, and delivered to the said Dresbach a deed of said lots, which contained this recital: "The premises now herein conveyed being the same for which a bond for deed was heretofore given to Thomas Allen, and this conveyance is now made to said Dresbach at the instance and request of said Allen." This deed was recorded February 24, 1872. The debt that was secured by the mortgage of April 6, 1871, was never paid, and in due time the mortgagee (plaintiff herein) brought his suit to foreclose his mortgage, making Allen and Dresbach defendants. Allen suffered default, and Dresbach answered, averring

*Reversed in banc. See 16 Pac. 532, 75 Cal. 102.

that prior to April 6, 1871, the title to the lots in controversy was in John P. Jackson; that Jackson had deeded to him, and that he held a good title to the lots, free from and not subject to plaintiff's mortgage. The court concluded that said lots 6, 7, and 8 were not subject to the lien of the mortgage, and judgment was entered accordingly.

The interest held by Allen at the time he executed the mortgage to plaintiff was the subject of mortgage. Section 2947 of the Civil Code provides that "any interest in real property which is capable of being transferred may be mortgaged," and the interest of one who holds a contract or bond for title is within the rule of law thus declared. *Jones* v. *Lapham*, 15 Kan. 540; *Loughlin* v. *Braley*, 25 Kan. 147; *Crane* v. *Turner*, 67 N. Y. 437; *Smith* v. *Patten*, 12 W. Va. 541; 2 Story, Eq. Jur. § 1021.

Under the contract, Allen had been put in possession of the premises by the vendors. He had made one payment, built a house on the land, and at the time he executed the mortgage had at least four months' undisturbed possession before him. When he delivered possession, and requested his vendors to make the deed to Dresbach, he still held the undisturbed possession of the lots. The recitals in the deed from Jackson to Dresbach, and the possession of Allen which was delivered by him to the latter, were sufficient to put Dresbach upon inquiry, and to charge him with notice of the facts, notwithstanding the fact that the contract was not at that time of record. The transaction was, in effect, a sale by Allen and Jackson to Dresbach, with full notice of the contract and of Houghton's lien, and Dresbach thereafter stood in no better position to defeat the lien of plaintiff than Allen would if he had completed the purchase.

It is claimed by respondent that the mortgageable interest held by Allen was subject to be determined in the event of a breach; that this interest ceased upon failure to pay the installment due August 22, 1872; and that Allen's request to Jackson to convey to Dresbach was a waiver of his right to require a sale at auction. But so long as Jackson was satisfied to allow Allen to remain in possession without payment of the first installment, there was no breach of the contract and no determination of the interest held by Allen. So far as the record shows, there was no demand made upon Allen for the installment due August 22, 1871, or refusal on his part to pay. By acting upon Allen's request to convey to Dresbach, Jackson recognized the right of Allen to control the deed, and this, of itself, was a waiver of the forfeiture for nonpayment. Under these circumstances, Jackson could not complain and the rights of Dresbach could not be enlarged over those of Jackson in consequence of the deed from the latter to the former. *Baker* v. *Bishop Hill Colony*, 45 Ill. 264.

We do not think that Allen could waive any right under the agreement, after the execution and delivery of the mortgage, which would operate to divest the mortgagee of his security. After pledging all the rights he held under the contract to Houghton as security for the payment of his obligation to him, he could not in equity destroy the effect of that security by a voluntary surrender or waiver which had neither consent nor consideration to support it. It may be admitted, as claimed by respondent, that, as between vendor and vendee, the vendor, after refusal by the vendee to complete the purchase, may sell and may recover possession; that the vendee, refusing to go on with his payments, after paying part, forfeits the payments made, and the vendor may bring ejectment or alienate; and also that time was of the essence of this contract. All these contentions may be conceded, yet the facts remain that the vendors here acquiesced in the continued possession of the property by the vendee, and recognized his rights under the contract to control the deed; that while rightfully in possession under contract for title, and before the lapse of time for payment of installments, he had mortgaged the premises to plaintiff, and that Dresbach knew or had notice of all these facts.

In speaking upon the question of the rights of parties similarly situated, but under a parol agreement to purchase, the New Jersey court of chancery said: "They (the purchasers by parol) did not pay the $500, as was stipulated by the agreement, on the first of April. But in May they paid upward of $900, and Allen (vendor) accepted and thereby waived all difficulty as to time. They had a right to a conveyance of the property upon their securing the balance of the purchase money according to the agreement. Can there be a doubt but that they might have assigned their benefit in this agreement to the complainants and placed them in their stead in their relationship to the property, and as to their right of conveyance from Allen? If such an assignment would have been valid, and could have been enforced in equity, I cannot see how the mortgage can be invalid. * * * They had a beneficial agreement, which, beyond all doubt, they had the right to assign. They meant to do this, and to carry out that intention executed the mortgage in question. This court will not permit them to defeat that intention, and defraud other parties upon the technical ground that there was no title or estate vested in them to mortgage. The equities of the complainants under the mortgage were that they had the right, if the Armitages (purchasers) refused to fulfill the agreement with Allen themselves, to assume his position, and redeem the property. Neither Allen nor the Armitages could defeat that right. If Allen had called upon them to carry out the agreement, and they had refused or neglected, he might then have disposed of the property free from their lien. But he could not covertly or without notice to them defeat their mortgage, or, rather, deprive them of their equities." *Sinclair* v. *Armitage*, 12 N. J. Eq. 177.

And so in this case, while a mortgage in this state is not an assignment, and while we do not think that the vendor or any one else was bound to notify the plaintiff, or call upon him to carry out the agreement, yet the parties, Jackson, Allen, and Dresbach, could not by an agreement among themselves deprive the plaintiff of his equities, among which was the right to have the property sold at auction to the highest bidder, in case of default in making payments, and, after payment of the balance due upon the contract, have the overplus, if any, applied to the satisfaction of the mortgage. Plaintiff had the right to assume that the contract would be carried out in all respects, and the purchaser, not being in default at the time of the execution and delivery of the mortgage, could not stipulate away this right, after receiving plaintiff's money ($921.75) upon the faith and security of the contract.

Judgment reversed, with directions to the court below to modify the decree of foreclosure and sale so as to include said lots 6, 7, and 8, and to have the proceeds, or so much as may be necessary, applied to the satisfaction of plaintiff's mortgage.

We concur: McKINSTRY, J.; TEMPLE, J.

73 Cal. 200

SAN JOAQUIN VAL. BANK *v.* BOURS. (No. 11,631.)

(*Supreme Court of California.* August 18, 1887.)

HARMLESS ERROR—EXCLUSION OF TESTIMONY—OTHER PROOF OF FACT.

In an action by a banking corporation against its cashier, seeking to hold him liable for making an improper loan, the exclusion of a question put by defendant to a witness, as to a custom or practice prevailing in another banking-house, *held* not prejudicial error, when defendant was himself allowed to testify fully as to the custom.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Action by a banking corporation against its cashier, to recover 9,247.49, and interest, which it was claimed had been loaned by defendant to an irresponsible person, without security, and had not been repaid.

J. H. Budd, for appellant. *W. L. Dudley* and *J. B. Hall*, for respondent.

FOOTE, C. A decision in this case was heretofore made by this court, and the opinion then filed is to be found in 65 Cal. 249, 3 Pac. Rep. 864.

A comparison of the record as it then stood, and of the one now under consideration, shows that there is no question now presented for determination which was not then brought to its attention, and passed upon by this court, except those which will hereafter be noticed. It is evident, therefore, that the law of this case, save with reference to the new points now advanced, has been settled. "Defendant was rightly held liable by the court below for the amount of the De Blainville indebtedness." 65 Cal. and 3 Pac. Rep., *supra*.

The sole ground for the reversal and the awarding of a new trial then was that a part of the judgment against the defendant was for an alleged overdraft, for and on account of his salary as cashier, for which reason the judgment was held to be erroneous. This ground for a reversal does not now appear. The errors of law claimed to have been made by the trial court, which were not alleged to have been committed when the case was here before, are:

First. That an objection on the part of the plaintiff was sustained to this question: "And all the way through, while that house was doing a banking business, there were cash tags, as you call them, from a few hundred dollars to eight or nine thousand dollars?" This question referred to a general custom or practice which had prevailed in the banking-house of Bours & Co., an institution other than the plaintiff. And the defendant was allowed to testify fully as to the custom, so that no damage was done him in any event; in fact, the appellant's brief seems to assume that such a custom was fully proved, both as to Bours & Co. and plaintiff.

Second. It is further contended that one or more of the findings are unwarranted, either because of there being no evidence to support them, or because the count or counts of the complaint upon which such findings were made were abandoned by the plaintiff. All the findings are either sustained by sufficient evidence pertinent to such of the issues made by the pleadings as were not abandoned, or they were based upon a count the allegations of which were not denied by the answer.

There is no prejudicial error, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 191

REYNOLDS *v.* LINCOLN and others. (No. 11,667.)

(*Supreme Court of California.* August 16, 1887.)

EJECTMENT—INSTRUCTIONS—LIMITATIONS.

In an action of ejectment, where defendants claimed under the statute of limitations, *held*, that there was no error of which plaintiffs could complain in instructions to the jury telling them, in effect, that plaintiffs were entitled to prevail upon the strength of their paper title, unless the defendants went into possession under a tax deed claiming title, and maintained such possession under claim of title openly, notoriously, and visibly, as against the whole world, for a sufficient length of time prior to the date when the act of 1878, amendatory of Code Civil Proc. Cal. § 325 took effect, to render the bar of the statute of limitations effectual; that there was no conflict in the instructions, and, there being a conflict in the evidence on the issues raised, a refusal to grant a new trial, after verdict for defendants, was not error.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

Action of ejectment, in which defendants set up, among other defenses, the statutes of limitations.

W. H. Beaty and *John Reynolds*, for appellant. *A. C. Freeman*, and *J. H. McKune*, for respondents.

FOOTE, C. This is an action of ejectment brought to obtain the possession of certain land lying in the county of Sacramento. The defendants had judgment rendered in their favor, and from an order denying the plaintiff a new trial he has appealed. Taking all the instructions emanating from the court, at the instance of the respective counsel and of its own motion, and giving them an unstrained interpretation, we think that they were correct. The jury were, in effect, told, *inter alia*, that the plaintiff's paper title should enable him to recover in the action, unless they were satisfied from the evidence that the defendants in good faith went into possession of the premises sued for, claiming title thereto under a tax deed, and by their adverse possession, and that said possession, under such claim or right, had been maintained openly, notoriously, and visibly as against the whole world, including the plaintiff's claim of title, for a sufficient length of time, and in such manner, prior to the date when the act of 1878, amendatory of section 325, Code Civil Proc., took effect, as to render the bar of the statute of limitations effectual. Upon a conflict of evidence as to those matters of fact, submitted to them for determination, the jury found a verdict for the defendants, and the court below, upon motion, one of the grounds of which was the insufficiency of the evidence to justify the verdict, refused to grant a new trial, and in so doing showed, as we think, no abuse of the discretion in such matters with which it is invested.

We perceive no conflict in the instructions, no disobedience by the jury in applying the facts to the law as given them by the court, nor any other prejudicial error in the record, and the order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

73 Cal. 190

FARIS and another *v.* LAMPSON and another. (No. 11,892.)

(*Supreme Court of California.* August 16, 1887.)

APPEAL—FAILURE TO ARGUE—AFFIRMANCE.

On appeal, where no oral argument is had, and the appellant fails to file any points or authorities, thus omitting to point out the errors of which he complains, the judgment will be affirmed without an examination of the record.

Commissioners' decision. Department 1.
Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.
Wesley K. Boucher, for appellants. *J. A. Louttit*, for respondents.

FOOTE, C. In this case no oral argument was had, nor did the appellants file any points or authorities; and, having thus omitted to point out the errors of which they complain, the judgment should be affirmed without an examination of the record. *Mokelumne H. C. M. Co.* v. *Woodbury*, 10 Cal. 188; *Edmonson* v. *Alameda Co.*, 24 Cal. 350; *Holm* v. *Roach*, 25 Cal. 37; *Hickinbotham* v. *Monroe*, 28 Cal. 489; *Brewster* v. *Johnson*, 51 Cal. 222; *Estate of Montgomery*, 59 Cal. 583.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment affirmed.

2 Cal. Unrep. 785

HAMMEL v. STONE. (No. 12,045.)

(*Supreme Court of California.* August 15, 1887.)

APPEAL—ORDER GRANTING NEW TRIAL—INTENDMENT.

On appeal from an order granting a new trial, made by a judge other than the one who presided at the trial of the cause, on the ground that the evidence was not sufficient to support one of the findings of fact, every intendment prevails in favor of the correctness of such order, and such intendment must be overcome by an affirmative showing of error, and an abuse of that sound legal discretion which the lower court was called upon to exercise in relation to the matter, in order to justify a reversal of such order by the appellate court.

Commissioners' decision. Department 2.
Appeal from superior court, Santa Barbara county; D. P. HATCH, Judge.
Wells, Van Dyke & Lee, for appellant. *B. F. Thomas*, for respondent.

FOOTE, C. This is an appeal from an order granting a new trial, made by a judge other than the one who presided at the trial of the cause. The order was made upon the ground that the record did not show sufficient evidence to support one of the findings of facts. Every intendment prevails in favor of the correctness of such an order, made in the manner above specified, and such intendments must be overcome by an affirmative showing of error. *Blum* v. *Sunol*, 63 Cal. 341. It is the well-settled rule of this court that unless the court below is shown to have abused that sound, legal discretion which it is called upon to exercise in relation to such a matter, its order in the premises will not be disturbed. *Savage* v. *Sweeney*, 63 Cal. 340; *Breckenridge* v. *Crocker*, 68 Cal. 403, 404, 9 Pac. Rep. 426, and cases there cited.

We perceive no abuse of that discretion in the present instance, and the order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

73 Cal. 204

SMITH v. CITY OF STOCKTON. (No. 12,077.)

(*Supreme Court of California.* August 18, 1887.)

NEW TRIAL—STATEMENT ON MOTION—TIME OF ALLOWANCE.

Where a statement, on motion for a new trial, has not been certified to by the trial judge as settled, the statutory limit of six months provided by Code Civil

Proc. Cal. § 473, does not apply to it; and where the motion is to incorporate into the statement a specification of particulars, wherein the evidence is alleged to be insufficient to support the verdict, it may properly be allowed within any reasonable time, in the discretion of the judge, provided the proposed statement contains the evidence which it is contended did not support the verdict.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Frank H. Smith and *Joseph H. Budd*, for appellant. *Louttit, Woods & Levinsky*, for respondent.

FOOTE, C. This is an appeal from an order made after final judgment, allowing the plaintiff to amend his statement on motion for a new trial. It will be perceived that, when the motion was made to incorporate in the proposed statement a specification of particulars wherein the evidence was alleged to be insufficient to sustain the verdict of the jury, the certificate of the judge who tried the cause, that said statement had been settled, had not been attached thereto, and that said statement had never been settled or certified to at all. Hence the proceeding, which the plaintiff was seeking to have amended, had not been taken or completed in a legal sense, so as to be susceptible of having applied to it the statutory limit of six months, under section 473 of the Code of Civil Procedure. Hayne, New Trials, § 160, p. 479. The statement, as proposed, contained the evidence which it was contended did not sustain the verdict, therefore the specification of the particulars of its insufficiency for that purpose might properly be made. Id. p. 477. There was no preparation of a new statement. It was an attempt to complete that which would have otherwise been invalid, and before the statutory period of limitation of six months had begun to run; and that was allowable under the section of the Code of Civil Procedure, *supra*, if done within a reasonable time, to be determined by a proper legal discretion, which we think was duly exercised by the trial court, considering all the circumstances surrounding the matter under discussion. The order should therefore be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

2 Cal. Unrep. 786

GOODWIN *v.* BURNEY. (No. 12,091.)

(*Supreme Court of California.* August 18, 1887.)

NEW TRIAL—EJECTMENT—CONFLICT OF EVIDENCE.

Where, in an action of ejectment, there is a decided conflict as to the facts going to show plaintiff's legal possession prior to defendant's entry, and as to the character of defendant's entry, an order refusing a new trial will be affirmed on appeal.

Commissioners' decision. Department 2.

Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

J. D. Goodwin and *D. W. Jenks*, for appellant. *E. T. Hogan*, for respondent.

FOOTE, C. This was an action of ejectment for a tract of land. As to the facts given in evidence going to show the plaintiff's legal possession of the premises in dispute, prior to the defendant's entry thereupon, and as to those relative to the character of the defendant's entry whether or not it was in good faith, and under a claim of right adverse to that of the plaintiff, there is a decided conflict, for which reason the order refusing a new trial should be affirmed.

73 Cal. 202

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

In re Estate of CARPENTER, Deceased. (No. 12,103.)

(*Supreme Court of California.* August 18, 1887.)

APPEAL—WHEN IT LIES—ORDER APPOINTING SPECIAL ADMINISTRATOR.

Code Civil Proc. Cal. § 963, subd. 3, providing for an appeal "From a judgment or order, granting, refusing, or revoking letters testamentary or of administration or of guardianship," is intended to refer to orders appointing general administrators, and does not affect Code Civil Proc. Cal. § 1413, providing that no appeal will be allowed from an order appointing a special administrator.[1]

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Carter, Smith & Keniston and *S. D. Woods*, for appellant. *J. C. Campbell*, for respondent.

FOOTE, C. This is an appeal from an order appointing a special administrator. We are of opinion that from such an order no appeal lies. Subdivision 3, § 963, Code Civil Proc., referring to certain appealable matters, reads thus: "From a judgment or order granting, refusing, or revoking letters testamentary, or of administration, or of guardianship." Section 1413, Code Civil Proc., is as follows: "In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment." In order, if possible, to harmonize the two sections of the Code so that both may prove effective, it would seem as if the legislative mind, in passing the first section, was directed towards orders appointing general administrators, and did not have in view such orders as regards special administrators, and that the last section was enacted for the purpose of supplying a rule of action in the appointment of such administrators as those last mentioned. It is presumable that this court, in delivering the opinion in the case of the *Estate of Crozier*, 65 Cal. 333, 4 Pac. Rep. 109, did not have under consideration the exact question which is here involved, and did not intend thereby to pass upon it, having there no cause to determine the force and effect of the two sections of the Code, *supra*, taken together.

It follows that the appeal should be dismissed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the appeal is dismissed.

2 Cal. Unrep. 787

HOGAN, Assignee, *v.* SANDERS. (No. 11,825.)

(*Supreme Court of California.* August 22, 1887.)

APPEAL—ORDER GRANTING NEW TRIAL.

On an appeal from an order granting a new trial on the ground of insufficiency of the evidence to support the finding, where there is a conflict of evidence on material points, the order will not be set aside.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

[1] Respecting the appealability of orders in probate proceedings, see Stuttmeister v Superior Court, *ante*, 35, and note.

Louttit, Woods & Levinsky, for appellant. *J. C. Campbell*, (*S. D. Woods* and *A. L. Levinsky*, of counsel,) for respondent.

McFARLAND, J. This is an action by the assignee of Emma F. Sanders and W. W. Cowell, insolvents, to compel defendant to convey to plaintiffs certain lots of land, upon the averment that they were conveyed to defendant by said Emma F. Sanders without consideration, and for the purpose of defrauding creditors, etc. Defendant claimed that he had furnished the purchase money to buy said lots; that the deed was made to said Emma, (who was his daughter,) to hold for him in trust, as she transacted most of his business for him; and that she afterwards conveyed the lots to him at his request, because she was about to be married. The case was tried by the court without a jury, and judgment was rendered for the defendant. Afterwards, however, on motion of plaintiff, a new trial was granted and defendant appealed from the order granting the new trial.

One of the grounds of the motion for a new trial was the insufficiency of the evidence to support the findings and decision. While we cannot see clearly why the learned judge of the court below granted the motion, still as there was a conflict of evidence on material points, we would not be justified in interfering with his discretion.

Order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

73 Cal. 166

WISE and others *v.* BURTON and others. (No. 11,780.)

(*Supreme Court of California.* August 1, 1887.)

1. APPEAL—ASSIGNMENT OF ERRORS—SUFFICIENCY.
 In an assignment of errors the specifications of the insufficiency of the evidence need not be more specific than the findings of the court.
2. SURVEYS—SEPARATE SURVEYS—COMMON LINE—PRESUMPTION.
 Where, in an action of ejectment, the question being the boundary line between two ranches, there having been two surveys, starting from points directly opposite, the distances between the calls, the monuments, and length of the lines run being exactly the same, the presumption will be conclusive that both surveys are of the same line, and that it is the true boundary line.
3. SAME—MONUMENTS—HOUSE.
 When in the field-notes of a survey, reference is made to "a house," and the same is marked on the map of the survey, the house becomes a monument of such survey, as much as a witness-tree.

Department 2. Appeal from superior court, Santa Barbara county.
Ejectment. Judgment for plaintiffs. The defendants appeal.
R. B. Canfield, for appellants. *W. C. Stratton*, for respondents.

THORNTON, J. This is an appeal from an order denying a new trial in an action of ejectment in which the main question is the location of the boundary line between two *ranchos*, Jesus Maria and La Purissima. The line in controversy is a part of the east line of the former ranch, and the west line of the latter. Both parties claimed under patents from the United States,—that of the Jesus Maria dated seventh of September, 1871; and that of the Purissima, twelfth of October, 1882. The court must have found that the evidence showed the western boundary of the Purissima was on a line further west than that contended for by the defendant, (appellant here.)

The cause was tried by the court, and it is urged that the evidence is insufficient to justify the decision. The findings of the court were of the most general character, viz.: That the plaintiffs were, at a day anterior to the commencement of the action, owners and seized in fee and possessed of the land in suit, and that defendant had wrongfully, etc., ejected them from such pos-

session. The specifications of the insufficiency of the evidence to justify the decision are also general. But they are aimed at the findings. They assert that the evidence is insufficient to show that the plaintiffs or either of them was the owner, etc., or that defendant ever ejected the plaintiffs, etc., from the land; following the findings. And it is said on behalf of plaintiffs (respondents here) that the specifications are insufficient, inasmuch as they do not state the particulars in which the evidence is insufficient. But as the findings are general, and the specifications follow them, we think they should be held sufficient. This conclusion is sustained by the ruling of this court in *Morris* v. *De Celis*, 51 Cal. 60, and *Du Brutz* v. *Jessup*, 54 Cal. 118. Though some of the cases subsequently decided are not in accordance with those above cited, still they have not been overruled, and are still authority here. Counsel, however, by following *Eddelbuttel* v. *Durrell*, 55 Cal. 277, would obviate all difficulty on this point, and be secured in having their cases considered. See, also, *Kelly* v. *Mack*, 49 Cal. 523, and *Doherty* v. *Enterprise M. Co.*, 50 Cal. 187.

The respondent states in his point that it is admitted that the patent of the Purissima, under which the plaintiffs claim, includes the land in dispute. He does not point out the admission, and after careful examination we are unable to find it in the record. It would be strange if the counsel adversary to plaintiffs had made such an admission, as it involved the very matter in dispute, and on which the defendants' case turned. We find no such admission; but we find from the field-notes and maps of the official surveys of the *ranchos* named, that, just where the land in dispute is located, the line between the two *ranchos* is a line common to both; that the entire west line of the Purissima is common with a portion of the east line of the Jesus Maria. That the two *ranchos* are coterminous from station 24 to station 26 of the Purissima there can be no doubt.

We insert here, side by side, the field-notes of both surveys as to those lines.

PURISSIMA RANCHO.

"22. Thence north forty-two degrees forty-five minutes west, at fourteen chains and fifty links intersects line between ranges thirty-four and thirty-five west, township seven north, of the San Bernardino base and meridian, twenty-eight chains and forty-three links south of corner to sections thirteen, eighteen, nineteen, and twenty-four; twenty-seven chains thirty-five links to elder tree six inches in diameter standing on edge of mesa near bluff bank of river, and marked L. No. 23, Station 23; thence north fifty-four degrees forty-five minutes west, thirteen chains and forty links to elder post in mound marked L. No. 24 Station; thence along the eastern boundary of the *Rancho* Jesus Maria, as patented on corrected line 24 north, forty-three degrees east, up the valley of the Santa Lucia at forty-eight chains and sixty links, leaves the valley and ascends hills, course north-east and south-west, seventy-one chains and ten links, to elder post in

JESUS MARIA RANCHO.

"2. S. 26¼° E. Over chemisal hills at 72 chains to San Antonio creek, 20 lks. wide, course west at 79.15 chains. Intersected east boundary of township 8 north, of range 35 west, 10 chs. 15 lks. south of the corner to sections 1, 6, 7, and 12, at which point I set a charred post and raise mound of earth with trench and pits, 301 chains set post No. 3, on a hill near a place called San Antonio, with a mound of rocks, as instructed. Station.

"3. S. 24° E. at 94 chains leave the hills and enter the valley of Santa Lucia, and continue down the valley 135 chains. Mark as No. 4 a live oak 28 in diameter, as instructed. Station.

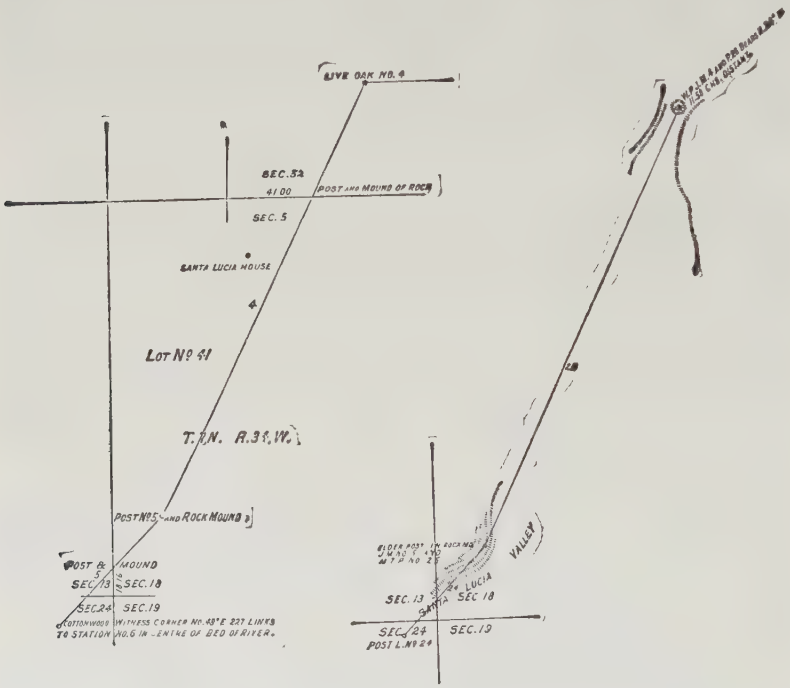
"4. S. 25¾° W. Down the valley of Santa Lucia at 74.13 chains intersected the south boundary of T. 8, N. R. 34 W. 41.00 chs. east of corner to sections 5, 6, 31, and 32, and set post, and raised a mound of rocks, at place of intersection at 115 chains the Santa Lucia house bears west distant about

rock mound on side hill, facing north-east for corner No. 5, of the *Rancho* Jesus Maria, and marked M. L. P. No. 25 for corner station 25; thence north twenty-five degrees forty-five minutes east, two hundred and eighty-seven chains, to post on top of chemisal hill on south-east side of Santa Lucia valley, from which a live oak post in mound and pits marked W. P. J. M. No. 4 and P. 26 for witness post to corner 26, bearing north twenty-four degrees west, eleven chains and fifty links distant, and from which a live oak tree bears south twenty-one degrees thirty minutes west, sixty-three links distant station."

20 chains 287 chains, set a post No. 5, and raised a mound of rocks, as instructed. Station.

"5. S. 43° W. At 41 chains intersected the west boundary T. 7 north, R. 34 west, 1,816 chains north of the corner to sections 13, 18, 19, and 24, and set a post, and raised a mound, with charcoal deposit trench and pits, as instructed, 90 chains to the right bank of La Purissima in Santa Ynez river, 92 chains, to a point in the middle of the river bed, station. This not being a suitable place to establish a corner, I mark a cottonwood tree for witness corner, which bears N. 43° E., distant 227 links from true corner."

There follow here traced copies of the lines referred to, taken from the maps. The one on the right is the line of the Jesus Maria, the other that of the Purissima.



The field-notes above given as to each ranch commence with the course ending at the point of beginning of the disputed line, and the course preceding that.

The Purissima's west line reaches the Jesus Maria's east line at Station 24. From that point it runs to Station 25,—a distance of nearly half a mile, (71

chains, 10 links.) It will be observed that the survey of the former (Purissima) is made going in a course north-east and south-west; that of the latter (Jesus Maria) in the opposite direction. The angle with the meridian at which those lines are run is the same. North 43° east in Purissima, and south 43° west in the Jesus Maria. The words and figures are reversed for the reason, above given, that the surveyors were doing the work in opposite directions. The same is true of the next line from Station 25 to Station 26 on the Purissima. The angle on line going north on both *ranchos* is the same. In former (Purissima) is north 25° 45′ east; in latter (Jesus Maria) south 25° 45′ west,—figures denoting angle reversed as above. The length of the line between these stations is 287 links. The north part of this line on the Jesus Maria is 287 links in length; the end of course 24 is Station 25. This course 24, before it reaches Station 25, has been running 71 chains, 10 links on the Jesus Maria as patented. It ends at a post on a rock mound, as above stated, on a side hill for corner No. 5 of Jesus Maria. Can there be any doubt that here is the Station 5 of the Jesus Maria, and that the line from 25 to 26 in the Purissima, and from 5 to 4 in the Jesus Maria, commences at the same point, runs at the same angle, and are of the same length, 287 chains? The conclusion is irresistible that the line between the above points is the same, and that the west line of the Purissima and the east line of the Jesus Maria are the same.

There is one controlling monument in the field-notes of the Jesus Maria survey. This is the Santa Lucia house. The existence of this house is testified to by the witness Harris, called by plaintiffs, and by Jesse, Lewis, and Cooper, called by defendant. The field-notes of the Jesus Maria show that the survey was made in 1859; and Lewis, who assisted in making it, says that it was then occupied by Burton. It is stated in the field-notes of the Jesus Maria that this house is west of the line of that ranch, and distant from it about twenty chains. This house is a monument, as a witness tree is a monument. The map and the objects on it are to be regarded. See *Vance* v. *Fore*, 24 Cal. 435; *Serrano* v. *Rawson*, 47 Cal. 55; *Black* v. *Sprague*, 54 Cal. 266; *McIver's Lessee* v. *Walker*, 9 Cranch, 173; *Chapman* v. *Polack*, 11 Pac. Rep. 764. It is a *witness-house* called for in the field-notes, and delineated on the map and field-notes, which are in the patent, constituting a part of it.

Nor is there any testimony which is contradictory to the views above presented. The testimony of the witness Harris is based on a view of the matter in dispute entirely theoretical and arbitrary, and outside of the facts in the case established by documents made contemporaneously with the surveys of both *ranchos*, and which cannot be gainsaid.

The surveyor (Norway) who make the survey of the Purissima must have run the common line, and found it correct, or he must have adopted it from the survey of the Jesus Maria made by Norris. In either case it is binding on the plaintiffs, who claim under the patent of the Purissima, into which this survey went, as shown by the map; and in either case the correctness of this common line, as disclosed by the maps and field-notes of the Jesus Maria, is acknowledged. The plaintiffs, then, are bound by this common line described in the Jesus Maria field-notes, as running about 20 chains east of the Santa Lucia house. The existence of the house at the time of survey of the Jesus Maria is established, as well as at the time of the trial, is spoken of in the testimony as the ranch-house of the Jesus Maria, and shown to have been occupied for several years. Its location is shown on the map. The survey of the Purissima was, under these circumstances, accepted with this call for the house, and its distance from the common line. We think the word "about," under these circumstances, should not lessen this distance of twenty chains, and that the distance of the house should be fixed at twenty chains, regarding the house as a monument. The fact that the application of a graduated scale to the map shows the distance of this house from the line to be twenty chains

confirms the propriety of disregarding the word "about." This application of the scale is allowable and proper, for the reason that the surveys are official, and made accurately on a scale of forty chains to the inch. It should also be borne in mind in this connection that the survey of the Purissima as to this common line, is subsequent to that of the Jesus Maria, and based on it. Then running a line due east from the house a distance of twenty chains, and then a line through the point so reached in the course designated on both maps, will fix the common line correctly. The plaintiffs can recover nothing west of this line.

It may be added here that the application of the graduated scale to both maps, which were made on the same scale, will show the distance of the corner of the sections 31, 32, 5, 6, township 8 N., range 34 W., from the common line, to be on the Jesus Maria map forty chains, and on that of the Purissima forty-four chains,—four chains further east than shown on the first mentioned map.

In the field-notes of the Jesus Maria it is stated that the eastern line of the *rancho*, so-called, intersects the south boundary of township 8 N., range 34 W., forty-one chains east of corner to sections 5, 6, 31, and 32, where a post was set and a mound of rocks raised. The above are delineated on the Jesus Maria map. The point of intersection is stated to be 74.13 chains from corner No. 4 of the survey. The above calls are all delineated on the map. As to this, Harris says: "I did not find the corner to sections 5, 6, 31, and 32. I found the first half-mile corner to the east of that point; and ran thence west 47 chains 10 links; thence north-easterly on ranch boundary, 76 chains and 48 links, to come to my corner No. 4 up to the post I set. The intersection of the Purissima line, as I ran it, with the township line, occurs 32 chains 90 links east of the corner to sections 5, 6, 31, and 32." While the corner of these sections could not be found by Harris, he did fix it at 32.90 chains west of the Purissima line. When he did fix it, he only ran 32.90 chains east. According to the testimony, he looked for and found the first half-mile corner to the east of the sections' corner, then ran west from that point 47.10 chains; thence ran north-easterly *on the ranch boundary* 76.48 chains, to come to corner No. 4, to the post he set.

Certainly a line drawn from a point 47.10 chains north of the corner of these sections would not be on the ranch boundary. The boundary lay east of this corner, not west. Still he was 47.10 chains west of the point, and then from that point obtained by westing, by going away from the ranch boundary, he says he ran north-easterly on the ranch boundary to his corner No. 4. The reference here is to corner No. 4 of the Jesus Maria. This was the only corner No. 4 he had referred to. It is not surprising that the real corner No. 4 was not found, and how a line starting from the point he says he did, would run north-easterly along the ranch boundary, passes comprehension.

Harris also speaks of corner No. 4 of the Jesus Maria and No. 23 of the Purissima as the same. In this the maps show that he is in error. According to them, No. 4 of the former corresponds to No. 26 of the latter. Harris' survey was made in disregard of the calls of the Jesus Maria plat and field-notes, which, as the line he was seeking to fix was a line common to both *ranchos*, he should have regarded. And especially should this have been done, when the survey of the Purissima was subsequent to that of the Jesus Maria, as the line in dispute was based on it.

Thompson's testimony relates to a part of the line of the Jesus Maria not in dispute here. The testimony of the other witnesses are clearly against the findings.

The findings of the court below are not sustained by the evidence as to any land west of the common line as herein laid down, and on that ground the order must be reversed. As to the evidence in relation to general repute on

the subject of the boundary of the Jesus Maria, which was ruled out in the view taken herein, it is unnecessary to pass on it, and therefore we notice it no further. As to the other points urged there is no error. But for the reasons above given the order denying a new trial is reversed, and the cause is remanded, with directions to the court below to set aside the judgment, and order a new trial, and that such new trial may be had in accordance with views herein expressed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

LOW *v.* BURTON. (No. 11,804.)

(*Supreme Court of California.* August 1, 1887.)

Department 2.

BY THE COURT. Appeal from order denying a new trial This case, as regards the points of contention, is the same as *Wise* v. *Burton*, (No. 11,780.) *ante*, 678, and on the authority of that case the order denying a new trial is reversed, and the cause remanded, with directions to the court below to set aside the judgment and order a new trial, and that such new trial be had in accordance with the opinion in case No. 11,780, above referred to. So ordered.

LOW *v.* BURTON. (No. 11,804½.)

(*Supreme Court of California.* August 1, 1887.)

Department 2.

BY THE COURT. Appeal from the judgment on the judgment roll alone. There is no error, and the judgment is affirmed. So ordered.

73 Cal. 174

WISE and others *v.* BURTON and others. (No. 11,780½.

(*Supreme Court of California.* August 1, 1887.)

EJECTMENT—ALLOWANCE FOR IMPROVEMENTS—APPEAL—FINDINGS.

In an action to recover land a judgment for the plaintiff will not be reversed on the ground that the court below has not found upon an issue in relation to improvements on the land claimed as a set-off to damages for withholding the property, where the only evidence as to such improvements on the record is that there was a house upon the land, but there is no evidence as to its value, or to show that it was put there as an improvement in good faith, as required by Code Civil Proc. Cal. § 741, providing that the value of such improvements may be allowed as a set-off to damages when made by a defendant in good faith.

Department 2. Appeal from superior court, Santa Barbara county.

A. B. Canfield and *A. Packard*, for appellants. *W. C. Stratton*, for respondents.

THORNTON, J. This is an appeal from the judgment in the same case, No. 11,780, which last is an appeal from an order denying a new trial.

There is but one point, which is that the court did not find on an issue made by the answer in relation to improvements on the land to be allowed as a set-off to damages for withholding the property for which judgment is rendered. The value of such improvements may be allowed as a set-off to damages when made by a defendant, or those under whom he claims in good faith, holding under color of title adversely to the claim of plaintiff. Code Civil Proc. § 741. It is not averred by defendant that such improvements were made *in good faith*, and there is no evidence in the record that any such improvements were made. In the record in case No. 11,780, which is an appeal from an order denying a new trial in this cause, there is evidence that there was a house on the land for which the judgment was rendered, but there is no testimony showing that the house was such that it should be

regarded as a permanent improvement, or of its value. Confining the consideration of the case to the record presented here on this appeal from the judgment, in which the defense is not well pleaded, and there is no evidence either of improvements or their value, we would not hold that the court erred in not finding on the issue. This court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue.

Granted that we could look into the record in the other case where all the evidence in the case is set forth, but in which there was also a lack of evidence, still we would not reverse because the court had failed to find on the issue mentioned. The court could not judicially know the state and condition of the house, whether it constituted an improvement of the character required by the statute, nor could it judicially know its value. The case would still be one of want of evidence, and in this state of the case the judgment should not, on the contention put forth, be reversed.

As far as regards this appeal, no error appears, and therefore the judgment must stand affirmed. So ordered.

We concur: McFARLAND, J.; SHARPSTEIN, J.

73 Cal. 196

HILTON and others *v.* YOUNG. (12,110.)

(*Supreme Court of California.* August 16, 1887.)

VENDOR AND VENDEE—EXECUTORY CONTRACT—RIGHTS OF PURCHASERS.

A purchaser of land, while part of the price remained unpaid, and before the legal title had been conveyed to him, conveyed a portion of the land to A. After the purchaser's death, all the right, title, and interest of his estate in and to the land was sold, under order of the probate court, to B., who had notice of A.'s claim, but who paid to the original vendor the balance due on the purchase price, and obtained a deed to the whole land to himself. In a suit by B. against A. to quiet title, in which A. filed a cross-bill, *held*, that B. took title subject to the equitable rights of A. in the part of the land conveyed to him, and that A., although not entitled to a decree declaring B. to have no right, title, or interest in such part, was entitled to a conveyance of such part from B.; but this, only on condition that A. pay to B. a ratable proportion of the sum paid by the latter to get the title to the whole.

Commissioners' decision. Department 1.

Appeal from superior court, Butte county; LEON D. FREER, Judge.

Gray & Sexton, for appellants. *Hundley & Gall*, for respondent.

HAYNE, C. This is an action to quiet title. One Vanderhoof had a contract with the Central Pacific Railroad Company for the purchase of certain land. He paid 20 per cent. of the price, and the interest on the balance for one year. While the legal title remained in the company, "for a valuable consideration, he granted and conveyed in fee-simple to the defendant, Mary M. Young, a part of said lands, the same being the premises in dispute in this action." This deed transferred to the defendant the right of Vanderhoof to a conveyance from the company of the tract in controversy, and to that extent operated as an assignment of the contract. Shortly after making this deed Vanderhoof died, and, his estate being insolvent, "all the right, title, and interest of said estate in and to said lands mentioned in said contract," was sold, under the order of the probate court, to the plaintiff Hilton. This sale did not transfer to Hilton any sort of interest in or right to the premises in controversy, for Vanderhoof had previously parted with all his right as to that portion of the land, and the probate sale only purported to be of the right, title, and interest which the estate had. In this condition of affairs, Hilton and his co-plaintiff went to the railroad company, and paying the balance of the purchase money, obtained a deed of all the land covered by the contract, including the defendant's tract. They did this with full knowledge and notice of the rights of the defendant. As a matter of course, so far as the tract

in dispute is concerned, they took only the legal title, with a trust in favor of the defendant, and their claim to the beneficial ownership of that tract is as destitute of foundation in law as it is in conscience.

The court below denied the plaintiffs' application for relief, and, upon the cross-complaint of defendant, decreed that they had not "any right, title, or interest in or to said tract of land," and that the title of the defendant be quieted as against the plaintiffs, and those claiming under them. This was going further than the facts found warranted. The legal title was in the plaintiffs. It could not have passed to the defendant as an after-acquired title; for neither the defendant's grantor, nor his estate, ever acquired the title. The legal title being in the plaintiffs, they could not be said not to have "any right, title, or interest." Upon the facts found, all that could properly have been done was to have decreed that the plaintiffs convey to the defendant. As a condition of this relief, the defendant should be required to do equity; and we think it is equity that she should pay a ratable proportion of what the plaintiffs paid to get the title.

The fact that the plaintiffs took the title from the railroad company with notice of the equitable rights of defendant, subjected them to all the duties resting upon the company. In the language of Story, (1 Eq. Jur. § 396,) "If a subsequent purchaser has notice of the contract, he is liable to the same equity, and stands in the same place, and is bound to do the same acts, which the person who contracted, and whom he represents, would be bound to do." But he is not ordinarily bound to do any other or further acts. Now, the company was bound to convey only upon payment of the balance due to it upon the contract. The defendant could not have got a deed from it without paying at least what was due for her portion of the land; and it would seem that, in order to get the deed from the successor in interest of the company, she must make the same payment.

Nor is there anything in the position of the parties before the making of the deed from the company which would change this result. The conveyance of the land from Vanderhoof to the defendant "in fee-simple" doubtless operated as an assignment of a portion of the contract, with an undertaking on his part to pay what remained due to the company. As between them, the obligation to pay the company was on Vanderhoof. But the fact that the plaintiffs had notice of this obligation on the part of Vanderhoof does not make them liable to meet it, any more than it would make them liable to meet his other obligations; for the defendant's portion was separate and distinct from the plaintiffs' portion, and as to the defendant's portion the plaintiffs do not, and could not, claim through Vanderhoof. The case, therefore, stands thus: The defendant got an assignment of a part of a contract to convey land; the plaintiffs got an assignment of the remaining part. But the owner of the land was not compelled to split up his contract by making separate deeds. And, as must be presumed from the findings, the plaintiffs, in order to get a deed to any portion, were compelled to pay the balance due upon defendant's part as well as upon their own. This having been done, we think the defendant cannot have the assistance of a court of equity to obtain the legal title from the plaintiffs, except upon condition of paying to them what they paid on her behalf. See *Tompkins* v. *Sprout*, 55 Cal. 31.

We therefore advise that the judgment be reversed, and the cause remanded with directions to the court below to enter a decree that the plaintiffs execute and deliver to the defendant a deed of the land in controversy, upon payment by defendant within a reasonable time, to be fixed by the court, of a ratable proportion (according to the number of acres) of the balance of the purchase money paid by plaintiffs to the railroad company; the plaintiffs to recover their costs of appeal.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment reversed, and cause remanded, with directions to the court below to enter a decree that plaintiffs execute and deliver to the defendant a deed of the land in controversy, upon payment by defendant within a reasonable time, to be fixed by the court, of a ratable proportion (according to the number of acres) of the balance of the purchase money paid by plaintiffs to the railroad company, the plaintiffs to recover their costs of appeal.

73 Cal. 182

BAKER and others *v.* FIREMEN'S FUND INS. CO. (No. 12,136.)

(*Supreme Court of California.* August 13, 1887.)

1. VENUE—ACTION TO DECLARE A DEED A MORTGAGE.

Const. Cal. § 16, art. 12, provides that a corporation may be sued in the county where the contract is made or to be performed, or where the obligation or liability arises, or in the county where its principal place of business is situated. Code Civil Proc. § 392, requires actions for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such estate or interest to be brought in the county where such real estate, or any part thereof, is situated. *Held*, that an action to declare a deed absolute on its face to be a mortgage, and for the reconveyance of the real estate described therein, was properly brought in the county where the real estate was situated, although the defendant, a corporation, had its principal place of business in another county, and it appeared from the recitals in the deed and agreement that defendant's assignor, the original mortgagee, was a resident of, and the deed had been acknowledged before a notary of, the county where the land was situated.

2. SAME—CHANGE OF VENUE—SETTING ASIDE ORDER.

The court has jurisdiction to set aside an order granting a change of venue, on the ground that it was inadvertently made.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

W. C. Belcher, for appellant. *J. C. Campbell*, for respondent.

SEARLS, C. J. The action in this cause was brought in the superior court of the county of San Joaquin to procure a decree declaring a deed absolute on its face to be a mortgage, and for a reconveyance of the real estate described in said deed, which real estate is situate in said county of San Joaquin.

Defendant, a corporation organized and existing under and by virtue of the laws of the state of California, and having its principal place of business at San Francisco, demanded a change of the place of trial to the city and county of San Francisco, which demand was not acceded to; whereupon defendant moved, upon affidavit, and upon the papers in the cause, for a change of the place of trial to said last-mentioned city and county. The motion was at first granted, but on the following day the order granting the change, as asked for, was set aside upon the ground that it "was inadvertently made," and an order entered denying such motion. From this order defendant appeals.

The only other facts deemed essential are—*First*, defendant sets out in its affidavit that San Francisco is its residence; *second*, it appears from the complaint that defendant was and is conducting and carrying on business in the state of California, and in the county of San Joaquin; *third*, the deed and agreement, which taken together are claimed to constitute a mortgage, were made and executed by plaintiffs and one H. Barnhart, who, according to the recitals of the agreement, were residents of the county of San Joaquin, and they were acknowledged and certified before a notary of said last-mentioned county. Defendant holds as an assignee of Barnhart.

Beyond the recitals above referred to in the agreement, which is set out in the complaint, there is no affirmative allegation as to the residence of the parties or place at which the contract sued on was made.

Appellant contends—"*First*, that the proper county for the trial of this action is one in which the principal place of business of the defendant is situ-

ated, and that the case does not come within any of the other specifications of section 16 of article 12 of the constitution, or within the proviso to section 5 of article 6; *second*, that by the order of March 23, 1887, the case was actually transferred to the superior court of the city and county of San Francisco, and was thereafter pending therein, and that, therefore, the superior court of San Joaquin county had no jurisdiction to make the order of March 24, 1887, and the same is void."

Section 16 of article 12 of the constitution is as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated; subject to the power of the court to change the place of trial as in other cases." By section 392, Code Civil Proc., actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, must be tried in the county in which the subject of the action or some part thereof is situated. The land is *the subject-matter* concerning which the contest is waged, and it is situate in San Joaquin county. The right or interest of the plaintiffs in this subject-matter, if any, is the question to be ultimately determined in this action. Such being the case, the action was properly brought in the county of San Joaquin, where the land was situated. *Bush* v. *Treadwell*, 11 Abb. N. S. 27. This last case was an action like the present, to have the title to certain real estate declared to be in the plaintiffs, on the ground that the deed conveying title to the defendant was a mortgage, and for a conveyance thereof to the plaintiffs, and the court held that under the Code of that state, (New York,) of which our section 392, Code Civil Proc., is an exact transcript, the action should have been brought in the county where the land was situated. It was there that the liability or obligation (if any) arose, within the meaning of section 16 of article 12 of the constitution. There is nothing in this view in conflict with the case of *Le Breton* v. *Superior Court*, 66 Cal. 27, 4 Pac. Rep. 777, cited by appellant. That was an action brought against a trustee, in the county in which he resided, to enforce a trust both upon personal and real property, and the court held that, as the suit was brought to reach personal property in the hands of the trustee, that fact gave the court jurisdiction.

In response to the second cause of contention by appellant, it may be said that the same question arose in *Wiggin* v. *Superior Court*, 68 Cal. 398, 9 Pac. Rep. 646, and was decided adversely to the position assumed by appellant. See, also, *Hall* v. *Polack*, 42 Cal. 218.

The order appealed from is affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.; MCKINSTRY, J.

TEMPLE, J., did not participate in the decision.

73 Cal. 186

PEOPLE *v.* BEZY. (No. 20,224.)

(*Supreme Court of California.* August 13, 1887.)

MURDER—DEGREE OF—EVIDENCE TO SUPPORT VERDICT.

On the trial of an indictment for murder, where the only extenuating circumstances were those sworn to by defendant, and some of those were improbable, evidence of prior ill feeling and threats on the part of defendant towards deceased, *held* to justify a verdict of murder in the first degree.

In bank. Appeal from superior court, Fresno county; S. A. HOLMES, Judge.

J. C. Campbell, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BY THE COURT. Defendant was convicted of murder in the first degree, and the punishment fixed at imprisonment for life, for the killing of one John Mengetti, on the third day of June, 1884, at the county of Fresno. The appeal is from the final judgment in the cause, and from an order denying a new trial.

The only point urged by counsel for appellant at the hearing was that the evidence is insufficient to sustain the verdict, or to warrant any verdict above the grade of manslaughter. Defendant and the deceased had, according to the evidence, been acquaintances and friends from boyhood until within, say, one year of the death of the latter, when they had a falling out, subsequent to which there is testimony tending to show threats by defendant against deceased. This prior ill feeling, coupled with all the circumstances detailed at the trial, forces the conclusion that the verdict was warranted by the evidence. There was no person present at the time and place of the shooting of deceased by defendant except these persons. Taking the testimony of defendant as absolutely true in all its parts, and it may well be considered that the killing (which was admitted) did not constitute a higher grade of crime than manslaughter; but the jurors were the judges of the weight to be given to defendant's statement as a whole, and to its various parts, and we can very well see that in the exercise of sound judgment they may have discarded as improbable some of the extenuating facts sworn to.

The judgment and order appealed from are affirmed.

73 Cal. 211

HOGAN, Assignee, *v.* COWELL. (No. 11,854.)

(*Supreme Court of California.* August 22, 1887.)

1. SALE—DELIVERY AS AGAINST CREDITORS.
 In an action by an assignee of an insolvent firm to recover a lot of horses sold by the firm prior to their insolvency to the defendant, the husband of one of the partners, and a creditor of the firm, it appearing that the horses at the time of the sale were being pastured on one of defendant's ranches, where they remained for five days after the sale, and were then moved by defendant to another ranch, *held*, that this was an immediate delivery, followed by an actual and continued change of possession, within the meaning of Civil Code Cal. § 3440, which makes transfers of personal property fraudulent and void against creditors unless accompanied by such delivery and possession of the thing transferred.[1]
2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.
 Where the issue is constructive fraud, it is not prejudicial error to admit testimony tending to show that there was no actual fraud.

Department 2. Appeal from superior court, San Joaquin county; SWINNERTON, Judge.

J. C. Campbell, for appellant. *J. A. Louttit*, (*S. D. Woods* and *A. L. Levinsky*, of counsel,) for respondent.

MCFARLAND, J. W. W. Cowell and Emma F. Sanders were carrying on business as copartners in the city of Stockton, and on August 1, 1884, came into ownership and possession of 40 head of wild, unbroken horses. Immediately thereafter the said horses were driven to a ranch owned by the defendant, Joshua Cowell, on the west side of the San Joaquin river, for pasturage, where they remained until November following. Defendant was authorized to sell any of such horses as he might find sale for, and a few head were so sold after consultation with their owners. On or about the first of November, 1884, the said W. W. Cowell and Emma F. Sanders, who in the mean time had intermarried with the defendant, Joshua Cowell, sold all of said horses remaining unsold to said defendant, for the consideration of certain amounts due for pasturage, and $1,500, and interest due from them to the defendant for money formerly borrowed and used in their business. At the time of this sale the horses were on defendant's said ranch. Within five days thereafter he removed them from said west-side ranch to another ranch owned by him, called the Home ranch, about 15 miles distant. From the time of the sale defendant had full possession and control of the horses. At the time of said sale, said W. W. Cowell and Emma F. Sanders were indebted to two mercantile firms of San Francisco, who, in addition to defendant, were their main creditors; and, before said sale was made to defendant, they offered to give said horses to said two firms in payment or part payment of their debts, but said offer was by said firms refused. The sale to defendant was made in good faith and for a full consideration. Afterwards said W. W. Cowell and Sanders (then defendant's wife) filed their petition in insolvency, and plaintiff, having been appointed assignee, instituted this action to recover said horses. The sole ground of the action was the formal one that there was not an immediate delivery, and an actual and continued change of possession of the horses, within the meaning of section 3440 of the Civil Code.

The court below found that there was such delivery and possession, and we are satisfied with the finding. It seems to us that the delivery and possession were as complete as the nature of the case permitted. It can hardly be contended that the respondent should have driven the horses away from both his *ranchos*. That would be almost the equivalent of saying that

[1] Respecting the change of possession sufficient to overcome the presumption of fraud, as against the creditors of the vendor, and when that is question for the jury, see Stull v. Weigle, (Pa.) 8 Atl. Rep. 578; Dodge v. Jones, (Mont.) *ante* 707; Young v. Poole, (Cal.) 13 Pac. Rep. 492; Cook v. Rochford, (Cal.) 12 Pac. Rep. 568, and note.

he should have put himself out of the actual possession in order to have kept himself within the legal possession. We do not see that the intermarriage of the respondent with one of his vendors materially alters the case, there being no charge of actual fraud.

Appellant assigns as error the admission of testimony showing that respondent's vendors offered the horses to certain creditors other than the respondent, and the refusal of such creditors to take them. That testimony, however, tended to show only that in the sale to respondent there was no actual fraud or intent to defraud; and, as appellant admitted expressly at the trial that there was no actual fraud, and that he relied solely on the constructive fraud which arose from deficient delivery and possession, we do not see how he could have been injured by such testimony.

Judgment and order denying motion for new trial affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

73 Cal. 206

REID *v.* REID. (No. 11,789.)

(*Supreme Court of California.* August 19, 1887.)

EVIDENCE—STENOGRAPHER'S TRANSCRIPT—TESTIMONY IN FORMER CASE.

The plaintiff was permitted, by virtue of Code Civil Proc. Cal. § 273, which provides that "the report of the official reporter, * * * when certified as being a correct transcript of the proceedings in the case, shall be *prima facie* a correct statement of such proceedings," to introduce the stenographer's transcript of evidence given by the defendant in another suit. *Held*, that this section did not make the transcript itself admissible in evidence.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; SWINNERTON, Judge.

L. W. Elliott and *J. C. Campbell*, for appellant. *John H. Hall*, for respondent.

HAYNE, C. In order to contradict the defendant upon a material point, the plaintiff was permitted, against objection, to introduce the stenographer's transcript of evidence given by the defendant in a different suit. This transcript, which does not appear from the record to have ever been filed, was certified by the stenographer "to be a true and correct transcription from my short-hand notes taken in the trial of said cause." The stenographer was not examined as a witness, but the transcript was admitted on the faith of the certificate. The question is whether the paper was legal evidence of what the defendant said on the former trial.

So far as we have been able to ascertain, this precise question has not been decided in this state. In *People* v. *Woods*, 43 Cal. 176, it was sought to use the reporter's notes as a record on appeal. The decision was that they could not be so used, because a record on appeal imported absolute verity, and the notes were only *prima facie* evidence. In *Meyer* v. *Roth*, 51 Cal. 582, the notes were sought to be introduced, not as evidence of an admission, or in contradiction of what had been sworn to, but as original evidence of the fact in dispute; but the witness who had testified, being alive and within the state, this was not permitted; the decision did not touch the point that the notes were not evidence of what the witness had said, but was that what the witness had said was not evidence of the fact in dispute. In *People* v. *Lee Fat*, 54 Cal. 529, the witness whose testimony was sought to be introduced could not speak English, and the testimony was given through an interpreter. The decision was that what the reporter had taken down was not what the witness had said, but was what the interpreter had said he had said, and was therefore hearsay. And *People* v. *Ah Yute*, 56 Cal. 120, followed the preceding case, and laid down the same rule. In *People* v. *Chung Ah Chue*, 57 Cal.

568, the decision turned on the construction of section 686 of the Penal Code, and is not applicable to cases to which that section does not apply. And *People* v. *Qurise*, 59 Cal. 344, simply followed the preceding case. In *Hicks* v. *Lovell*, 64 Cal. 22, the admission of the reporter's notes of what the witness had sworn to was sustained on the ground that "no objection was made to the transcript as evidence of his testimony." In *People* v. *Cunningham*, 66 Cal. 672, 4 Pac. Rep. 1144, and 6 Pac. Rep. 700, 846, only two justices concurred in the opinion, and they placed their opinion on the ground of "the admissions of the defendant's counsel." The decisions of the court, therefore, do not cover the precise question.

By the common law there can be no doubt but that the evidence was inadmissible; for the document amounts to a mere certificate of the reporter that the evidence had been given. It had not the sanction of an oath. The oath of office is not an oath in the cause. As said by TILGHMAN, C. J., in *Miles* v. *O'Hara*, 4 Bin. 110, concerning the notes of a judge: "It is refining too much to say that he takes his notes under the obligation; nor is that the oath which the law requires to verify a fact." Moreover, there was no opportunity for cross-examination. These principles have been applied in analogous cases. Thus it has been held that the judge's notes are not admissible. *Miles* v. *O'Hara*, above cited; *Schafer* v. *Schafer*, 93 Ind. 586. So of the minutes of a referee. *Mott* v. *Ramsay*, 92 N. C. 152. So of the notes of a committing magistrate. *State* v. *Collins*, 32 Iowa, 36. So of the notes of a coroner. *Bass* v. *State*, 29 Ark. 142. And so of the notes of a stenographer. *Lipscomb* v. *Lyon*, 19 Neb. 511, 27 N. W. Rep. 731. Compare *Rounds* v. *State*, 57 Wis. 52, 14 N. W. Rep. 865.

If, therefore, the notes are admissible, it must be by virtue of some statute. The statute which is claimed to cover the case is section 273 of the Code of Civil Procedure, which is as follows:

"Sec. 273. The report of the official reporter or official reporter *pro tempore* of any court, duly appointed and sworn, when written out in long-hand writing, and certified as being a correct transcript of the testimony and proceedings in the case, shall be *prima facie* a correct statement of such testimony and proceedings."

But this statute does not say that the transcript shall be legal evidence of any fact. It simply says that it is *prima facie* correct. The two propositions do not seem to be identical. There are many things which are not only presumably but demonstrably correct, but which are, nevertheless, not legal evidence. Moreover, the notes are only *prima facie* correct. If the reporter had been called and had testified on his examination in chief that the transcript was correct, it would have to be taken at that stage as *prima facie* correct. But the opposite party would have had the right to cross-examine him, before proceeding further, to show its incorrectness, and possibly would have succeeded in eliciting something which would have shown such incorrectness. And to make the document itself admissible upon the faith of the certificate would deprive the party of this right of cross-examination, which the authorities agree is one of the most important tests of truth. But even if the reporter could have stood the test of cross-examination, and the result of his whole testimony had been that the transcript was correct, we do not think that the transcript would have been admissible except in connection with the testimony of the reporter. The unfiled transcript is certainly not a public record, but must be put upon the footing of a private memorandum; and, having been written up we do not know when, it was not admissible as part of the *res gestæ;* as to which see *Severance* v. *Lombardo*, 17 Cal. 57; *Sill* v. *Reese*, 47 Cal. 342. This being the case, the transcript could at most have been used to refresh the memory of the witness. And the general rule with reference to the admissibility of papers used to refresh the memory of a witness is stated by Cowan & Hill in their notes to Phillips on Evidence as fol-

lows: "He will not be permitted to read his notes or *memoranda* to the jury, nor can they be admitted as evidence to the jury in any sense." 1 Phill. Ev. (4th Amer. Ed.) 586, note 170. This general rule seems to be embodied in the Code of Civil Procedure, for, after providing that *the adverse party* may read the memorandum to the jury, it has the following: "So, also, a witness *may testify from* such a writing, though he retain no recollection of the particular facts." Code Civil Proc. § 2047.

We think, therefore, that section 273 does not make the transcript itself admissible in evidence. Nor is this to be regretted. For the provision is so unlimited as to open the door to gross frauds if the construction contended for should be given to it. There is no requirement that the notes shall be filed. Either party to the action in which they are taken, or the judge, may require them to be filed. But in practice this option is hardly ever exercised. Consequently there is nothing by which their incorrectness may be shown. Moreover, there is no limit to the time within which the certificate may be given. From the absence of words of limitation in this regard, and from the fact that the official reporter is placed in the same category with the reporter *pro tempore*, it would seem that he may give his certificate after ceasing to be reporter, even 10 or 20 years after, and the result would be that a party might find himself confronted with a certificate as to what had been said in another cause, perhaps between other parties, a long time previously, and have nothing of record by which he could disprove it, and possibly be unable to find a trace of the person who had given the certificate. Part of the ground upon which public documents, or copies thereof, are admissible, is the publicity of the subject-matter. 1 Greenl. Ev. § 483. And where a certificate is admissible it is a material circumstance that it was not made long after the fact. *Gaines* v. *Relf*, 12 How. 535.

But what meaning is to be given to the statute? Speaking of the act of 1867–68, which went further than the Code, (because it provided that the notes should be *prima facie* evidence,) WALLACE, J., delivering the opinion in *People* v. *Woods*, above cited, said: "This proceeding evidently refers to the proceedings to be had in the court below upon settlement of statements, allowance of bills of exception, etc." If the framers of the section had any other purpose in view it cannot be gathered from their language.

We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

2 Cal. Unrep. 788

PEOPLE v. PARVIN and others. (No. 11,929.)

(*Supreme Court of California.* August 23, 1887.)

1. CONSTITUTIONAL LAW—TITLE OF STATUTE—AMENDING ACT—SUBJECT.
Under Const. Cal. § 24, art. 4, providing that "Every act shall embrace but one subject, which subject shall be expressed in its title," the act of 1880, entitled "An act to amend section 3481 of the Political Code," is constitutional, as a statute to be amended may be the "subject" of an amending act.

2. SWAMP LANDS—RECLAMATION DISTRICT—NEW DISTRICT.
Pol. Code Cal. § 3481, provides that the requisite number of owners of "lands within any reclamation or swamp-land district, and in which the lands have not been reclaimed, may have said body of lands set off from such district." *Held*, that this did not repeal the prior laws, or affect the assessment proceedings thereunder, and applied to all future cases, whether the existing district was organized under the Code or not.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; McFARLAND, Judge.

Action by the people, in the nature of a *quo warranto*, against the defendants, for claiming the so-called reclamation district No. 366 to be a legal district. The defendants, prior to the suit, had procured a district known as district No. 366 to be carved out of and set off from district No. 3, which latter was organized under the act of March 28, 1868. By the judgment of the court below, the defendants were ousted from the franchise of governing as a legal district the lands within its limits; the effect of the decision being to replace those lands under the jurisdiction of district No. 3. The contest in the trial court hinged on section 3481, Pol. Code, and upon its amendment as enacted April 15, 1880; that is, whether the defendants could avail themselves of that section of the Political Code so as to disestablish and dismember a district formed prior to the Code, under a distinctive statute.

McKune & George, for appellants. *G. W. Gordon*, for respondents.

HAYNE, C. The main question argued in this case, and the one upon which we think the decision must turn, is whether the act of 1880, entitled "An act to amend section 3481 of the Political Code," is in violation of section 24 of article 4 of the constitution, which provides that "Every act shall embrace but one subject, which subject shall be expressed in its title. * * *" It is not contended that the act embraced more than one subject. The objection is that no subject is expressed; and the argument is that a section of the Political Code is not a subject, but is a mere reference to where the subject may be found.

The reason of the requirement that the subject shall be expressed is to prevent legislators being entrapped by false titles. *Kurtz* v. *People*, 33 Mich. 282; *Boyd* v. *State*, 53 Ala. 605; *Hannibal* v. *Marion*, 69 Mo. 575; *Robinson* v. *Skipworth*, 23 Ind. 317; *Commissioners of Marion* v. *Commissioners of Harvey*, 26 Kan. 197; *Howell* v. *State*, 71 Ga. 227. This reason does not require the title to give the substance of the bill. To give the substance of the bill would be to make the title almost as cumbrous as the bill itself, which would tend to defeat rather than to accomplish the purpose of the requirement. It would be to make the title an index, abstract, or catalogue of the contents of the bill, which has been held to be unnecessary. *Montclair* v. *Ramsdell*, 107 U. S. 155, 2 Sup. Ct. Rep. 391; *People* v. *Hazelwood*, 116 Ill. 327, 6 N. E. Rep. 480; *Hope* v. *Gainesville*, 72 Ga. 250; *Allegheny County Home's Appeal*, 77 Pa. St. 80; *Lockhart* v. *Troy*, 48 Ala. 584; *State* v. *Barrett*, 27 Kan. 218; *Brewster* v. *Syracuse*, 19 N. Y. 117. Now, if the purpose was not to apprise the legislators of the substance of the bill, it must have been to put them on inquiry as to what was sought to be done. And we think a title which shows that it is intended to change a specific section of a specified statute is sufficient to put the legislators on inquiry. This seems to us to be the reasonable construction. And it is generally agreed that the provision is to receive a liberal, and not a narrow and technical, construction; which latter would only serve to defeat and embarrass legislation. *Stone* v. *Brown*, 54 Tex. 342; *Breen* v. *Railroad Co.*, 44 Tex. 305; *State* v. *Ranson*, 73 Mo. 86; *In re Public Parks*, 86 N. Y. 439, 440; *Larned* v. *Tiernan*, 110 Ill. 177; *Mills* v. *Charleton*, 29 Wis. 410; *McAunich* v. *Railroad Co.*, 20 Iowa, 342; Cooley, Const. Lim. 146.

Nor does this construction do violence to the language of the provision. According to Webster, one of the meanings of the word "subject" is "that which is brought under thought or examination; that which is taken up for discussion." Now, is not the statute to be amended or repealed "that which is taken up for discussion?" When, for example, a scholar writes an essay upon some play of Shakespeare, suggesting an emendation of the text, is it not proper, and in accordance with usage, to say that the subject of the essay is the play in question, and not the plot, the scene, the characters, or the in-

cidents of the play? If it be said that the statute to be amended is not the subject, such a rule would in some cases require an effect to be given to the provision beyond that which its language imports; for the provision does not require the title to express the subject of any previous act; it only requires an expression of the subject of the act to be passed. Now, in the case of a repealing act, what is the subject? It has no subject, unless the statute to be repealed is its subject, for it establishes nothing. So that, if the statute to be repealed is not a sufficient expression of its subject, it would be necessary to give the subject of the statute to be repealed, which would be going further than the language of the provision requires. Now, if the statute to be repealed is the subject of a repealing act, it would seem that the statute to be amended may be the subject of an amending act.

We think, therefore, that the construction which is suggested by reason of the provision does not do violence to its language, but accords with it. And this result is in accordance with the preponderance of authority. Thus, in *Fleischman* v. *Walker*, 91 Ill. 320, the following title: "An act to amend an act entitled 'An act in regard to practice in courts of record,' "—was held to be sufficient. Such a title is not substantially different from "An act to to amend section —— of the Code of Civil Procedure;" and the case is authority for the sufficiency of the latter title. So in *State* v. *McCracken*, 42 Tex. 384, the following title: "An act to amend an act entitled 'An act to adopt and establish a Penal Code for the State of Texas,' approved August 26, 1871,"—was held to be sufficient, although there was a mistake in giving the date of the passage of the Code. So in *Dunbar* v. *Frazer*, 78 Ala. 538, the following title: "An act to amend section 1544 of the Code except as to 'certain counties specified by name,' " was held to be sufficient. So in *Dogge* v. *State*, 17 Neb. 143, 22 N. W. Rep. 348, the following title: "An act to amend section 4 of chapter 55 of the Compiled Statutes of Nebraska," was held to be sufficient. Compare also *State* v. *Garrett*, 39 La. Ann. 638; *Gatling* v. *Lane*, 17 Neb. 84, 22 N. W. Rep. 453; *John* v. *Reaser*, 31 Kan. 406, 2 Pac. Rep. 771; *Burroughs* v. *Commissioners of Norton*, 29 Kan. 197, 198; *Wheeler* v. *State*, 23 Ga. 10.

These cases are authority for the proposition that the statute to be amended or repealed may be the "subject" of an amending act, and that is all that is necessary to the present decision. In some of them the reference to the act to be repealed seems too vague, and in that respect we think they go too far. While in some cases the act might be such that a reference to its title would be sufficient, yet if the statute is multifarious the precise part to be amended should be pointed out. Compare *People* v. *Hills*, 35 N. Y. 452. In other words, the reference should be specific.

The other questions raised do not require extended notice. If section 3481 is a valid enactment, we think, if clear, that it applies to all future cases in which the requisite number of owners of "lands within any reclamation or swamp-land district, and in which the lands have not been reclaimed, desire to have said body of lands set off from such district," whether the existing district was organized under the Code or not. This does not repeal the prior laws, or affect the assessment proceedings thereunder. It merely relates to the creation of new districts of a certain character. The words "independent reclamation," in section 3481, seem to have no other meaning than "separate and distinct reclamation." This is apparent from section 3482, which provides for the liability of the new district for former work.

The foregoing being the only questions argued, and the findings setting forth all the facts, we think the case may be finally disposed of. We therefore advise that the judgment should be reversed, and the cause remanded, with directions to enter judgment in favor of the defendants.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to enter judgment in favor of defendants.

73 Cal. 216

GOLD *v.* SUN INS. CO. (No. 11,901.)

(*Supreme Court of California.* August 24, 1887.)

1. FIRE INSURANCE—CONTRACT TO RENEW POLICY—ACTION FOR BREACH—COMPLAINT.
In an action for breach of a contract to renew a policy of insurance, the complaint alleged the execution of the former policy, its date, the amount and property insured, and that on a day named, for a valuable consideration, defendant agreed to renew the policy for the same amount and period, and on the same terms and conditions. *Held*, that it sufficiently set forth the contract of the parties, and that it need not allege the terms and conditions of the original policy, or the payment or satisfaction of the renewal premium.
2. SAME—PLEADING—CONDITIONS OF ORIGINAL POLICY—PRESUMPTIONS.
In such an action the court cannot presume, in the absence of allegation in the pleadings, that there were any terms or conditions in the original policy, a breach of which would defeat the plaintiff's right to recover.
3. SAME—PROOFS OF LOSS.
Where defendant entered into a contract to renew an insurance policy and repudiated it after a loss, the plaintiff is under no obligation to serve proofs of loss as required by the original policy.

Commissioners' decision. Department 2.

Appeal from superior court, Tehama county; BRAYNARD, Judge.

Rhodes & Barstow, for appellant. *John F. Ellison*, for plaintiff and respondent.

FOOTE, C. This was an action to recover from the defendant the sum of $500 for failing to comply with a contract to issue to the plaintiff a fire insurance policy for the sum last mentioned. The complaint was demurred to, the demurrer overruled, and, the defendant having failed to answer over, judgment was rendered for the plaintiff as prayed for, and from that this appeal is prosecuted. The demurrer went to the point that the complaint did not show facts sufficient to constitute a cause of action.

The pleading in question alleges an agreement on the part of the defendant, a fire insurance company, upon a day certain to renew a policy of insurance upon a saloon, bar-room, fixtures, etc., belonging to the plaintiff. It states the date and amount of the original policy, and the property which was by it insured, its value, and that the contract was for a renewal of that policy, upon the same property and for a like amount. That relying on the promise to renew that policy, and the insurance company having received a valuable consideration for such promise from the plaintiff, the latter had not obtained any other insurance upon the property, and that at the time he suffered loss of it from fire, he was under the belief that the defendant had insured it by a renewal of the policy, and that he was not aware of the breach of the contract by the defendant until the loss had occurred. That by reason of that breach, and the loss occasioned by the fire, the plaintiff has been damaged in the sum of $500, which was the amount of the policy agreed to be renewed, and that no part of that sum has been paid.

The defendant contends that the demurrer should have been sustained: (1) Because the terms and conditions of the policy originally issued, and for the renewal of which the contract was entered into, were not stated in the complaint. (2) That it was not averred that the premium for the renewal was paid, or satisfaction made therefor. (3) That no proof of loss was furnished as was required under the original policy.

In the first place we understand that a parol contract to issue a fire policy, made by an insurance company, authorized by its charter to issue policies of that kind, is valid, and that such a contract can be enforced by compelling a

specific performance by the company, or in an action for the breach of the agreement. And the question always is, whether, having agreed upon the terms of the insurance, and to issue a policy therefor, the company is liable for the failure to do so. *Ellis* v. *Fire Ins. Co.*, 50 N. Y. 405–408. The defendant was informed, by the language of the complaint, when the contract to *renew* a certain policy of insurance was made, what was its subject-matter, for what amount the property was to be insured, and that it was made and entered into for a valuable consideration; thus it seems to us that the terms of *the contract* as agreed upon were sufficiently stated. A sufficient contract having therefore been thus stated in the complaint, we cannot presume, in the absence of any such allegation in the pleadings, that there were any terms or conditions in the original policy, a breach of which would defeat the plaintiff's right to recover in this action.

There does not seem to have been any need to have stated that a premium was paid, or the amount of it, or that satisfactory arrangements had been made for its payment. That could have been proved under the allegation that a valuable consideration had moved to the defendant from the plaintiff, as the basis of the contract to renew the policy. And had it been denied in an answer that such consideration did so move, the defendant, under the issue thus made, could have introduced evidence to disprove the fact that any such consideration had thus moved.

There was no necessity to make a proof of loss as required by the terms of a policy, which had been agreed to be, but never was, renewed, and which the defendant, repudiating its contract, refused to renew. *Tayloe* v. *Fire Ins. Co.*, 9 How. 390.

The demurrer was therefore properly overruled, and the judgment should be affirmed.

We concur: BELCHER, C. C., HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 213

CROSSMORE *v.* PAGE and another. (No. 11,798.)

(*Supreme Court of California.* August 24, 1887.)

PROMISSORY NOTES—INTERPRETATION—DEFAULT.

A promissory note provided that "if default be made in the payment of the interest as above provided, then this note shall immediately become due at the option of the holder thereof." *Held*, that the holder was entitled only to a reasonable time after default in which to exercise his option, and that seven months was not a reasonable time.

Commissioners' decision. Department 2.

FOOTE, C. This is an action to foreclose a mortgage given to secure the payment of a promissory note executed by Page to Rhodes, and by the latter indorsed to the plaintiff. The court, sitting without a jury, rendered judgment as prayed for against both Page and Rhodes, but upon motion duly made granted a new trial as to Rhodes. From that order the plaintiff appeals. The note, to secure the payment of which the mortgage was executed, reads as follows:

"$8,153.50. STOCKTON, CAL., June 30, 1884.

"On or before three years after date, without grace, I promise to pay to Alonzo Rhodes, or order, the sum of eighty-one hundred and fifty-three and fifty one-hundredths dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin, at the rate of eight (8) per cent. per annum from date until paid, interest payable annually, and if not so paid as it becomes due to be added to the

principal and become a part thereof, and bear interest at the same rate; but if default be made in the payment of the interest, as above provided, then this note shall immediately become due, at the option of the holder thereof.

"C. A. PAGE."

The contract was that in case of default in the payment of interest "this note shall immediately become due, at the option of the holder thereof." This is not the same as saying that the note shall become due immediately *upon* the option of the holder. The meaning is that the note is to become due immediately upon the default, at the option of the holder. And this is a different thing from saying that it shall become due seven months after default at the option of the holder. The holder was entitled to a reasonable time to exercise his option; but this time was nothing like what elapsed before the election was made. To allow him to wait seven months before doing anything, would be to make the contract read that in case of default the holder has the option to make the note become due at an indefinite time after default, whereas, what it says is that it shall become due immediately upon the default, at the option of the holder, which is to be exercised at furthest within a reasonable time. In exercising a right like this, the holder must keep within the terms of his contract. Not having done this he had to wait until the next installment of interest should fall due and remain unpaid, which had not taken place when this action was brought. This being so, it may well be presumed that the court below came to the conclusion, after a re-examination of the evidence given upon this point, that it did not sustain the decision, and therefore granted a new trial; and it is our opinion that the order made in the premises was right, and should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

73 Cal. 323

PEOPLE *v.* GOSLAW. (No. 20,320.)

(Supreme Court of California. August 31, 1887.)

MURDER—EVIDENCE—DEADLY INTENT.

On the trial of an indictment for murder, it was shown that just previous to the assault defendant was enraged at deceased, and was making search for him; that immediately after defendant entered the house where deceased was, heavy blows were heard, and defendant was then pulled away from deceased, who had received on the head eight blows apparently with a heavy, blunt instrument, any one of which was sufficient to cause death. Defendant was young, large, and powerful, while deceased was old and feeble. Deceased made no resistance, and gave defendant no provocation. *Held* sufficient proof of deadly intent.

In bank. Appeal from superior court, Santa Clara county; BELDEN, Judge.

J. H. Campbell, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted of the crime of murder in the first degree, and adjudged to suffer the death penalty. The only point made is that there was no evidence which could justify a verdict of murder in the first degree. There can be no question as to the proof of malice. There was not the slightest provocation, either by word or deed, and the killing was most cruel and brutal, showing plainly an abandoned and malignant heart. The only contention open to the defendant is that he intended to inflict upon the deceased a cruel and unprovoked beating, but did not intend to take his life. On this appeal we can only examine the evidence to ascertain whether there was any testimony tending to show that the assault was with deadly intent.

We think there is an abundance of such proof. The deceased, Henry Grant, was a feeble old man, who had once been engaged with the defendant in the business of house-moving at Los Gatos. Grant had procured some tools from a contractor at San Jose, who had demanded their return. Defendant desired to get them from Grant, but was informed that the owner had sent for them. Defendant then went to San Jose and asked the owner to loan them to him, but was refused. At this he returned to Los Gatos, where, late in the evening, he was informed that deceased had sent the tools to the owner at San Jose. He became very angry, and started to hunt the deceased. He made inquiries at different places for him, and, not finding him, started for Grant's house, which was one-half mile distant. He was accompanied by his younger brother. Just as they reached the gate in front of Grant's house, defendant was heard to say: "I won't hurt him. Oh, no! I'll not hurt him." The remark was understood, not as indicating a peaceful intent, but as an ebullition of rage. The defendant, who is a large, powerful man, then went into the house, and immediately heavy blows were heard. Defendant's brother rushed into the house and pulled defendant away from the insensible form of the deceased, who had received eight crushing blows upon the head, apparently made with some heavy, blunt instrument, although no weapon was found. Defendant afterwards admitted, in reference to the assault: "He made no resistance; he had nothing in his hand; it was simply my damned temper that led me into it."

It is not true that there was no evidence of the use of a weapon; on the contrary, the character of the wounds indicated that the injuries were not inflicted with the naked fist. Here a feeble old man, assaulted by a young man, powerful beyond the average of men, was killed by eight cruel blows upon his head, from which he never recovers consciousness. And it appeared that any one of several of these blows would have been sufficient to produce death. The old man had given no provocation in the first place, did not at the time say or do anything to excite the anger of the defendant, and made no resistance. Under such circumstances we cannot say there was no evidence to satisfy the jury that the defendant intended the natural and probable consequences of his acts. The judgment is affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.; MCKINSTRY, J.: SHARPSTEIN, J.

73 Cal. 307

SULLIVAN and another *v.* WALLACE and another. (No. 11,661.)

(*Supreme Court of California.* August 31, 1887.)

1. NEW TRIAL—INSUFFICIENT EVIDENCE—DISCRETION OF TRIAL COURT.
 Where the court granted a motion for a new trial without stating its reasons, but one of the grounds of the motion was that the evidence was insufficient to justify the findings, and the record showed that there was a conflict in the evidence material to the issues, *held*, a proper exercise of the discretion of the court.
2. SAME—NOTICE OF MOTION—TIME OF FILING.
 Where a notice of motion for a new trial was filed in the clerk's office on the eleventh day after the notice of decision was served by mail, and the record showed that the distance between the place of deposit and place of address of the notice of decision was over 70 miles, *held*, under Code Civil Proc. Cal. § 1013 giving an extension of time in certain cases of service by mail, that the notice of motion was filed in time.
3. SAME—POWER OF COURT TO SUSPEND RULES.
 A court may, whenever the purposes of justice require it, suspend its rule requiring *ex parte* orders to be served, or except a particular case from its operation.
4. SAME—STATEMENT ON MOTION FOR—CERTIFICATE OF JUDGE.
 The certificate of the judge who settled the statement on motion for new trial, carries with it the presumption that it was regularly and properly done.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, judge.

Ed. M. Martin, for appellants. *R. B. Wallace*, for respondents.

FOOTE, C. This is an action of ejectment; the plaintiffs had judgment, but upon motion duly made, the court below granted a new trial, and from the order made in the premises this appeal is taken.

The respondents' motion to dismiss the appeal should be denied, as the affidavit of the appellant's counsel shows that service of the notice of appeal was properly had on the attorney of the former.

The appellants contend that the notice of motion for a new trial was not filed in the clerk's office until the eleventh day after the notice of the decision had been deposited in the post-office at Sacramento, postage paid, and properly directed to the respondents' attorney of record, at his office in San Francisco. But it is shown that the distance from Sacramento to San Francisco is 70 miles, and section 1013, Code Civil Proc., with reference to the service of such a notice as that of the decision in a case is as follows: "In case of service by mail, the notice or other paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, *but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised, or act be done, is extended one day for every twenty-five miles distance between the place of deposit and the place of address*, such extension, however, not to exceed ninety days in all."

Here the act to be done by the adverse party, after the service of notice of decision, was the filing and serving of the notice of intention to move for a new trial, and as it appears by the record that the distance between the place of deposit and the place of address, as regards the first notice, was 70 miles, the attorney for the appellants had 12 days from date of the deposit of the first notice in the post-office at Sacramento, within which to file and serve the notice of motion; that is, until the twelfth day of January, 1885, and it was filed and served one day before that time.

The appellants also argue that the statement on motion for a new trial should not have been settled, because of the fact that it was not served as required by law. The certificate of the judge who settled the statement carries with it the presumption that it was regularly and properly done, for "in the absence of anything appearing to the contrary, the legal intendment would arise, from the fact of the bill being signed by the judge, that the same was done regularly." *People* v. *Martin*, 6 Cal. 477; Hayne, New Trials, § 146; *Valentine* v. *Stewart*, 15 Cal. 396; *Young* v. *Rosenbaum*, 39 Cal. 646. The statement contains nothing sufficient to overcome this presumption. It is claimed, however, in opposition to this view, that the trial judge illegally extended the time within which to settle the statement, because a copy of the order made in the premises was not *served* on the attorney of the opposite parties according to a rule of the court requiring that to be done in the case of the making of all *ex parte* orders. "Rules of court are but a means to accomplish the ends of justice, 'and it is always in the power of the court to suspend its own rules or to except a particular case from *their* operation, whenever the purposes of justice require it.'" *Pickett* v. *Wallace*, 54 Cal. 148. In this case the trial judge seems to have followed the rule thus laid down. The court below granted the motion for a new trial, and set aside the judgment, but did not state any reason for its action in the premises. One of the grounds, however, specified and relied on by the moving party, was that the evidence was insufficient to justify the findings, and the record shows that a conflict did exist in the evidence material to the issues raised by the pleadings, hence

we can see no abuse of the discretion vested in that tribunal in making the orders appealed from, and they should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.

73 Cal. 285

BELL, Adm'r, etc., *v.* HUDSON and others, Ex'rs, etc. (No. 12,041.)

(*Supreme Court of California.* August 30, 1887.)

1. PARTNERSHIP—ACCOUNTING—DELAY IN BRINGING SUIT.
Where, in a suit for an accounting brought by the administrator of a deceased partner, appointed 25 years after his decease, against the executors of the surviving partner, also deceased, the complaint shows that the surviving partner continued in the individual possession of all the real and personal property of the partnership, and managed and disposed of the same as he saw fit, for 25 years after his partner's decease, and fails to allege that the heirs of plaintiff's decedent had not knowledge of the proceedings of defendant's decedent, or that there was any impediment to their action, a demurrer to the complaint will be sustained on the ground of staleness.

2. SAME.
In such a case an allegation in the complaint that the real estate had at all times stood, and still did stand, in the name of the partners, will not avail to save the action as to the real estate, as the action cannot be regarded either as one for partition, ejectment, or for mesne profits.

Commissioners' decision. Department 2.

Appeal from superior court, Yuba county; KEYSER, Judge.

Hundley & Gale and *A. F. Jones*, for appellant. *W. G. Murphy* and *W. C. Belcher*, for respondents.

HAYNE, C. According to the complaint, the material facts are as follows: In 1849, John A. Bell and William M. Bell became partners "in the business of buying and selling stock and the purchase of real and personal property." The business was carried on until the death of John A. Bell, in 1859, at which time there was on hand belonging to the firm, "a large amount of personal property, consisting of stock cattle, beef cattle, horses and mares, of the estimated value, as plaintiff is informed and believes to be true, of $50,000, real estate situated in the county of Sutter and state of California, and in the county of Westmoreland, state of Pennsylvania, of the estimated value, as plaintiff is informed and believes to be true, of $10,000; which said real estate has at all times since the same was acquired and still does stand in the names of said partners, John A. and Wm. M. Bell, together with notes and other demands of the estimated value of over $10,000, as plaintiff is likewise informed and believes to be true, besides other property to the plaintiff unknown." No administration was had upon the estate of John A. Bell until June 3, 1885, when the plaintiff was appointed administrator. In the mean time "and up to the third day of June, A. D. 1885, the said William M. Bell has continued, and did continue, individually in the possession of the whole of said real and personal property, and to manage and carry on said business, and dispose of said property, and to collect the debts and things in action, and to manage and control all the property in anywise belonging to said partnership, and during the time aforesaid used the said property in any manner he saw fit, and has sold and disposed of said property, and changed it into other property, and realized thereon large sums of money, the amount of which plaintiff does not know and cannot ascertain." It is not alleged that the heirs of John A. Bell were ignorant of these proceedings on the part of William M. Bell, or that there were any impediments to the prosecution of their

claims, or that they made any demand upon him, or in any way asserted their claims during his life-time. He died on June 3, 1885, and the defendants were appointed executors of his will. The complaint goes on to allege that "the said plaintiff has requested and demands of the said defendants a statement and account of said copartnership transactions, which the said defendants have neglected and refused to give; and that he demanded of the said defendants that they deliver over all property due and owing, belonging, or coming to him as administrator of the estate of John A. Bell, deceased, and that they pay over to him as such administrator, all sums of money as were due to the estate of John A. Bell, deceased, as his part of said partnership assets and property, which they have likewise failed to do." The prayer is for an accounting and for general relief.

The court below sustained a demurrer to the complaint, and, the plaintiff not amending, final judgment was entered in favor of the defendants. Two grounds are urged in support of the judgment. It is argued, in the first place, that the claim is barred by the statute of limitations, and in the second place that the claim is so stale that a court of equity will refuse to enforce it.

1. In the view we take of the case, it is unnecessary to pass upon the first question. Assuming in favor of the plaintiff what we are inclined to think is true, viz., that the trust is not one of those implied trusts against which the statute runs, we think that so far as the claim for relief is founded upon the partnership transaction it is stale, and that a court of equity will not aid its enforcement. This is a defense peculiar to courts of equity, and applies although no statute of limitations governs the case. *Harwood* v. *Railroad Co.*, 17 Wall. 81; *Sullivan* v. *Portland*, 94 U. S. 811; *Godden* v. *Kimmell*, 99 U. S. 201; *Sheldon* v. *Rockwell*, 9 Wis. 181; *Harrison* v. *Gibson*, 23 Grat. 224; *Stout* v. *Seabrook*, 30 N. J. Eq. 189, 190; *In re Neilley*, 95 N. Y. 390; *Groenendyke* v. *Coffeen*, 109 Ill. 329; 2 Story Eq. Jur. § 1520. It is not the same thing as equitable estoppel, although it has been termed a *quasi* estoppel, (2 Pom. Eq. Jur. §§ 816, 817,) and hence the rules governing equitable estoppel (see *Boggs* v. *Mining Co.*, 14 Cal. 279) do not apply. The ground of the doctrine was stated by TANEY, C. J., delivering the opinion of the supreme court of the United States in *McKnight* v. *Taylor*, 1 How. 168, as follows: "We do not found our judgment upon the presumption of payment, for it is not merely on presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost."

The principal foundations of the doctrine are acquiescence and lapse of time. But other circumstances will be taken into consideration. Thus it is a material circumstance that the claim was not made until after the death of those who could have explained the transaction. See *Mooers* v. *White*, 6 Johns. Ch. 368; *Barnes* v. *Taylor*, 27 N. J. Eq. 259; *German Seminary* v. *Kiefer*, 43 Mich. 111, 4 N. W. Rep. 636; *Bolton* v. *Dickens*, 4 Lea, 577; *Hatcher* v. *Hall*, 77 Va. 578. So it has been held that a change in the value and character of the property may be material. *Bliss* v. *Prichard*, 67 Mo. 187; *Allen* v. *Allen*, 47 Mich. 79, 10 N. W. Rep. 113. But as stated by DAVIS, J., in *McQuddy* v. *Ware*, 20 Wall. 19: "There is no artificial rule on such a subject, but each case as it arises must be determined by its own particular circumstances." In other words, the question is addressed to the sound discretion of the chancellor in each case. *Brown* v. *Buena Vista*, 95 U. S. 160; *Rayner* v. *Pearsall*, 3 Johns. Ch. 586; *Landrum* v. *Union Bank*, 63 Mo. 56.

The following decisions are instances of the application of the rule to facts similar to the facts of the case under consideration. In *Groencndyke* v. *Coffeen*, 109 Ill. 339, which was a suit by the heirs of the deceased partner for an accounting, it was held that a delay of 16 years rendered the claim stale. In *Codman* v. *Rogers*, 10 Pick. 119, which was a suit for an accounting brought by the representatives of the deceased partner against the representatives of the surviving partner, it was held that a delay of 17 years rendered the claim stale. In *Harris* v. *Hillegass*, 66 Cal. 79, 4 Pac. Rep. 987, which was a similar case, it was held that a delay of somewhat over 20 years rendered the claim stale. And like decisions were made in *Ray* v. *Bogart*, 2 Johns. Cas. 432, and *Harlow* v. *Lake Superior Co.*, 41 Mich. 584, 2 N. W. Rep. 913. And in *McEwen* v. *Gillespie*, 3 Lea, 205, which was a similar case, it was held that a delay of 21 years rendered the claim stale.

Now, in the present case, the complaint does not allege that the heirs of Joln A. Bell had not knowledge of the proceedings of William M. Bell, or that there was any impediment to their action, and consequently it must be presumed that they had such knowledge, and that there were no such impediments. *Marsh* v. *Whitmore*, 21 Wall. 184, 185; *McQuddy* v. *Ware*, 20 Wall. 19; *Harwood* v. *Railroad Co.*, 17 Wall. 81. Such being the case, we think that the fact that they delayed the assertion of their claim until the death of the surviving partner, a period of 25 years, is sufficient to make their claim stale.

It is contended, however, that this question cannot be raised on demurrer. But the preponderance of authority (and we think the better reason) is to the effect that it can. *Lansdale* v. *Smith*, 106 U. S. 392, 1 Sup. Ct. Rep. 350; *Bliss* v. *Prichard*, 67 Mo. 189, 190; *Shorter* v. *Smith*, 56 Ala. 210. The defense is, in substance, that the bill does not show equity; or, in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action. This was one of the grounds of the demurrer; and if it had not been it would not have been waived, but could be taken at any time. Code Civil Proc. § 434. We think, therefore, that so far as the claim for relief is founded on the partnership transactions a court of equity will not enforce it.

2. But the complaint alleges that the real property "has at all times since the same was acquired and still does stand in the names of said partners, John A. and William M. Bell." Does this, in connection with the other allegations, state a cause of action of any kind? We think not. The action cannot be considered as for partition between co-tenants, because the administrator is not a co-tenant, and cannot bring such an action. Freem. Co-Tenancy, § 454. It cannot be treated as an action of ejectment between co-tenants, because what is alleged does not amount to an averment of ouster, (*Carpentier* v. *Webster*, 27 Cal. 561; *Carpentier* v. *Mendenhall*, 28 Cal. 487;) and it cannot be treated as an action for mesne profits, because (if for no other reason) there is no averment that the use of the land was of any value.

We see no aspect in which the complaint states a cause of action, and we therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 299

TURNER *v.* WHITE and another.

(*Supreme Court of California.* August 31, 1887.)

1. PLEADING—COMPLAINT—CONCLUSIONS OF LAW—ALLEGATION OF OWNERSHIP.
The complaint in an action to quiet title alleged that the property in controversy belonged to one of the defendants at a certain date; that execution proceedings were had against him and the property sold and conveyed by the constable; "that *by virtue* of the deed of conveyance from said constable, plaintiff became seized of and ever since has been seized of and the owner of said premises, and entitled to the possession thereof." *Held*, that this was not an averment of unqualified ownership in the plaintiff, but a mere conclusion of law, upon which no issue could be based.

2. QUIETING TITLE—EVIDENCE OF OWNERSHIP—ADMISSIONS IN PLEADINGS.
In an action to quiet title, where the ownership of one of the defendants to the property in controversy at a certain date stood admitted by the pleadings, it was error to permit such defendant to testify that the property had never belonged to him.

Commissioners' decision. Department 1.
Appeal from superior court, Nevada county; WALLING, Judge.
Thos. Ford, for appellant. *Frank Power*, for respondent.

HAYNE, C. The action was brought to set aside a deed from the defendant James White to the defendant Martha White, as being in fraud of creditors. But at the trial the plaintiff abandoned his charge of fraud; and both court and counsel seem to have come to the conclusion that the property was not really included in it; and the action appears to have proceeded as an action to quiet the plaintiff's title. The plaintiff's theory was that he acquired the title through a sale under execution against the defendant James White. The defendant's theory, as developed by the evidence, was that James White never had any interest in the property. The validity of the execution proceedings not being questioned, it will be seen that the ownership of James White, at the time of the execution sale, was a central point in the case. But this point must be resolved in favor of the plaintiff upon the pleadings. The complaint alleges that at the time of the levy James White was the owner. The only thing approaching to a denial is the following: "Defendants deny that the plaintiff is the owner or in possession of the property in his complaint described, but aver that it is the property of the defendant Martha S. White; deny that the plaintiff ever was the owner of any of said property." With reference to the averment that "it is the property of the defendant Martha S. White," it is sufficient to say that at most it speaks only from the time of the commencement of the action, and is not at all inconsistent with the allegation that at some prior time James White was the owner.

With reference to the remainder of the paragraph quoted, we were at first inclined to treat it as sufficient, upon the ground that the allegation of the plaintiff's ownership was the ultimate fact alleged, and that the averments of how he acquired the title were averments of mere evidence which need not be denied. But after consideration we do not think the allegation in the complaint can be so treated. It is perfectly true that, in general, an allegation that a party is the owner of real property is an allegation of an ultimate fact, and not of a conclusion of law. *Payne* v. *Treadwell*, 16 Cal. 242; *Garwood* v. *Hastings*, 38 Cal. 217; *Ferrer* v. *Insurance Co.*, 47 Cal. 431. But as held in *Levins* v. *Rovegno*, 12 Pac. Rep. 161, the same averment or statement may be of a fact or of a conclusion, according to the context. Now, in the present case the complaint first avers the ownership of James White at a certain date, and then sets out the execution proceedings against him, and then has the following: "That *by virtue* of the deed of conveyance from said constable, plaintiff became seized of, and ever since has been seized of, and the owner of, said premises, and entitled to the possession thereof." This we think is

not the averment of unqualified ownership in the plaintiff, but only of the consequence resulting from the deraignment set forth. In other words, it is a mere conclusion, and its denial raises no issue. The allegation of the ownership of James White at the time of the levy, therefore, stands admitted. In this condition of the pleadings, it was error to allow James White to testify, against a proper objection, that the property had never belonged to him; and the findings to that effect is against the admissions of the pleadings.

The deed from James to Martha White does not help the defendants' case in this regard, because they seem to have exerted themselves to show that the property was not included in it. We therefore advise that the judgment be reversed, and the cause remanded for a new trial, with leave to the defendants to amend their answer.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded for a new trial, with leave to the defendants to amend their answer.

73 Cal. 310

PRITCHETT v. STANISLAUS CO. (No. 11,710.)

(*Supreme Court of California.* August 31, 1887.)

1. MUNICIPAL CORPORATIONS—ACTION BY MARSHAL FOR SERVICES—PLEADING ORDINANCE FIXING COMPENSATION.
 By St. Cal. 1883, p. 24, municipal corporations are divided into classes, and by section 881 of the same act, the board of trustees of cities of the fifth and sixth classes are authorized to fix by ordinance the compensation of city marshals. In an action by the marshal of a city (of the sixth class) to recover for services rendered, the complaint failed to state that the board of trustees of such city had passed any ordinance fixing the compensation of the marshal, or to state to what class of municipal corporations such city belonged. *Held*, that the complaint was demurrable.
2. CONSTITUTIONAL LAW—ACT CAL. 1883 CLASSIFYING MUNICIPAL CORPORATIONS, VALID.
 The California act of March 2, 1883, (St. 1883, p. 24,) providing for the classification of municipal corporations, is a general law, and constitutional.

Department 2. Appeal from superior court, Stanislaus county; MINOR, Judge.

Schell & Bond, for appellant. *J. R. Kittrell*, Dist. Atty., for appellee.

THORNTON, J. This action was brought by the plaintiff to recover for services rendered by him as marshal of the city of Modesto, of the county above named. The services for which a recovery is claimed are for the execution of process—such as warrants of arrest and subpœnas issued out of a justice's court of the county aforesaid, in criminal cases,—for a period extending from the fourth of May, 1885, to the ninth of January, 1886. The demurrer was sustained, and we think properly. By the act of March 2, 1883, entitled "An act to provide for the classification of municipal corporations," (St. 1883, p. 24,) it was provided as follows: "All municipal corporations within the state are hereby classified as follows: Those having a population of more than one hundred thousand shall constitute the first class; those having a population of more than thirty thousand, and not exceeding one hundred thousand, shall constitute the second class; those having a population of more than fifteen thousand, and not exceeding thirty thousand, shall constitute the third class; those having a population of more than ten thousand, and not exceeding fifteen thousand, shall constitute the fourth class; those having a population of more than three thousand, and not exceeding ten thousand, shall constitute the fifth class; those having a population of not exceeding three thousand, shall constitute the sixth class." We think this act is constitutional, as it is a general law. Const. art. 11, § 6; *Thomason* v. *Ashworth*, (opinion filed July 2, 1887,) *ante*. 615.

It is said that the city of Modesto is a municipal corporation of the sixth class, and the board of trustees of the city are authorized by law to fix by ordinance the compensation of the marshal, which compensation shall not be increased or diminished during his term of office. Such is the provision made by statute. See St. 1883, § 855, p. 268. It is further provided by section 881 of the same act (St. 1883, p. 278) that the board of trustees shall, by ordinances not inconsistent with the provisions of this chapter, prescribe the additional duties of officers and fix their compensation. The compensation fixed by the board of trustees under section 855 is to be for all duties imposed on the marshal by the act. These duties are set forth in section 880 (St. 1883, p. 277) and include the duty to execute and return all process issued and directed to him by any legal authority, and, by the same section, for the service of any process he is to receive the same fees as constables.

It may be that we cannot take judicial notice as to what class the city of Modesto belongs. But to whatever class it belongs, the marshal is not entitled to the compensation claimed from the county of Stanislaus for the services performed and set forth in the complaint in this case. The compensation allowed the marshal in the fifth and sixth classes (and there is no such officer in the other classes, first, second, third, and fourth) is to be fixed as stated above; that is to say, the same provision is as to the compensation of the marshal in municipal corporations of the fifth class as in this of the sixth. St. 1883, p. 251, § 755. It does not appear that the board of trustees of the city of Modesto has passed any ordinance fixing the compensation of the marshal, but we presume it has. If it has passed such ordinance, the marshal is only entitled to the compensation so fixed. If no such ordinance has been passed by it, then the marshal can recover nothing.

It should have been set forth in the complaint, to entitle the plaintiff to recover, to what class of municipal corporations the city of Modesto belongs, and what compensation to the marshal had been fixed by an ordinance passed by the board, and it should further appear that the claim of plaintiff accorded with such ordinance. In this view, the complaint of plaintiff is fatally defective, and the demurrer to it was properly sustained.

The judgment must be affirmed. Ordered accordingly.

We concur: McFARLAND, J.; SHARPSTEIN, J.

73 Cal. 252

PEOPLE *v.* WHEELER and another. (No. 20,270.)

(*Supreme Court of California.* August 30, 1887.)

1. FALSE IMPRISONMENT.
 A tract of land was claimed without right by the defendant W., and, while at work on a part not inclosed, cleared, or cultivated by W., complainant was seized, thrown down, bound, and carried away by the defendants. *Held*, that the defendants were properly convicted of false imprisonment.
2. CRIMINAL PRACTICE—COMMITMENT—FICTITIOUS NAME.
 In California, a defendant charged with crime may be held by the examining magistrate to answer, although in the complaint he was given a fictitious name.
3. SAME—COMMITMENT FOR FALSE IMPRISONMENT UNDER WARRANT FOR ROBBERY.
 Under Pen. Code Cal. § 872, providing for commitment to answer, the defendant may be held, after examination before the magistrate, to answer a charge of false imprisonment, the evidence being sufficient, although arrested on a warrant issued upon a complaint for robbery.

Commissioners' decision. Department 1.

Appeal from superior court, Lake county; HUDSON, Judge.

Hunsaker & Britt, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BELCHER, C. C. The defendants were tried upon an information charging them with the crime of false imprisonment, and convicted. They moved for

a new trial, and have appealed from the judgment, and order denying their motion. The facts of the case may be briefly stated as follows: In 1884 the defendant Wheeler made application to purchase from the University of California a tract of land bordering on Clear lake, in Lake county, and made a preliminary payment therefor. The land sought to be purchased was at that time unsurveyed public land of the United States. Afterwards, in February, 1885, the township embracing the land was surveyed, and on the nineteenth of April, 1886, the map of the survey was filed in the local land-office. From the time of this attempted purchase Wheeler claimed the land, and soon after the map was filed made application to have it listed over to the state. There were two cabins on the tract,—one near what is called "Chappall Bay," and the other about a mile and a half away, and situate near the lake shore. In October, 1885, Wheeler employed the complainant, John Standley, to work on this tract, chopping brush; and he continued to so work until the thirteenth of March, 1886, when he was discharged. During the time he was so employed he lived in the cabin near Chappall Bay, and cleared off one and three-fifths acres, for which he was paid by the acre. Wheeler lived in the other cabin, having in it a bed, books, cooking utensils, etc., and was there most of the time. Early in March he went away, leaving in the cabin a young man named Hall, who was also employed by him. On the nineteenth day of April, 1886, Standley went to the United States land-office, and filed there his declaratory statement to pre-empt a quarter section of the tract, and received the usual certificate and receipt from the register and receiver. The cabin then occupied by Hall was on this quarter section. On the twenty-first of April, Standley saw Hall, and told him he had a bill of sale of the cabin, and he would like to have him move Wheeler's things out as soon as possible. In compliance with this request, Hall moved Wheeler's things out of the cabin, and surrendered possession of it to Standley, who went to living in it, and commenced at once to build a new cabin for himself, some 200 yards away, and was engaged working upon it on the fourth of May following. On the twenty-third of April, Hall wrote to Wheeler, telling him of Standley's attempted location and entry upon the land. On the fourth of May, Wheeler returned, with the avowed purpose of removing Standley from the premises, forcibly if necessary. He was accompanied by four other persons, one of whom was the defendant Mooney. Wheeler and Mooney came to a point near where Standley was at work on his cabin, in a boat. They went up to him, and after some conversation Wheeler said: "You have no legal right here, and I desire you to get away." After some further conversation Mooney laid his hand on Standley's shoulder and said: "There is your boat, and I advise you to get into it." The parties then clinched, and Standley was thrown down. The other three persons then came up and assisted in holding him. Wheeler ran to the boat and got a rope, and with that Standley's hands and feet were tied. He was then placed in the boat and taken round to Chappall Bay. There he was taken from the boat and made to get into a wagon, in which he was driven away. At Chappall Bay he asked the names of the four persons who had assisted Wheeler in removing him to that point, and each one of them gave him a false name.

Before pleading to the information, the defendants moved the court to set it aside, upon the ground that they had not been legally committed by a magistrate. In support of their motion it was shown that Standley, on the fourth of May, 1886, made a complaint before a justice of the peace of Lake county, charging A. A. Wheeler, John Doe, Richard Roe, John Brown, and Richard Williams with the crime of robbery, committed in the forcibly and feloniously taking from his person a certain key. On this complaint a warrant was issued, and the proper officer made return thereon that he had arrested "the within-named defendants." An examination was had before the magistrate, and an order of commitment was indorsed by him upon the complaint as fol-

lows: "It appearing to me that the offense of robbery has not been committed, but that the crime of false imprisonment has been committed, and that there is sufficient cause to believe that the within-named A. A. Wheeler, Cornelius Mooney, J. B. Lewis, C. Stanton, and C. Harkort are guilty thereof, I order that they and each of them be held to answer the same," etc. Upon this showing, we think the court properly denied the motion. The committing magistrate was authorized to hold the defendants to answer for any offense which the evidence showed them to have committed, (section 872, Pen. Code,) and his power was not limited to such offenses as were embraced within the crime charged in the complaint. Nor was it material that all the defendants except Wheeler were given fictitious names in the complaint. The regularity of the proceeding by information did not depend in any manner upon the affidavit on which the warrant of arrest was issued, and had no connection with it. *People* v. *Velarde*, 59 Cal. 458.

At the trial the defendants sought to justify their action upon the ground that Wheeler had had the actual possession of the disputed premises for more than a year, and was entitled to retain that possession; that Standley induced Hall to surrender to him the possession of the cabin by fraudulent misrepresentations, and became a naked trespasser upon the land, and that under the law, as declared in *Atherton* v. *Fowler*, 96 U. S. 519, and *McBrown* v. *Morris*, 59 Cal. 65, he could acquire no rights to the land by his attempted pre-emption; and that Wheeler was therefore authorized to remove him, and to use so much force as was necessary to accomplish that end. The court below did not adopt defendants' theory, and therefore nearly all of its rulings were excepted to, and are now assigned as errors.

We do not think it necessary to consider separately all of the points presented. For the purpose of the case it may be conceded that Standley obtained no rightful possession of the Wheeler cabin, and that his pre-emption filing was wholly invalid. Still the question remains, were the defendants justified in removing him from the land in the manner they did remove him? In considering this question it must be observed that the land was uninclosed public land. Wheeler acquired no title to it, or right to its possession, by his application to purchase it from the university. He had a cabin upon it, and had cleared a small area, and planted some vegetables upon it. But all this evidently gave him no possession of the portions not actually occupied by him. Standley had commenced building a cabin for himself, some 200 yards distant from Wheeler's cabin. This new cabin was upon ground which had not been inclosed, cleared, or cultivated by Wheeler. While at work upon his cabin he was seized, thrown down, tied, and carried away by defendants. Upon these facts it seems to us that no plausible pretense of justification can be put forth. False imprisonment is the unlawful violation of the personal liberty of another, (section 236, Pen. Code,) and every element of the offense seems to have been fully and clearly shown.

It is enough to say of the errors alleged to have been committed by that court in the admission and exclusion of evidence, and in the refusal to give the jury certain instructions asked by defendants, that we have carefully examined the record, and are of the opinion that the rulings are proper. The judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 187

FRAZER v. OAKDALE LUMBER & WATER CO. (No. 11,799.)

(*Supreme Court of California.* August 15, 1887.)

1. PLEADING—MISTAKE IN COPY SERVED—HARMLESS ERROR.
 After setting out several causes of action and their assignment to the plaintiff, the complaint proceeded: "* * * That said defendant is now indebted to the plaintiff thereon in the sums *hereinbefore* set forth." The copy of the complaint as served, with a copy of the summons, contained the word "hereinafter" where the word "hereinbefore" occurred in the original. *Held*, that the mistake was harmless and immaterial, and did not "mislead" the defendant, or "affect his substantial rights," within the meaning of Code Civil Proc. Cal. § 475.
2. SAME—JOINDER OF CAUSES OF ACTION—CONTRACT.
 Code Civil Proc. Cal. § 427, provides that a plaintiff may unite several causes of action in the same complaint, where they all arise out of contracts, express or implied. *Held*, that a claim for work done by the plaintiff for the defendant might be united with a claim of third persons for work done by them for the defendant, and by them assigned to the plaintiff.
3. SAME—MISJOINDER—DEMURRER.
 Under the California practice, it is not a ground of demurrer that two or more causes of action are improperly united in one count.
4. ASSIGNMENT OF CLAIMS—ACTION BY ASSIGNEE—WHEN MAINTAINABLE.
 An assignee of claims for labor performed by the assignors "within two years last past" may maintain his action thereon against the debtor on the very day of the assignment.

Commissioners' decision. Department 2.

Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

On demurrer to complaint.

W. E. Turner, for the company, appellant. *F. D. & G. W. Nicol*, for Frazer, respondent.

BELCHER, C. C. In the complaint filed in this case there are set forth several distinct causes of action. The first is an account for work and labor alleged to have been performed by plaintiff for defendant at its special instance and request. The others are on account for work and labor alleged to have

been performed by other parties for the defendant at its special instance and request, and by such parties sold and transferred to the plaintiff. After setting out these several causes of action and their assignment to the plaintiff, the complaint then proceeds: "Plaintiff, further complaining, alleges that he is now the owner and holder of all said accounts; that said defendant is now indebted to him thereon in the sums *hereinbefore* set forth; that defendant has refused and neglected, and still does refuse and neglect, to pay said amounts, or any part or portion thereof, although the same is due, and payment thereof has been frequently demanded." Then follows the prayer that plaintiff have judgment against the defendant "in the sum of $912.67 upon his account for work and labor; in the sum of $165.84 upon the said assigned claim of John Borteilho; in the sum of $315.40 upon the assigned claim of John Conlin," etc.,—"said sums aggregating the sum of $3,758.93, together with costs of suit."

Service of the summons was made upon the president of the defendant corporation. In making the service the sheriff handed to the president a copy of the summons, with a copy of the complaint, in which the word "hereinbefore," as it appears in the clause before quoted, was written "hereinafter." The defendant appeared specially, and moved the court to set aside the service of summons, on the ground that no copy of the complaint, as required by law, had ever been served upon the defendant; "that the paper purporting to be a copy of the complaint, and which was handed to defendant, was not and is not a copy of the complaint as filed in said cause." The court denied the motion, and the defendant reserved an exception. Thereupon the defendant demurred to the complaint upon the grounds—*First*, that it did not state facts sufficient to constitute a cause of action; *second*, that several causes of action were improperly united.

When the demurrer came on to be heard, counsel for defendant asked that it be considered only with reference to the copy of the complaint as served. This request was refused, and an exception reserved. The demurrer was then argued, submitted, and overruled. The defendant was given time to answer, but neglected to do so, and thereupon, on motion, judgment was entered in favor of plaintiff.

1. We see nothing in the point that the court erred in not setting aside the service of summons. The mistake in writing the word "hereinafter" for "hereinbefore" in the copy of the complaint was harmless and immaterial. It could in no way have misled the defendant, or have affected its substantial rights. Section 475, Code Civil Proc. If in the complaint filed the word had been entirely omitted, or had been written as in the copy, the sufficiency of the complaint could not for that reason have been questioned. We agree, therefore, with the court below, that the copy was in all material respects a true and correct copy.

2. Nor do we see any error in the order overruling the demurrer. The complaint stated several causes of action, but they were such causes of action as may properly be united. Section 427, Code Civil Proc. They were separately stated, too, and not, as claimed, "all jumbled together" in one count. Besides, it is not made a ground of demurrer that two or more causes of action are improperly united in one count. *Bernero* v. *Insurance Co.*, 65 Cal. 386, 4 Pac. Rep. 382.

3. Some of the claims were assigned to the plaintiff on the day the complaint was filed, and the point is made that the defendant had all that day to pay them, and the action was therefore prematurely commenced. There is nothing in this point. The claims were for labor performed for the defendant by the assignors "within two years last past." The claims appeared to be due, and each claimant had a present right to commence an action. By the assignments the plaintiff acquired all the rights of his assignors.

The judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 193

BALL and others *v.* NICHOLS. (No. 11,934.)

(*Supreme Court of California.* August 16, 1887.)

1. APPEAL—BY DEFENDANT—ERRORS AFFECTING CO-DEFENDANT.
On an appeal by one of several defendants, the appellant will not be heard to urge error either in the pleadings or the decree which affect his co-defendants only.

2. ADVERSE POSSESSION—PLEADING—PAYMENT OF TAXES.
Title by adverse possession may be pleaded without alleging that the taxes have been paid, as required by Code Civil Proc. Cal. § 325, as amended in 1878; the payment of such taxes is a matter of proof, and not of pleading.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Suit to reform a deed and quiet title, by C. R. Ball, respondent, against John H. Nichols, appellant, William George, and Charles Genasci, guardian.

A. Burrows, for appellant. *Chas. W. Kitts*, for respondent.

FOOTE, C. This is an action to reform a deed for misdescription of land conveyed by it, and to quiet title. It was tried upon the issues raised by an amended complaint of the plaintiff, the answer of the defendants, and a cross-complaint by one J. H. Nichols, and the answer of the plaintiff thereto; the amendments to which latter pleading having been omitted from the transcript, but supplied upon suggestion of a diminution of the record. Judgment was rendered for the plaintiff, and from it Nichols alone of the defendants appeals. A point made by his counsel is that the complaint is insufficient, and shows no cause of action, and for such alleged defect that the judgment should be reversed. The appellant cannot be heard to complain as to any defect in the complaint so far as affects his co-defendants, as they do not appeal. The title to the land in question and the right to have the deed reformed were properly brought in issue by the complaint of plaintiff, the cross-complaint of Nichols, the answer of the plaintiff, and the amendments thereto, and there are findings on all the issues raised by those pleadings. The wards of Genasci are not bound by the decree in the case, as they are not mentioned in it, yet that omission affects them only, and the appellant cannot be heard in their behalf. He and the plaintiff obtained their title from a common source, and if, at the time when he obtained his subsequent deed to the land, he had full notice of its prior sale to the plaintiff, and of the fact that the latter's deed was intended to have the land in dispute included in it, but that it was omitted by a mistake of the parties as to its proper description, then he has nothing to do with the question as to whether the Genasci mortgage covered the plaintiff's land. All the concern he can have in the matter is that it affects that land which he has an interest in; and, even if there was no finding upon the allegation of the existence of the mortgage, it was immaterial so far as Nichols was concerned, but there is a finding which shows that the mortgage was invalid as to the plaintiff's land, as the mortgagee was charged with notice of the plaintiff's claim to the premises in dispute, and therefore when he took it knew that his mortgage could not legally give him any claim thereon.

It is urged that the statement in the complaint of the plaintiff's claim of title by adverse possession is not sufficient, because it is not alleged that the taxes have been paid, as required by section 325, Code Civil Proc., as amended in 1878. But the fact that such taxes had been paid, if essential to the plaintiff's claim through adverse possession, was only a matter of evidence, and

was not a necessary thing to have been pleaded. The language used in the case of *Webb* v. *Clark*, 65 Cal. 56, 2 Pac. Rep. 747, cited to us by the appellant's counsel in support of his view of this matter, does not conflict with what we have just said. Neither do we think that any of the findings are outside of the issues raised by the pleadings.

Upon the whole record we perceive no prejudicial error, and the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 238

BOSTWICK *v.* MAHONEY. (No. 11,969.)

(*Supreme Court of California.* August 27, 1887.)

1. APPEAL—WHAT REVIEWABLE—OBJECTION TO JURY—RECORD.
An objection to the jury that tried the case, upon the ground that the superior court of the county and the board of supervisors had not ordered and drawn jurors for the year, as provided by Code Civil Proc. Cal. § 204 *et seq.*, and that the jury was not part of the regular jurors, under section 210 of said Code, will not be considered on appeal, where there is nothing in the record to show that the jury was not what the appellant claims it ought to have been.

2. UNLAWFUL DETAINER—TITLE OF TENANT—PAROL EVIDENCE.
In an action of unlawful detainer, for holding over, the defendant, when a witness for himself, was asked if he "*held the legal title*" to the premises in question on a certain day. *Held*, that an objection to the question, on the ground that the tenant could not prove title in himself by parol, was properly sustained.

3. EVIDENCE—OFFER TO PROVE—INCOMPETENCY.
Where an "offer to prove," by a certain witness, contains testimony which is clearly incompetent, it is not error to reject it, although part of the evidence embraced in the offer *is* competent.

Department 2. Appeal from superior court, Stanislaus county; WM. O. MINOR, Judge.

Stonesifer & Minor, for Mahoney, appellant. *Carter, Smith & Keniston* and *W. L. Dudley*, for Bostwick, respondent.

MCFARLAND, J. This is an action of unlawful detainer. Verdict and judgment were for plaintiff, and defendant appeals from an order denying a motion for a new trial, an appeal from the judgment having been dismissed. Plaintiff proved a written lease of the premises; the expiration of the term; due notice and demand; and all other facts necessary to a recovery. Defendant's defense seemed to rest upon the theory that he could defeat the action by showing that the lease was intended to be a mortgage; but the only exceptions which appear in the very meager record go to certain specific rulings made by the court during the progress of the trial.

Appellant objected to the jury upon the ground that the superior court of the county and the board of supervisors had not ordered and drawn jurors for the year as provided in section 204 *et seq.* of the Code of Civil Procedure, and that the jury in attendance was not part of the regular jurors under section 210 of said Code. But as there is nothing whatever in the record to show that the jury was *not* what appellant claims it ought to have been, we are relieved from any further consideration of that point.

The second exception is to the ruling of the court in sustaining an objection to the following question asked of defendant when a witness for himself: "Will you state whether on the ninth day of August, last year, you *held the legal title* to that property?" This would be a convenient, and exceedingly expeditious way to prove legal title; but the methods by which courts arrive at such proof, though slower, are more satisfactory.

The third exception is to a ruling sustaining an objection to a long question to the same witness, or rather to an "offer to prove by this witness," which covers about two pages of the transcript, and commences in this way: "Then, to get ourselves on the record, we will offer to prove, *by this witness*, that he (defendant) was seized in fee, possessed of and entitled to the possession of the land in dispute here," etc. Many other things are offered to be proved "by this witness" which rest on record or documentary evidence; and the ruling of the court was obviously correct, although the offer may have contained some other things not objectionable. And it may be remarked that "an offer to prove" is a very loose and unsatisfactory method of proposing evidence. Unless the parties agree about it, it is much the better way to ask the proposed question of the witness, or to offer the document sought to be introduced.

There is a general exception to the charge of the court; but no error is pointed out, and the charge, which is short, seems to be entirely correct. Order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

73 Cal. 265

HEPPE v. JOHNSON and another. (No. 11,785.)

(*Supreme Court of California.* August 30, 1887.)

1. COUNTY TREASURER—EMBEZZLEMENT—SURPLUS AFTER MORTGAGE FORECLOSURE—LIABILITY OF SURETIES.
 The surplus remaining after a mortgage foreclosure proceeding, was paid into court, and, by the clerk of the court, turned over to the county treasurer, as required by St. Cal. 1863–64, p. 468. The county treasurer turned the money over to his successor in office, by whom it was embezzled. In an action by the party entitled to the surplus, against the sureties upon the official bond of the embezzling treasurer, *held*, that no advantage could be taken by the sureties, of any irregularities there may have been in making the deposit by the clerk with the county treasurer.
2. SAME—BOND—ACTION AGAINST SURETIES—PARTIES.
 In an action against the sureties upon the official bonds of a county treasurer, each bond being, in form, joint and several, the plaintiff can join as defendants one or more or all the persons severally liable upon the bonds, under Code Civil Proc. Cal. § 383, which provides that "persons severally liable upon the same obligation or instrument may all or any of them be included in the same action, at the option of the plaintiff."
3. SAME—EMBEZZLEMENT—WHEN MADE—LAST TERM.
 Where money is embezzled by a county treasurer, in the absence of proof as to when it was misappropriated, the presumption is that the misappropriation took place at the end of his last term, and that the liability of sureties arises under the last bond.
4. SAME—JUDGMENT AGAINST SURETIES—FORM.
 In an action against the sureties upon the official bond of a county treasurer, for money embezzled by him, the judgment rendered should not be in the ordinary form for the recovery of money, but should be a separate judgment against each of the sureties for the full amount for which he made himself liable in the bond, and costs, with a proviso that each judgment should be satisfied by the collection or payment of the amount of the defalcation and costs; following *People* v. *Rooney*, 29 Cal. 643, and *People* v. *Love*, 25 Cal. 520.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

Freeman, Johnson & Bates, for appellant. *Taylor & Holl*, for respondents.

BELCHER, C. C. On the twenty-first day of February, 1873, a decree of foreclosure was entered in the district court in and for Sacramento county, in favor of Nicholas Schadt against William Nicholas Heppe, administrator of the estate of Jacob Heppe, deceased, and others. This decree, among other things, provided: "That if there be any surplus after the payment of the moneys due plaintiff, with interest, attorney's fees, costs, and accruing costs,

that such surplus be paid into court, to be disposed of under the order of the court to the persons entitled thereto." In pursuance of the decree the sheriff sold the mortgaged property, and, after paying the plaintiff, and all costs, as required, had left in his hands a surplus of $1,178.85, which he paid to Lauren Upson, clerk of the court, on the twenty-first day of March, 1873. Immediately on receiving the money, Upson deposited the same with John Bellmer, then the county treasurer, and took from him a receipt which, after reciting the title of the court and cause, reads as follows: "Received, Sacramento, March 21, A. D. 1873, of Lauren Upson, clerk of the court aforesaid, the sum of $1,178.85 in gold coin, paid into court in the above-entitled action, to be kept by me as a special deposit, subject to the order of court. JOHN BELLMER, County Treasurer."

On the eighteenth of June of the same year an order of court was made which, among other things, declared the plaintiff here entitled to $589.42, one-half of the money paid into court by the sheriff, and directed that such sum be paid by the clerk of the court to the lawful guardian of plaintiff. The other half of the money was paid out, on the order of the court, to the parties entitled thereto, but the plaintiff's share was kept by Bellmer in a sack, with a tag on it, on which was written the amount of money, and the name of the case to which it belonged, until March 6, 1876, when his term of office expired. On that day he turned it over to D. E. Callahan, his successor in office, and took his receipt therefor. The money was deposited with Bellmer, and by him turned over to Callahan, without any order of court or of the county auditor, and no entry of it was ever made in any of the county books. Callahan held the office of county treasurer during three successive terms, the last term ending on the first Monday of January, 1883. It does not appear what became of the money after it was given to Callahan. It was never demanded of him by plaintiff, or by any person in her behalf, nor paid to her, or any one for her, nor was it turned over by him to his successor in office. Callahan died, and this action was afterwards brought to recover the money, with interest and costs, from the defendants, who were sureties on each of his official bonds.

The defendants answered to the complaint, and, among other defenses, pleaded that neither treasurer was authorized to receive the money sued for in his official capacity, and also that there was a defect of parties, because on each of the bonds there was a large number of sureties who were not made parties defendant in the action. At the trial defendants objected to all evidence showing the receipt of the money by the treasurer, and their objections were overruled. They also moved for a nonsuit, upon the ground that there was a failure to prove any of the material allegations of the complaint, and this motion was denied. At the conclusion of the trial, judgment was entered in favor of the plaintiff, and from that judgment, and an order denying a new trial, this appeal is prosecuted.

When the mortgage referred to was foreclosed the Code provided that, if there be surplus money remaining in a foreclosure proceeding, after payment of the amount due on the mortgage, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in the court. Section 727, Code Civil Proc.

In April, 1864, an act was passed by the legislature entitled "An act concerning moneys deposited in courts of record of this state." St. 1863–64, p. 468. The first section of the act provides that "in all cases in which the statutes of this state authorize the deposit of moneys in the courts of record of this state, the moneys so deposited shall be paid to the clerk of the court, who shall deposit them, in his name of office, with the treasurer of the county." The second section makes it the duty of the treasurer "to receive such deposits of moneys from the clerk of the court as special deposits, and to keep each deposit entirely separate from all other moneys under his control,

and to give to the clerk making such deposits receipts for the same, which receipts shall state the court in which action is pending, and also the title of the action in which such deposit is made, and the amount so deposited." The third section provides that for the safe-keeping of all moneys so deposited the treasurer shall be responsible upon his official bond.

It is claimed for the appellants that this act was repealed when the Codes took effect on the first day of January, 1873. Section 18 of the Code of Civil Procedure declares that "in all cases provided for by this Code, all statutes, laws, and rules, heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated." If the act was repealed by this provision it was because the subject of the act was one of the "cases provided for" by the Code. We have not been cited to any sections of the Code in force in 1873, which cover the ground occupied by the statute, nor do we know of any. Sections 572 and 573, Code Civil Proc., provide for a different case. In 1874 a new section was added, numbered 2104, which seems to take the place of the statute. In our opinion the act was in force in 1873, and it controlled and justified the action of the clerk.

It is further contended that the treasurer was not authorized to receive the money from the clerk, because it was not accompanied by the certificate of the auditor, as provided in sections 4145 and 4217 of the Political Code. On the other hand, it is claimed for the respondent that these sections have no application to special deposits made by the clerk of a court of record. However this may be, it is clear that the money was deposited and receipted for as required by the act of 1864. Bellmer received it without question, and held it during his term of office, and then turned it over to his successor. It was evidently his duty to so turn it over, and we can perceive no irregularity in the manner of his doing it. Now, if it be conceded that Bellmer received the money irregularly, does it follow that Callahan, after he received it, could embezzle it without any official responsibility? Suppose Bellmer had received from the tax collector public funds, without the certificate and discharge required by the Political Code, and had regularly turned the money over to Callahan, could Callahan have embezzled that money and not be responsible for it on his official bond? We think not. It seems to us that when Callahan received the money in question, whatever irregularities there may have been in making the deposit with Bellmer, he received it in his official capacity, and was bound to pay it out, on the order of the court, or turn it over to his successor in office.

The point that there was a defect of parties is not maintainable. Each of the bonds on which the defendants were sureties was in form joint and several. Section 958, Pol. Code. Section 383 of the Code of Civil Procedure provides that "persons severally liable upon the same obligation or instrument, * * * may all or any of them be included in the same action at the option of the plaintiff." Under this section, the plaintiff had the right, at her election, to join as defendants one or more or all the persons severally liable upon the same obligation or instrument. *People* v. *Love*, 25 Cal. 526; *People* v. *Evans*, 29 Cal. 436.

If the defendants are liable at all, we are asked to determine under which of the three bonds their liability arises. It was the duty of Callahan to safely keep the money and turn it over to his successor. In the absence of proof as to when it was misappropriated, the presumption must be that the misappropriation took place at the end of his last term, and the liability would therefore be under the last bond.

The judgment rendered in the case was in the ordinary form of a judgment for the recovery of money. That is not the proper form in a case like this, as was held in *People* v. *Love*, 25 Cal. 520, and in *People* v. *Rooney*, 29 Cal. 643. The case should be remanded to the court below, with directions to pro-

ify the judgment in accordance with the cases cited, and as modified it should stand affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the cause is remanded to the court below, with instructions to modify the judgment in accordance with the views above expressed, and as so modified the judgment is affirmed.

73 Cal. 313

PEOPLE *v.* KUNZ. (No. 20,292.)

(Supreme Court of California. August 31, 1887.)

1. JURY—CHALLENGE FOR ACTUAL BIAS—EXAMINATION.
 A proposed juror who had testified to holding an opinion as to the guilt or innocence of the defendant, but that he could give him a fair and impartial trial, was asked, in support of a challenge for actual bias, whether the opinion was adverse to defendant, and the question was excluded. *Held* error; following *People* v. *Brown*, 14 Pac. Rep. 90. MCFARLAND, J., dissenting.
2. SAME—CHALLENGE SUSTAINED—REVIEW OF RULING.
 The action of the court in sustaining a challenge to a juror, there being no exception to any ruling upon the admission or rejection of evidence, cannot be reviewed on appeal.
3. CRIMINAL PRACTICE—TESTIMONY OF ACCOMPLICE—CORROBORATION.
 It is not necessary that every fact sworn to by an accomplice shall be specifically corroborated.
4. SAME—SUFFICIENCY OF CORROBORATING TESTIMONY—QUESTION FOR JURY.
 Where, independent of the evidence of an accomplice, there is evidence tending to connect the defendant with the commission of the offense, the question of its sufficiency is for the jury.[1]

Appeal from superior court, Trinity county; T. E. JONES, Judge.

D. G. Reid and *J. N. Gillett*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. This case must be reversed on the authority of *People* v. *Brown*, 14 Pac. Rep. 90. On the preliminary examination of the jurors, three of them announced, in response to proper questions, that they each had decided opinions as to the guilt or innocence of the defendant, but thought they could give the defendant a fair and impartial trial. Each was challenged for actual bias by the defendant, who then, to further show the nature of the bias, asked whether the opinion was adverse to the defendant. This question was in each case objected to, the objection sustained, and an exception noted. The defendant challenged the jurors peremptorily, and before the panel was completed exhausted all his peremptory challenges. The question was so recently before us in the case above cited that further discussion of the point is unnecessary. Such evidence has always been held admissible in this state upon a challenge for actual bias, and there are no decisions in which a contrary opinion is intimated. One Kerlin was called and examined on *voir dire* as to his qualifications to serve as a juror. He was challenged by the district attorney for actual bias. There is no exception to any ruling of the court upon the admission or rejection of testimony, and this court cannot review the action of the court in sustaining the challenge. We understand that the corroborating evidence goes much beyond proof of mere threats on the part of the defendant. There was evidence outside of that of the accomplice of a conspiracy to procure the murder of deceased. We are not prepared to say that

[1] Respecting the sufficiency of accomplice testimony, see People v. Elliott, (N. Y.) 12 N. E. Rep. 602, and note. As to who is an accomplice within the rule, see Smith v. State, (Tex.) 5 S. W. Rep. 219, and note.

this does not constitute some evidence corroborating the testimony of the accomplice which of itself, and without the aid of the evidence of the accomplice, tended to connect the defendant with the commission of the offense. The sufficiency of that evidence was properly left to the jury. The rule does not require that every fact testified to by the accomplice shall be specifically corroborated.

The judgment is reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

MCFARLAND, J. I dissent. While the Penal Code does not allow an exception to a ruling of the court, denying a challenge to a juror for actual bias, it is true that it does allow an exception to a ruling upon the admissibility of evidence on the trial of such challenge; thus presenting a wonderful example of the incident being considered more important than the principle, and a part greater than the whole. But, notwithstanding this anomaly, it does not follow that a judgment of conviction must be reversed every time a court commits an error in ruling upon testimony on the trial of a challenge. The rule of section 1258 that this court must not regard "exceptions which do not affect the substantial rights of the parties" applies here, as well as to wiser provisions of the law. Now, in what way was any substantial right of appellant affected by the refusal of the court to allow the three jurors to be asked whether their opinions were adverse to defendant? When the question was asked in each instance the juror had been examined at great length as to the strength and fixedness of his opinion, and defendant had interposed his challenge for actual bias. It must be remembered that whether or not the court should have allowed the challenge is not before us; that was a ruling which we cannot review. The defendant was not injured, therefore, by the rejection of the proposed question, unless we can assume, upon any possible view, that the ruling of the court on the challenge would or might have been different *if it had known* that the opinion of the juror, such as it was, *was adverse to defendant*. But the court at that juncture had no business with the question, "to which side does the opinion of the juror incline?" If the opinion of the juror disqualified him, he should have been discharged, no matter from what side the challenge came. And, to assume that the judge of the court below would have changed his ruling, and allowed the challenge if he had known that such change of opinion would have favored one party as against the other, would be to assume that he was partial and unfair,—an assumption utterly intolerable. I cannot see, therefore, how the allowance of the proposed question could possibly have affected the final ruling of the court on the challenge,—a ruling which we cannot disturb. I think, therefore, that the judgment should be affirmed. I have assumed that the question was a proper one, because I suppose that point may be considered as settled by the judgment of this court in *People* v. *Brown*, a judgment in which I did not concur, and from which I had no opportunity to dissent. The facts of that case, however, differ from those of the case at bar. The practice lately grown up of asking all sorts of imaginable questions of jurors has come to be a grievous evil, and should be discouraged in every legitimate way.

76 Cal. 50

MENK *v.* HOME MUT. INS. CO. (No. 7,890.)

(*Supreme Court of California.* August 30, 1887.)

1. INSURANCE—MISSTATEMENTS IN APPLICATION—KNOWLEDGE OF INSURANCE AGENT.

In an action on a fire-insurance policy, evidence that the application was made out by an agent of the insurance company, with full knowledge as to the condition of the premises, and that plaintiff did not know what representations it contained,

held admissible, under an issue of misrepresentations. The defendants cannot take advantage of misstatements in the application made by their own agent, and known by him to be false.

2. SAME—LOSS—EVIDENCE OF LOSS OF PROPERTY NOT INSURED.
In an action upon a fire insurance policy, where the defendant alleges that plaintiff burned his own property, evidence on the part of plaintiff showing the loss of other property besides that which was insured is admissible.

3. SAME—PROOF OF LOSS—ADMISSIBILITY OF AFFIDAVIT.
In such a case, it is not prejudicial error to permit the plaintiff to read in evidence his affidavit, prepared soon after the fire, making proof of the loss, where he has testified fully as to the facts within his knowledge, and where the effect of such evidence is expressly limited by the court to showing that plaintiff had made the affidavit.

4. SAME—DESCRIPTION OF PROPERTY INSURED—REFERENCE TO APPLICATION.
Where the application for a policy of fire insurance, in describing the property, included the cellar under the building, but in the policy itself the cellar was omitted, and reference was made to the application for a more particular description, *held*, that the cellar was covered by the insurance.

5. NEW TRIAL—MOTION FOR—QUESTIONS PRESENTED BY.
A general statement in a motion for a new trial, in an action upon a fire insurance policy, that there was no evidence to prove that plaintiff performed all the required conditions of the contract of insurance, is insufficient to allow defendant to make the point that by the terms of the contract, if the parties could not agree upon the amount of loss, it should be referred to arbitration.

Department 1. Appeal from superior court, San Francisco; JOHN CALDWELL, Judge.

Byrne & Cross, for appellant. *Gaylord & Searls*, (*A. B. Dibble*, of counsel,) for respondent.

TEMPLE, J. Suit was brought upon a policy of insurance issued by the defendant, and from the judgment rendered in the action against the defendant, and from an order denying defendant's motion for a new trial this appeal is taken. The application and survey were expressly referred to and made part of the policy, and it was further stipulated that such application and survey should be considered a part of the contract and a warranty by the assured, and that any false representation, by the assured, of the condition, situation, or occupancy of the property, or any omission to make known any fact material to the risk, or any overvaluation, should render the policy void.

Among other defenses, it was claimed that there was an overvaluation of the property and a misrepresentation as to its value; that a portion of the premises was occupied by a tenant as a saloon for the sale of liquors, which fact was not mentioned in the application, which stated, as to the occupancy of the premises: "First story by the applicant as a brewery; the second story as a lodging-house, and family residence in the rear." It was also claimed on the trial, although there was no special plea of such defense, that the application contained a warranty in the above-quoted language that the applicant resided with his family on the premises, whereas, in fact, he did not reside there, but the premises were occupied by a tenant. In addition to the above language bearing upon this last point, the application, in reply to the question, "Each story, how occupied?" has this: "Second story by tenant as a lodging-house." It is plain that there is no representation that the applicant personally resided there. The rear was occupied as a residence by the tenant who had the lodging-house.

On the trial the plaintiff was permitted to testify, against the objection and exception of the defendant, that the application was in fact made out by an agent of defendant by the name of Burckhalter, and that the plaintiff did not know what representations it contained; and, further, that the agent knew all about the premises, and the manner in which they were occupied, and their value. There was other testimony to the same effect. It is claimed that this was error, and the case of *Menk* v. *Insurance Co.*, 11 Pac. Rep. 654, is relied

upon as authority. That was a case by the same plaintiff to recover for the same loss, the property being insured in the two companies at the same time, Burckhalter being the agent for both companies. Counsel assert that the language of the two complaints is practically identical. In that case this court said, in effect, that the complaint alleged that the policy was issued upon an application *made* and signed by the plaintiff, and that such testimony was in contradiction of the complaint and should have been ruled out. The language of that complaint is not before us, except in the statements quoted from the opinion. In this case the allegation is simply, "a copy of the application of plaintiff for said insurance, referred to in said policy, is also hereto annexed." Obviously this is not an allegation that the application was made out by the plaintiff. Of course, whoever made it out, it was the application of the plaintiff, and was signed by him or his agent. The only point in the offered testimony was that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company; nor would misstatements be fatal to the claim of plaintiff, which the agent well knew to be false, when he made out the application, received the money of the applicant, and issued the policy.

The tendency of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud. *Kruger* v. *Insurance Co.*, 13 Pac. Rep. 156. This consideration answers several points made by the defendant, which need not be further referred to.

It is claimed that the plaintiff was allowed, against the objection of defendant, to prove, in making out his loss, the value of property not insured. The application describes the property as follows: "Viz.: $2,000 on his 2-story frame building and cellar, value $6,700,—the first story occupied as a brewery, the second story as a lodging-house, and family residence in rear; $400 on his brewery apparatus, such as kettle, beer kegs, tubs, faucets, cooler, and tools, value $1,400; $100 on his household furniture contained therein, value $300; situate north side Front street, Truckee, Nevada county, Cal." In the policy the property is described thus: "Viz.: $2,000 on his 2-story frame building occupied as a brewery, lodging-house, and family residence in rear, situate north side Front street, Truckee, Nevada county, California; $400 on his brewery apparatus; and $100 on his household furniture contained therein; $2,500 other concurrent insurance permitted, reference being had to application and survey No. 88,038, on file in this office, which is made a part hereof."

The words "and cellar" are omitted in the policy. The amount of insurance, $2,000, was asked upon the frame building and cellar, which were together valued at $6,700. No separate valuation was placed upon the frame building, nor was any insurance asked upon it as a separate property. The cellar was inclosed by the frame building, and probably, when he came to write the policy, the agent concluded that the two constituted one building. The cellar was in the rear portion of the frame building, and "was a stone building, having its floor somewhat lower than that of the frame building, and rising 13 or 14 feet above the level at that floor, but not as high as the ceiling by about 5 feet. 'It was made of rocks; walls two feet thick. Had iron doors. Covered on top with bricks and fourteen inches of dirt.'" The application was expressly referred to in aid of the description. There can be no doubt that the cellar was included in the policy.

We are unable to discover any error in the admission of evidence in regard to the personal property. Read in connection with the application it seems plain that the articles for which the recovery was had were included in the policy. We see no injury to the defendant in the fact that the plaintiff was

allowed to testify as to the loss of other property beside that which was insured. It was a part of the statement as to what was burned, and then it had a bearing upon the issue tendered by the defense, that plaintiff had burned his own property.

The plaintiff was allowed to read in evidence his affidavit, which was prepared soon after the fire, to make proof of loss. The effect of the paper as evidence was expressly limited by the court to showing that he had made the affidavit. The most that can be said about it is that the evidence was immaterial. In the face of the fact that the plaintiff had been on the stand, and had testified fully as to the facts within his knowledge, we will not presume that the jury could have disregarded the positive injunctions of the court. We do not think that the error, if it were error, could have prejudiced the rights of the defendant. It does not appear that the affidavit was ever sent to the defendant, and if it had been, and the defendant set up as a defense the alleged breach of the contract in making the statement charged to be false, we see no materiality in it.

The evidence offered to show that liquor had been sold to Indians, admitting its materiality, was clearly incompetent.

The defendant is not in a position to make the point that, by the terms of the contract, if the parties could not agree upon the amount of loss, it should be referred to arbitration. Waiving the question as to whether it should have been pleaded, there is no specification in the statement on motion for a new trial of insufficiency of the evidence, under which it could be raised. A general statement that there was no evidence which proved, or tended to prove, that the plaintiff at any time complied with or performed all the conditions or any of the conditions of the contract of insurance by him to be performed, would not be sufficient.

Judgment and order affirmed.

We concur. McKINSTRY, J.; PATERSON, J.

73 Cal. 281

ROACH, Adm'r, *v.* COFFEY, Judge, etc. (No. 12,143.)

(*Supreme Court of California.* August 30, 1887.)

ADMINISTRATOR—CONTEST BETWEEN HEIRS—RIGHTS OF ADMINISTRATOR—MANDAMUS.

In California an administrator, having been made a formal party defendant in a contest between heirs, to settle the rights of all persons in the estate, filed cross-interrogatories, and applied to have them annexed to a commission to take depositions which had been issued. His application was refused, and he filed a petition for *mandamus* to compel the probate judge to grant it. *Held*, that the administrator was not entitled to contest the claim of the parties to heirship in the estate or to distribution, and that *mandamus* would not lie.

Department 2.

Petition for mandate. Superior court, San Francisco; COFFEY, Judge.

John A. Wright, for petitioner. *Edward R. Taylor* and *E. D. Sawyer*, for respondent.

MCFARLAND, J. This is a petition to compel the respondent by a writ of *mandamus* to settle certain proposed cross-interrogatories. During the pendency of the administration of the estate of Thomas H. Blythe, deceased, in the court of respondent, one Florence Blythe, in pursuance of section 1664 of the Code of Civil Procedure, filed her petition in said court for the purpose of ascertaining and declaring the rights of all persons to said estate, and to whom distribution thereof should be made. Notice was issued on said petition, and after the return-day thereof the said Florence filed her complaint as provided in said section. In her complaint she made a great many persons parties defendant, and, among others, William Savage and David Savage, and

also the petitioner herein, who was and is public administrator and administrator of said estate. William and David Savage filed an answer to the complaint of said Florence, denying her heirship, and averring that they and certain other persons were the true heirs; and afterwards procured a commission to issue out of the court of respondent to take the depositions of certain witnesses in England. A day was fixed for the settlement of direct and cross-interrogatories before the respondent. The petitioner herein served and filed certain cross-interrogatories, and asked to have them settled and annexed to the commission; but, upon motion of said William and David Savage, the respondent omitted to annex said interrogatories to said commission, upon the ground that petitioner, as administrator, was not entitled to contest the claim of the parties in said action to heirship, or distribution of said estate, and this proceeding is brought to compel respondent by *mandamus* to settle the said interrogatories of petitioner, and annex them to said commission.

We think that it is the settled law of this state that an administrator cannot represent either side of a contest between heirs, devisees, or legatees, contesting for the distribution of an estate. He cannot litigate the claims of one set against the other. His duty is to preserve the estate, and distribute it as the court shall direct. It is true that petitioner was named as a formal party in the complaint filed by Florence Blythe; but the only averment in relation to him is that he was administrator. He is not alleged to be a claimant to the estate; and there are no issues to which his interrogatories could be addressed. *Estate of Wright*, 49 Cal. 550; *Bates* v. *Ryberg*, 40 Cal. 465; *Estate of Marrey*, 3 Pac. Rep. 896.

Prayer of petitioner denied, and writ dismissed.

We concur: SHARPSTEIN, J.· THORNTON, J.

73 Cal. 260

SHUMWAY *v.* LEAKEY. (No. 11,700.)

(*Supreme Court of California.* August 30, 1887.)

1. SHERIFF—PROPERTY HELD UNDER ATTACHMENT—KEEPER'S FEES—ORDER OF COURT.
Under the statute of California, relating to the fees of the sheriff of Lassen county, which provides that he shall be allowed for his trouble and expense in keeping property under attachment such sum as the court shall order, not exceeding three dollars *per diem*, for keeper's fees, the sheriff has no right to the fees unless the court makes such order.

2. SAME—WHAT AMOUNTS TO ORDER—REMARK OF JUDGE.
In such a case, when the judge of the court in which the attachment suit was pending, in a conversation with the sheriff on the street, told him to pay the fees, this does not amount to an order.

3. SAME—ACTION AGAINST—ALLOWANCE OF FEES—ORDER OF COURT.
In an action against a sheriff to recover money retained by him as fees for keeping and preserving property under attachment, without first obtaining the order of the court allowing said fees, as required by the statute of California, a motion made by defendant, after plaintiff has rested his case, to have the court then make an order allowing the fees, is properly denied, as such order was to be made, if at all, in the attachment suit.

4. SAME—RETAINING MONEY—PENALTIES—DEMAND.
Under Pol. Code Cal. § 4181, which provides that if a sheriff neglects * * * to pay over, *on demand*, money which may come into his hands by virtue of his office, the amount thereof, with 25 per cent. damages, and interest at the rate of 10 per cent. per month from the time of demand, may be recovered by the person entitled thereto, the party seeking to avail himself of such severe penalty must be exact in his proceedings; and a demand for an amount greater than that claimed in a suit therefor, and much greater than that found due by the court, is not sufficient to justify the court in allowing the penalty and interest.

Commissioners' decision. Department 1.

Appeal from superior court, Lassen county; PRESSLEY, Judge.

E. V. Spencer, for appellant. *A. D. Goodwin* and *A. L. Shinn*, for respondent.

HAYNE, C. This is an action under section 4181 of the Political Code, which provides in relation to a sheriff that, "if he neglects or refuses to pay over on demand to the person entitled thereto any money which may come into his hands by virtue of his office, (after deducting his legal fees,) the amount thereof, with 25 per cent. damages and interest at the rate of 10 per cent. per month from the time of demand, may be recovered by such person." The defense of the sheriff was that, after deducting his legal fees, there remained only $76.66, which he duly tendered to the plaintiff, but which plaintiff refuses to receive. The fees which he claimed the right to deduct were keeper's fees, etc., upon an attachment in the cause. The controversy turns upon the right to deduct these fees.

The provision of the statute in relation to the fees of the sheriff of Lassen county is as follows: "For his trouble and expense in taking and keeping possession of and preserving property under attachment or execution, or other process, such sum *as the court shall order:* provided, that no more than $3 *per diem* shall be allowed to a keeper." Laws 1869–70, p. 158. With reference to similar provisions, it is the settled rule that unless the court makes such order the sheriff has no right to the fees. *Bower* v. *Rankin*, 61 Cal. 108; *Lane* v. *McElhany*, 49 Cal. 424; *Geil* v. *Stevens*, 48 Cal. 590. Now, in this case, there was no such order. The findings state that the sums claimed as fees were paid by the sheriff "without at any time obtaining an order of said court allowing, fixing, or authorizing such payment, or any portion thereof." And this finding is sustained by the evidence.

The objection to the offer of defendant to prove that before paying out the fees "he had asked the Hon. J. W. HENDRICK, superior judge, about paying the bills, upon meeting said judge upon the street, and that said judge told him to pay them," was properly sustained. What the judge told the defendant on the street is not an order. Even if the judge had promised out of court to have the order entered, it would not have amounted to an order. *Campbell* v. *Jones*, 41 Cal. 518. Nor was there error in the denial of the defendant's motion, made after the plaintiff had rested his case, to have the court then make an order allowing the fees. Such order was to be made, if at all, in the attachment suit. The motion was not a part of the case before the court, and hence cannot be considered on this appeal. The court, therefore, properly rendered judgment against the defendant.

But we think the court erred in allowing the penalty of 25 per cent., and interest at 10 per cent. per month. The statute provides that the penalty is to be imposed for non-payment "on demand." In seeking to avail himself of such a severe penalty, the party must be exact in his proceedings. And without expressing any opinion as to whether a demand in general terms, without naming any sum, would have been sufficient, we think that a demand for $921.47, when the amount claimed in the complaint was only $848.73, and the amount found to be due only $366.73, was not sufficient. This point does not appear to have been taken before the learned judge of the court below, nor is it made on appeal. But we think that justice requires this disposition of the case. In this view it is not necessary to determine whether the penalty can only be recovered in an action for a false return.

We therefore advise that the judgment be reversed, and the cause remanded, with directions to enter judgment for $366.73, with interest from February 25, 1885, at legal rates, and for costs of suit.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to enter judgment for $366.75, with interest from February 25, 1885, at legal rates, and for costs of suit.

2 Cal. Unrep. 794

SWAMP-LAND RECLAMATION DIST. NO. 407 *v.* WILCOX. (No. 11,782.)

(*Supreme Court of California.* August 31, 1887.)

1. SWAMP-LANDS—ASSESSMENTS—ORDER OF BOARD OF SUPERVISORS—ALTERATION—EVIDENCE.

In an action by a swamp-land reclamation district to enforce the payment of a swamp-land assessment, plaintiff offered in evidence an order appearing in the "minute-book" of the board of supervisors, in which, by Pol. Code Cal. §§ 4029–4031, all orders of the board are required to be recorded; and it was conceded that, without the direction of the board, the order had been altered by B., who at the time of the entry, but not at the time of the alteration, was *ex officio* clerk of the board. B. testified, against objection, that he made the alteration to correct what appeared to him, on examination, to be a clerical error of his deputy, now deceased, the then acting clerk of the board. The "rough minute-book," containing the original entry from which the record was made, and to which the altered record conformed, was also admitted against objection. *Held*, that it was error for the court to admit the order in evidence.

2. SAME—RECORD—ALTERATION—PAROL EVIDENCE.

Held, further, that the order was a record which B. had no right to alter or amend, and that parol proof was inadmissible to correct or change the record.

3. SAME—ASSESSMENT LISTS—DESCRIPTION.

Under Pol. Code Cal. § 3461, requiring certain assessment lists to contain "a description, by legal subdivisions, swamp-land surveys, or natural boundaries," a description, naming the adjoining proprietors on the respective boundaries, is sufficient.

4. SAME—ASSESSMENTS AND BENEFITS—DUTY OF COMMISSIONERS.

Pol. Code Cal. § 3456, provides that assessments for swamp-land improvements shall be proportionate to the resulting benefit, and section 3461 provides, among other requisites, that the list must contain "the amount of the charge assessed against each tract." The list in question conformed to the requirements of section 3461. *Held*, that the commissioners were not required to report that, in making the assessment, they had complied with section 3456, and that in the absence of evidence to the contrary, they must be presumed to have regularly performed their official duty.

5. SAME—ASSESSMENT LIST.

In an action to enforce the payment of a swamp-land assessment, it appeared that, in the assessment list, there was no dollar-mark before the figures opposite defendant's name, under the heading "Amount of charges assessed." In a number of assessments the dollar-mark preceded the figures under that heading, and in others the mark did not appear. *Held*, that the figures must be construed to represent dollars.

6. SAME—OATH OF COMMISSIONERS.

Ths commissioners of swamp-land assessments were verbally sworn before viewing the land, but it did not appear that they subscribed their oath, and filed it in the county clerk's office, as required of all "officers" by Pol. Code Cal. §§ 904, 909. *Held*, that whether the commissioners were or were not "officers," within the meaning of those sections, a failure of strict compliance with their requirements would not avoid official acts fully performed.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

W. H. Beatty, Add C. Hinkson, and *Freeman, Johnson & Bates*, for appellant. *A. P. Catlin*, for respondent.

BELCHER, C. C. This is an action to enforce payment of a swamp-land assessment. The plaintiff was organized as a swamp-land district in January, 1882, to reclaim certain swamp lands situate on Andrus island, in Sacramento county; and, as alleged in the complaint, the assessment sought to be recovered was thereafter regularly levied on land owned by the defendant within the district. In the court below judgment was entered in favor of the plaintiff, from which, and from an order denying a new trial, the defendant has appealed.

The validity of the assessment is assailed by the appellant upon several grounds, but they need not all be noticed.

*Reversed in banc. See 17 Pac. 241, 75 Cal. 443.

In support of the averment that commissioners were appointed to view the lands of the district, and to assess upon them the proper charge for their reclamation, the plaintiff offered in evidence at the trial an order appearing in minute-book "K" of the records of the board of supervisors, which read as follows: "OFFICE OF THE BOARD OF SUPERVISORS,

"FRIDAY, August 25, 1882.

"Swamp-land district No. 407. The report of the trustees of swamp-land district No. 407, was received and the following report adopted: 'Ordered that J. M. Upham, J. M. Stephenson, and John Miller, three competent and disinterested persons and residents of Sacramento county, be, and are hereby, appointed commissioners, who must, in the manner provided by law, view the land of said district and assess thereupon the proper assessment and charge for the reclamation of said land, to-wit: The sum of $78,000, in the manner and at the cost surveyed, planned, and estimated by J. C. Pierson, engineer of said district, and by the board of trustees filed this day with the clerk of this board.' "

The defendant objected to the entry being received in evidence upon the ground that when made it was an order appointing commissioners to view and assess a charge on lands in swamp-land district No. 341, and that it had since been altered and changed, and was therefore irrelevant and immaterial. And in this connection counsel offered to show that from August 25, 1882, until 1885, the record read as follows: "Swamp-land district No. 341. The report of the trustees of swamp-land district No. 341, was received and the following report adopted: 'Ordered that J. M. Upham, J. M. Stephenson and John Miller,' " etc. Then followed the balance of the order as above set out.

Thereupon the attorney for the plaintiff admitted in open court that on the seventeenth day of July, 1885, the day before the trial, Thomas H. Berkey, in his presence, changed the figures designating the number of the district from "341" to "407." It was then shown that Thomas H. Berkey was the county clerk of Sacramento county on the twenty-fifth day of August, 1882, but that his term of office had expired before he changed the record as above stated, and that he was then acting as a deputy county clerk; that the record of the proceedings of the board of supervisors, of which the entry in question was a part, was signed by the president of the board, but was not signed by Berkey, or any of his deputies, and that the alteration was made by Berkey when the board of supervisors was not in session and without its direction or permission. Berkey was called as a witness and testified, against the objection of defendant, that he made the alteration as soon as his attention was called to what appeared to him, by a comparison of the records and examination of different pages of the record-book, to be a clerical error made by one Parnell, now deceased, who, in August, 1882, was his deputy, and as such was the acting clerk of the board of supervisors. A book was also introduced in evidence, against the objections of defendant, described by the witness, Berkey, as the book of original entry, and what he termed the "rough minutes"—a book in which the clerk first entered the minutes of the proceedings of the board, and from which the record of its proceedings was made up. In that rough minute-book appeared the following entry under date of August 25, 1882: "The board of swamp-land com., No. 407; report of trustees filed and ordered adopted; see order." Upon this showing the court overruled the objections of defendant, and admitted the order in evidence.

In so doing we think the court erred. The county clerk is *ex officio* clerk of the board of supervisors, and as such must record all the proceedings of the board. And the board must cause to be kept a "minute-book," in which must be recorded all orders and decisions made by them, and the daily proceedings had at all regular and special meetings. Sections 4029–4031, Pol. Code. The order in question was, therefore, a record which, it is evident, Berkey had no right to alter or amend, even though he had personal knowledge—

as he did not have in this case—that it was erroneously entered. *Dyer* v. *Brogan*, 11 Pac. Rep. 589; *Pacheco* v. *Beck*, 52 Cal. 3; *Wigginton* v. *Markley*, Id. 411. Nor was parol proof admissible, in a collateral proceeding like this, to correct or change the record. This must be so on principle, and has been held in many similar cases. Thus, in *Jordan* v. *School-District*, 38 Me. 170, it is said: "School-districts are required by law to keep a record of their proceedings by a sworn clerk. Such proceedings can therefore be proved only by the record, or a copy thereof, properly authenticated. The parol proof offered was consequently properly rejected." So, in *Morrison* v. *City of Lawrence*, 98 Mass. 221, it is said: "Parol evidence was inadmissible to prove any acts or proceedings of the city council, or that the record of such proceedings as kept by the clerk was erroneous or defective." See, also, *Mayhew* v. *District of Gay Head*, 13 Allen, 134, and *City of Logansport* v. *Crockett*, 64 Ind. 319.

If the record was, in fact, erroneous in the particulars named, the plaintiff's remedy was an application to the board of supervisors, or some other direct proceedings, to have it corrected.

The defendant also objected to the assessment list, offered in evidence by the plaintiff, upon several grounds, and his objections were overruled. One ground of objection was that the land was not properly described. The Code required the list to contain "a description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed," and "the number of acres in each tract." The land assessed to the defendant was described as a portion of two swamp-land surveys, "bounded on the north by the lands of Mrs. R. F. Davis, on the east by the lands of L. C. Ruble, on the south by the lands of the Pacific Mutual Life Insurance Company, and on the west by Old river,—number of acres, 100." This should be held, we think, to be a sufficient description, as otherwise it would seem impossible to describe the land so as to comply with the statute. Evidently, it could not have been described by legal subdivisions, nor, being a portion of two surveys, by swamp-land surveys. If, then, the words "natural boundaries" are to be construed as excluding all artificial boundaries, or boundaries made by man, it must follow that no sufficient description of the land could be made. We do not think such a result was intended or should be declared. In our opinion any description which clearly identifies and marks out the land is sufficient.

Another ground of objection was that it did not appear from the face of the assessment list, or from any other evidence, that the assessment or charge was made in proportion to the whole expense, and to the benefits which would result from the works of reclamation, nor that the charge was estimated in gold and silver coin of the United States, nor in any kind of money. Section 3456 of the Political Code requires the commissioners to "view and assess upon the lands situated within the district a charge proportionate to the whole expense, and to the benefits which will result from such works, and estimate it in gold and silver coin of the United States." And section 3461 provides what the list must contain, as follows: "The list must contain: (1) A description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed. (2) The number of acres in each tract. (3) The names of the owners of each tract, if known; and if unknown, that fact. (4) The amount of the charge assessed against each tract."

The list returned was signed by the supposed commissioners, and complied with the requirements of section 3461, and there is nothing to show that the assessment was not made in full compliance with section 3456. The commissioners were not required to report that in making the assessment they had complied with the requirements of section 3456, and, if they had done so, their certificate to that effect would not have been even *prima facie* evidence of the fact. *People* v. *Hagar*, 49 Cal. 232. They were, however, charged with an official duty, and, in the absence of all evidence to the contrary, must be presumed to have regularly performed that duty. Section

1963, subd. 15, Code Civil Proc. It is true that there was no dollar-mark before the figures, "4,746.45," placed opposite the name of defendant, under the heading, "Amount of charges assessed;" but the record shows that this was only one of a number of assessments contained in the list, and that "in a number of cases there was a dollar-mark ($) preceding the figures in columns headed with the words 'Amount of charges assessed,' and in a number of other instances, as in this, the dollar-mark did not appear." It is not shown when or in how many places the dollar-mark did appear, but if it was prefixed to some of the items in the column, then all the figures standing in the same column, and in the same relation to other similar items, must be construed to be dollars, without a repetition of the mark before each item. *People* v. *Empire G. & S. M. Co.*, 33 Cal. 171.

Still another ground of objection was that it did not appear that Upham, Stephenson, and Miller took, subscribed, and filed their oath of office in the office of the county clerk, before they assessed the land and made the assessment list. It did appear that they were sworn verbally by a justice of the peace, before they went out to view the land. It is not necessary to decide whether or not they were such officers as sections 904 and 909 of the Political Code refer to; for, if they were, their official acts, after being fully performed, were not rendered void by the fact that they had failed to comply strictly with the requirements of those sections.

After carefully examining the whole record, we find no error of which the defendant can complain, save the one first above noted; but for that error the judgment and order should be reversed and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

SWAMP-LAND RECLAMATION DIST. NO. 407 *v.* RUBLE. (No. 11,783.)

(*Supreme Court of California.* August 31, 1887.)

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

W. H. Beatty, Add C. Hinkson, and *Freeman, Johnson & Bates*, for appellant. *A. P. Catlin*, for respondent.

BELCHER, C. C. This case does not differ in any material respect from that of *Swamp-Land Reclamation Dist. No.* 407 v. *Wilcox, ante*, 843, (just decided.) Upon the authority of that case the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

2 Cal. Unrep. 800

WHYLER and another *v.* VAN TIGER. (No. 11,931.)

(*Supreme Court of California.* August 31, 1887.)

1. GUARDIAN AND WARD—APPOINTMENT—ISSUE OF LETTERS.

Where a mother was appointed guardian of the person and estate of her minor son, and on the same day presented her bond, which was approved, a lease made

by her of the ward's property on the following day was held valid, though no letters of guardianship had been issued to her, and she had not taken the oath of office.

2. SAME—LEASE IN INDIVIDUAL NAME.
A lease purporting to be made by one tenant in common in her own right, and as the guardian of the estate of her co-tenant and ward, is valid, although signed and delivered as her individual deed.

Department 2. Appeal from superior court, Sutter county; PHIL. W. KEYSER, Judge.

This action was brought by Joseph Martin Whyler to recover the possession of the undivided one-half of 300 acres of land situated in Sutter county, California, for an accounting of the rents and profits, and for $150 damages for withholding possession. The land in controversy was leased to Henry Van Tiger by Mary E. Whyler, as guardian of the estate of Joseph Martin Whyler, but the lease was signed and delivered as her individual deed.

The cause was tried by the court, a jury being waived, and the court found from the evidence and admissions of counsel the following facts:

"(1) That the plaintiff is a minor, under the age of 14 years, and now is, and more than two years last past has been, a resident of Sutter county, California, and has estate therein. (2) That on the twenty-eighth day of September, 1885, Mary E. Whyler, who was the mother of said minor, filed her petition with the clerk of this court, asking to be appointed the guardian of the person and estate of said minor, Jos. M. Whyler; and thereupon, by an order entered on its minutes and without notice, this court appointed her such guardian, and fixed her bond at $1,000; and thereafter, to-wit, on the twenty-ninth day of September, 1885, she presented her bond conditioned according to law, and the order of said court, which, on the same day, was duly approved by the judge thereof, and she immediately entered upon the discharge of her duties as such guardain. No letters of guardianship were issued to said Mary E. Whyler, nor did she take the oath of office. (3) That on the third day of May, 1886, John T. Allment and Mary E. Whyler filed their petition with the clerk of this court, asking that said John T. Allment be appointed guardian of the estate of the said minor, Joseph M. Whyler; and thereupon, by an order entered in its minutes, and without notice, this court appointed John T. Allment guardian of the estate of said minor, and fixed his bond at $500; and thereafter, to-wit, on the fourth day of May, 1886, the said John T. Allment presented his bond, conditioned according to law, and the order of said court, which on the same day was duly approved by the judge thereof; that letters of guardianship were issued to said John T. Allment, and thereafter, to-wit, on said last-mentioned day, the said John T. Allment took and subscribed the oath of office. (4) That said plaintiff and Mary E. Whyler were, on the twenty-eighth day of September, 1885, ever since have been, and now are, the owners in fee as tenants in common, in equal shares, of the land and premises described in plaintiff's complaint. (5) That on the thirtieth day of September, 1885, the said Mary E. Whyler, acting for herself, and also as guardian of the estate of said minor, Jos. M. Whyler, duly made, executed, and delivered to defendant a written lease of said premises, for the period of four years from the date thereof; that on said last-mentioned day said defendant entered into the possession of said premises, and ever since has held, and now holds, the possession thereof, as the lessee thereof.

"(1) As conclusions of law, I find that Mary E. Whyler was the legal guardian of the person and estate of said minor, Jos. Martin Whyler, at the time she executed the lease to the defendant of the premises in controversy. (2) That she executed and was authorized to execute said lease, at the time it bears date, for herself and as such guardian, to said defendant, and that said lease conveyed to said defendant the right of possession of said premises.

(3) That said defendant entered into possession of said premises under and by virtue of said lease, and is now and was on the fifteenth day of May, 1886, entitled to and is and was lawfully in the possession thereof. (4) That the defendant is entitled to judgment against the plaintiff for costs.

J. H. Craddock, for appellant. *Stabler & Bayne* and *Sanborn & Phipps*, for respondent.

By the Court. There is no error in the record. We think that Mrs. Whyler was a guardian when she executed the lease to defendant, and that the lease was properly executed.

The judgment must be affirmed. So ordered.

73 Cal. 345

People *v.* West. (No. 20,317.)

(*Supreme Court of California.* September 5, 1887.)

1. Criminal Practice—Assault with Intent to Commit Murder—Verdict—Substance and Form.

 Under Pen. Code Cal. § 1151, a verdict of the jury, on the trial of a defendant charged with an assault with an intent to commit murder, "We, the jury in the above-entitled case, find the defendant guilty," is sufficient in form and substance.

2. Same—Instructions—Form of Verdict.

 On the trial of a defendant charged with an assault with intent to commit murder, it is not misleading to instruct the jury that, if they find the defendant guilty of the offense charged in the indictment, their verdict shall be, "We, the jury, find the defendant guilty," but if they find him guilty of the lower crime of assault their verdict shall designate the crime, "We, the jury, find the defendant guilty of assault."

3. Same—Trial—Misconduct of Jury—Discussing Merits of Case.

 It is not a prejudicial disobedience of the admonition of the court not to talk about the merits of the case, for a juror to state, at the conclusion of the charge of the court, that there is a misunderstanding among the jury as to the testimony of a witness, and ask to have stated what the testimony was.

4. Same—Evidence—Assault—Declarations of Prosecuting Witness.

 When a witness is called by the defense for the purpose of showing that the prosecuting witness did not know who assaulted him, and testifies to a conversation had with the prosecuting witness the morning after the commission of the offense, in which he told him he did not know whether it was the defendant or not, it is competent to ask him, upon cross-examination, if the prosecuting witness did not tell him the evening before that it was the defendant who assaulted him.

In bank. Appeal from superior court, Butte county. W. C. Van Fleet, Judge.

Reardan & Freeer, for appellant. *John C. Gray* and *Geo. A. Johnson*, Atty. Gen., for respondent.

Paterson, J. The defendant was charged with the crime of assault with intent to commit murder. The jury found the defendant guilty in the following language: "We, the jury in the above-entitled case, find the defendant guilty." It is claimed that this verdict is contrary to law; does not find the defendant guilty of any offense; and that, because the lesser crime of simple assault is included within the crime charged in the information, the verdict is ambiguous and uncertain. The jury were given four forms of verdict, the court saying: "I have prepared forms of verdict for you. You will find that they conform to the definition of the crime and the different offenses which I have defined to you. If your verdict be that the defendant is guilty of the offense charged in this information, then it is simply essential for you to find a verdict like the following: 'We, the jury in the above-entitled case, find the defendant guilty,' and that imports the conviction of the offense with which the defendant is charged in the information. If, however, you should in your wisdom arrive at the conclusion that the defendant is guilty of the lower crime of assault, which I have defined to you, then, in that event, it

will be essential that you designate the character of the offense, and your verdict in that case would be: 'We, the jury, find the defendant guilty of assault.'" In the case upon which appellant relies, (*People* v. *Ah Gow*, 53 Cal. 628,) the form of the verdict was: "Guilty of the indictment as charged to him." It was there held that the jury had failed to find the defendant guilty of anything. An assault with intent to commit murder is not divided into degrees, and the general rule is that a verdict of guilty is a conviction upon every material allegation in the information. *People* v. *March*, 6 Cal. 543. Section 1151 of the Penal Code provides that a verdict of guilty upon the general issue imports a conviction of the crime charged in the information. Under the instructions given in the court, the jury could not have been misled, and the verdict is sufficient in form and substance.

Immediately upon the conclusion of the charge of the court to the jury one of the jurors said: "I would like to ask one question, if the court please, about which there is a conflict among the jury. The evidence of the two men who swore that they saw this man West, at 6 o'clock or a little after that, going through that lane, and that of the defendant with regard to it, is not clearly understood. The question is whether he swore that he was there at all, and the two men swore that they saw him in there at that time?" It is not pretended that the jurors in any material respect disobeyed the admonition of the court not to talk about the merits of the case, and this question itself indicates nothing prejudicial to the rights of the defendant. It is simply an inquiry on the part of one of the jurors, and indicates only that there was a misunderstanding as to the testimony of one or more of the witnesses. The inquiry of the juror was answered by stating the testimony to him, to which there was no objection. During the progress of a trial a juror may not hear clearly what has been said, and without impropriety may ask a fellow-juryman whether the testimony is as he understands it. In the absence of something more than the showing that is made here, we must hold that the defendant was not injured. *People* v. *McCurdy*, 68 Cal. 576, 10 Pac. Rep. 207.

There was no error in permitting the witness Ward to answer the question, "How did it come up?" The defense had attempted to show by him that the prosecuting witness did not know whether it was West or another person who had committed the assault; and, for that purpose, had been permitted to show that Weyman had said to him on the morning after the commission of the offense that he (Weyman) did not know whether it was West or a white man. We think it was legitimate cross-examination of the witness to inquire whether, in the conversation had with the same party the evening before, he had not said that it was West who assaulted him.

Judgment and order affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

73 Cal. 222

PEOPLE v. KERRIGAN. (No. 20,297.)

(*Supreme Court of California.* August 25, 1887.)

1. CRIMINAL PRACTICE—CONDUCT OF TRIAL—EXCLUSION OF SPECTATORS—PUBLIC TRIAL. During the progress of a trial for an assault with intent to commit murder, the court made an order directing that the lobby outside of the court-room should be cleared of spectators, and that no person except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial, should be allowed to remain; but no order was made requiring the doors to be closed, and the friends of defendant and reporters were permitted to come and go at will. The order of the court was made on behalf of the defendant, as well as to preserve order, because the attendance and conduct of a large crowd in the court-room tended to excite the defendant. *Held*, that defendant's right to a public trial was not violated.

2. Insanity as Defense—Moral Insanity.
Under the decisions of California, moral insanity, as distinguished from mental derangement, is no excuse for crime, nor an exemption from punishment therefor.

In bank. Appeal from superior court, San Francisco; D. J. Murphy, Judge.

J. A. Hosmer and *D. T. Sullivan*, for appellant. *Geo. A. Johnson*, for the People.

Paterson, J. The defendant was convicted of an assault with intent to commit murder. The defenses interposed at the trial were, not guilty, and insanity. During the progress of the trial in the court below the defendant became greatly excited and indulged in profane and abusive language, addressed to the judge and other officers of the court. Her conduct created so much commotion among the spectators that the trial was seriously interrupted, and the court found it necessary to make an order excluding spectators from the court-room. Appellant claims that she was deprived of the constitutional right of a public trial by the making and enforcement of this order.

There is some controversy as to the scope of the order,—which was not entered in the minutes at the time,—but the judge certifies that the order was "that the lobby outside of the court-room should be cleared of spectators, as their presence tended to irritate and excite the defendant, and that no persons except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial, should be allowed to remain." It appears further, from the statement of the judge, that no order was made requiring the doors to be closed, and that, in fact, the friends of defendant and reporters were permitted to come and go at will; that the order was made by the court on behalf of the defendant, as well as to preserve order, because the attendance and conduct of a large crowd of spectators in the court-room evidently tended to excite the defendant; and it is apparent from the affidavits, showing the conduct of the defendant and many of the spectators, that such was the fact.

In our opinion, the order and action of the court, as shown by the bill of exceptions, were not in violation of the defendant's right to a public trial. It was proper, we think, under the circumstances, to exclude from the court-room those who were excluded, not only because of the vulgar and profane language of the defendant herself, but because such action was evidently necessary to protect the court from indignity and indecorum. No actual injury to the defendant is shown. It is not shown that any person who could have been of any service to the defendant on her trial was excluded. While it is very important that all the rights guarantied by the constitution to a person charged with crime should be fully and fairly awarded to him, it is also important that courts of justice should be upheld in the enforcement of all necessary and reasonable rules for the orderly, speedy, and effective conduct of their duties. *People* v. *Swafford*, 65 Cal. 224, 3 Pac. Rep. 809; *Grimmett* v. *State*, 2 S. W. Rep. 631; section 128, Code Civil Proc.

It is claimed that the court erred in its charge to the jury upon the subject of moral insanity; that the court, in effect, took the evidence upon this question from the jury's consideration by instructing them, in substance, that there is no such thing as moral insanity. Counsel for appellant has not pointed out the particular instruction to which his objection is directed; but the following, from those given by the court of its own motion, evidently shows the views of the court as expressed to the jury: "In our courts of law there is no such doctrine established or recognized as moral insanity, distinguished from mental derangement, as an excuse for crime, and as an exemption from punishment therefor. There is no such type of insanity recognized in our courts, as, for instance, that a person may steal your property, burn your dwelling, murder or attempt to murder you, and know at the time that the deed is a

criminal act, and wrong in itself, and deserves punishment; having the ability to correctly reason on the subject, and yet be held guiltless and not punishable on the ground solely of a perversion of the moral senses."

It may be true, as claimed by appellant's counsel, that the weight of authority in this country is against the doctrine here enunciated. The authorities cited by him support his contention that "moral insanity is now as well understood by medico-jurists, and almost as well established by judicial recognition, as the intellectual form." But it is not an open question in this state. The instruction quoted is within the test of insanity as given by this court in former decisions, and we adhere to the rule of decision with confidence in the correctness of the principle established. If the defendant had sufficient mental capacity to appreciate the nature of her act; if she knew and understood that she was violating the rights of another by an act which was in itself wrong, and which was prohibited by the law, and the commission of which would entail punishment upon herself; if she had the capacity thus to appreciate the character and comprehend the consequences of her act,—she is responsible to the law for the act thus committed, and must be judged accordingly, regardless of any perversion of the moral senses, however great; for, if great moral depravity should be taken as a test of insanity, then the highest degree or enormity of crime would, by virtue of its own atrocity, furnish the best evidence of insanity on behalf of the one who committed the act.

The third point relied upon by the appellant is that the verdict of the jury is contrary to the evidence. It is claimed that the defense of insanity was established by a preponderance of evidence, and that there is no testimony, in fact, sufficient to cause a substantial conflict. To support this contention, we should have to hold that the testimony of Dr. Dozier, a physician of 20 years' practice, 11 of which were devoted exclusively to the patients of the Napa Insane Asylum, is unworthy of consideration or belief. This we cannot do. The witness, as first assistant physician of the asylum, had defendant under his personal observation for a period of about six weeks, and testified that he never saw her, and never spoke to her at any time while she was under his charge, when she impressed him as being an insane person. There was other evidence in the case which tended to corroborate Dr. Dozier in his theory that her malady was that of extreme moral depravity, or moral insanity only, and that she was capable of distinguishing right from wrong.

We see no errors, and the judgment and order are affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; TEMPLE, J.; MCFARLAND, J.; THORNTON, J.

73 Cal. 220

PEOPLE *v.* RICE. (No. 20,234.)

(*Supreme Court of California.* August 25, 1887.)

1. RECEIVING STOLEN GOODS—INFORMATION—ALLEGATION OF VALUE.
 Under Pen. Code Cal., defining the crime of receiving stolen goods, it is not necessary, in the information charging a person with that crime, to allege that the property was of any value.
2. SAME—TIME OF OFFENSE—VARIANCE.
 On the trial of a person for receiving stolen goods, it is not a material variance, within Pen. Code Cal. § 955, prescribing when time is material, that the evidence shows the crime to have been committed three months before the time stated in the information.
3. CRIMINAL PRACTICE—ABSENCE OF COUNSEL OF ACCUSED.
 It is not a cause for reversal that, on the trial of a person charged with receiving stolen goods, his counsel was absent when the court overruled the demurrer to the information; no reason being assigned for his absence, and it not being shown that defendant was injured thereby.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

W. D. Grady and *R. H. Ward*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. Appellant was accused by information, and convicted of the crime of receiving stolen property. There is no allegation that the property was of any value, and the information was demurred to on that ground. The demurrer was overruled, and that ruling is assigned as error. There is nothing in the Code defining the crime which, by necessary implication, requires that the value of the property should be alleged, and it is sufficient to charge the offense as defined by the Code. *People* v. *Avila*, 43 Cal. 196; *People* v. *Shuler*, 28 Cal. 490. The punishment for receiving stolen goods does not in any degree depend upon the value of them. Therefore, value need not be stated. 2 Bish. Crim. Proc. 930.

Independently of any admission by defendant's counsel at the trial that the property alleged to have been stolen was stolen, we think the evidence sufficient to justify a finding that it was stolen. No one testified to having seen it stolen, but the circumstances proven, in our opinion, established the fact beyond a reasonable doubt. The evidence shows that the offense was committed three months before the time stated in the information. We think the variance immaterial. Pen. Code, 955.

It appears that defendant's counsel was not present when the court announced the overruling of his demurrer to the information. No reason is assigned for his absence, nor is it shown, or attempted to be shown, that the defendant was in any way prejudiced thereby. The rule which requires that a defendant on trial for a felony must be present during the entire trial, does not apply to a point like this, and there is no reason why it should.

Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.; TEMPLE, J.; PATERSON, J.

73 Cal. 219

WOLFF *v.* PROSSER. (No. 11,898.)

(*Supreme Court of California.* August 25, 1887.)

PARTITION—DECREE—BENEFICIARY NOT A PARTY—HARMLESS INJURY.

In an action for partition of certain mining claims, a grantee of the plaintiff was made a beneficiary under the decree, though not a party to the suit. It appeared, however, that the sum to be distributed to him amounted to only $10. *Held*, that although such grantee's right should not have been determined, it was a proper case for the application of the maxim, "*de minimis non curat lex*," and the error was without substantial injury.

Commissioners' decision. Department 2.

Appeal from superior court, Sierra county; F. D. LOWARD, Judge.

Taylor & Holl, for appellant. *Van Clief & Weihe*, for respondent.

HAYNE, C. Action for the partition of certain mining claims. The court ordered the property to be sold and the proceeds divided in a specified way. Part of the division consisted in the payment to "John Gale, the grantee of said Wolff," of one-sixth of what should remain after applying the proceeds as directed. The only point made is that, since Gale was not a party to the action, his right to any part of the proceeds should not have been determined. Conceding this to be so, it appears from the record that after applying the proceeds in the manner first directed by the decree, the sum to be distributed to Gale amounted to only $10. We think this is a proper case for the application of the maxim, *de minimis*, etc., and that the error was without substantial injury. We therefore advise that the judgments be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgments are affirmed.

73 Cal. 230

PEOPLE *ex rel.* ATTORNEY GENERAL *v.* LEONARD. (No. 11,933.)

(*Supreme Court of California.* August 26, 1887.)

1. OFFICE AND OFFICER—ELIGIBILITY—LUCRATIVE OFFICE UNDER UNITED STATES.
Section 20, art. 4, Const. Cal., providing that "no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state," etc., should be construed to mean eligible to *hold* office as well as to be elected to office, and hence disqualifying a state supervisor from holding this office after he had received and entered upon the duties under a lucrative federal appointment.

2. SAME.
Section 20, art. 4, Const. Cal., provides that "no person holding any lucrative office under the United States * * * shall be eligible to any civil office of profit under this state," etc. *Held*, that the words "lucrative office" refer solely to the office "under the United States," and one holding such lucrative office is disqualified to hold any state office, no matter how small the emolument of the latter may be.

Commissioners' decision. Department 2.

Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

F. D. Nicol, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. This action was instituted for the purpose of having the office of supervisor of the First district of Tuolumne county declared vacant. The court below gave judgment in accordance with the prayer of the complaint, and from that the defendant has appealed. It appears that he had been duly elected by the people of his district to the office of supervisor thereof, and had held it for some months, receiving for his services less than $500 a year as salary, and that then he was appointed to the office of postmaster of the city of Sonora, which is a lucrative office under the United States. It is contended by the relator, in support of the judgment, (although the defendant was eligible to the office of supervisor at the time he was elected to fill it, and he held it legally and properly up to the time when he was appointed to and held the office of postmaster,) that the moment he thus accepted the latter office he became an unconstitutional holder of the office of supervisor, and that the same at once became vacant and subject to be so declared by the proper court, under section 20, art. 4, of our state constitution. That section reads as follows: "No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state: provided, that officers in the militia, who receive no annual salary, local officers, or postmasters whose compensation does not exceed $500 per annum, shall not be deemed to hold lucrative offices."

In seeking to interpret the meaning of a constitutional provision, it is proper always that the intent of the framers of such an instrument should, if possible, be ascertained and carried out. Upon looking at the section under discussion, we find it the same as originally passed by the convention of 1849. The primary matter, as shown in the first clause of the section, to which the minds of the members of that and succeeding constitutional conventions seem to have been addressed, was to make ineligible to any state civil office of profit, any person who held a lucrative office under the United States, or any other power. The main object, then, must have been to prevent a conjunction of a federal and state office of profit in the same person, without any condition whatever; then the inconvenience of so arbitrary a rule was thought of, and thence came the determination to exempt from the terms "civil office of profit," or "lucrative office," officers in the militia to whose positions no sal-

ary is attached, and local officers and postmasters who did not receive by way of compensation more than $500 per annum. If the section in controversy can be so construed as to permit the holder of a civil office of profit under the state to be appointed to and hold, at the same time, a lucrative office under the United States, then the prime object of the members of the constitutional convention, which made such section a part of the law of the land, viz.: The prevention of dual office-holding by one person under two separate and distinct governments, and the separation of the allegiance justly due one by its officers from that due to another power,—would be defeated, and the earnest intentions of that body rendered utterly abortive.

In addressing himself to the discussion of such a matter as the one now in hand, the distinguished Chief Justice RYAN, in *State* v. *Trumpf*, 50 Wis. 112, 5 N. W. Rep. 876, and 6 N. W. Rep. 512, after deploring the fact that it had become the law of that state, through successive decisions of its court of last resort, that "eligibility" in the constitution of that commonwealth meant eligibility to hold office, and not eligibility to be elected thereto, was constrained to say this: that "the distinction between eligibility to election to office and eligibility to hold office is too nice to enter into a rule of judicial decision." So it appears to us, when we come to consider the motive which must of necessity have actuated the constitutional assembly that enacted the provision which we are considering, and the cogent and powerful reasons which would occur to the mind of any earnest thinker, why such a restriction should be placed on the holding of office by one man, at the same time, under more than one government, (such as that it would tend, if the duties of both offices were onerous, to the neglect of one or both, or to the undue influence of the office-holder as a powerful agent of some ambitious president, or head of a department, if the federal office was a lucrative one, and the like,) that it was clearly intended that one holding "a lucrative office" under the United States should not hold a "civil office of profit" under the state.

The case of *Searcy* v. *Grow*, 15 Cal. 121, which is cited to us as declarative of the proposition that "eligibility," as used in our constitution, does not mean incapacity to hold, but incapacity to be elected to a civil office of profit under the state, while holding a lucrative federal office, does not, as we understand it, go to the extent claimed, for there the question involved was, whether or not the holder of a lucrative federal office was eligible *for election* to a state office, and therefore the language used in that case, in so far as it does not directly apply to the point actually submitted for decision, is but *obiter dictum*. And we are not without authority as to the correctness of the view which we take of the meaning of the word "eligibility" as used in the text of the state constitution, although there is no case to which we have been enabled to have access, which involves the precise question in issue here; that is, whether one duly eligible and elected to a civil office of profit under the state can be permitted to hold that office after he has accepted and is in the incumbency of a lucrative federal office. The nearest approach to it is that of *State* v. *Clarke*, 3 Nev. 566. There it appeared that Clarke was United States district attorney for the state of Nevada when he was elected to the office of attorney general of the state. The constitution of that state is similar in its language to ours upon the point under review, being as follows: "No person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state: provided, that postmasters, whose compensation does not exceed $500 per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office." That court used this language in determining the meaning to be attached to the word "eligible," as used in the Nevada constitution: "We agree with the defendant that the framers of the constitution intended to prohibit one who was holding a lucrative federal office from holding a state office at the same time. But instead of restricting the meaning of the word 'eligi-

ble,' as defendant contends, we think, to carry out the intention of the constitutional convention, we ought to give it a more extended signification than is generally given, and hold that it means both 'incapable of being legally chosen' and 'incapable of legally holding.'"

And we have found upon investigation that in very many, if not all, of the various state constitutions, the principle seems to have been incorporated and adopted of prohibiting the holding by one person, at the same time, of a lucrative federal office and any one of the more important state offices. And in most of such constitutions the word "eligible" has (as it appears to us) been made use of, as it is in our constitution, in a broad and far-reaching sense. In the case of *Carson* v. *McPhetridge*, 15 Ind. 327, this is said: "The term 'eligible,' as used in our constitution, relates to capacity of holding, as well as capacity of being elected to, an office." In *Brady* v. *Howe*, 50 Miss. 626, "eligibility" is defined to mean capacity to take and hold an office; one not eligible to mean one disqualified from taking and holding. And in *State* v. *Murray*, 28 Wis. 99, "the term 'ineligible' means as well disqualification to hold an office, as disqualification to be elected to an office." And so it will be found upon examination that in nearly all, if not all, of the cases where "eligible" was said to mean capacity to be elected to an office, and not capacity to hold it, the party seeking to hold the office was declared not to be eligible, because of the want of capacity to be elected; and there is nothing said in any of them which, by fair construction and interpretation, in the light of the facts of the case, shows that the mind of the court was directed to, and intended to decide, where unlimited and unexplained by other language, that eligibility to office did not mean the qualification to hold as well as to be elected to an office. So that, upon the first ground contended for by the appellant for the reversal of the judgment, it is apparent he is without legal support.

Neither can we concur with appellant's second proposition, which is that, because the annual salary of his office of supervisor was less than $500, therefore section 20, art. 4, of the constitution does not apply. The words "lucrative office," as used in that section, refer solely to the office "under the United States,"—the federal office. If the salary of the office "under the United States" exceeds $500,—which is admitted to be the case here,—then its incumbent cannot hold "any civil office of profit under this state," whether the profit of the latter exceeds $500 per annum or not. The words "local officers," immediately preceding "postmasters," refer evidently to local federal officers. The words "officers of the militia" probably mean such officers when called into the federal service. At all events, it is clear that "lucrative office" applies only to offices under the United States, and "civil office of profit" only to offices under the state.

Therefore the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 240

HEINLEN v. BEANS and another. (No. 11,999.)

(*Supreme Court of California.* August 29, 1887.)

APPEAL—FROM JUDGMENT ENTERED BY ORDER OF SUPREME COURT.

When the supreme court, upon appeal, affirm the judgment of the court below, or directs the entry of a specific judgment, and such judgment is entered by the lower court, it cannot be appealed from.

Department 2. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

G. A. Heinlen, for appellant. *John Reynolds*, for respondents.

McFARLAND, J. When this case was here upon a legitimate appeal, this court reversed the judgment and directed the court below to enter judgment for defendants. 12 Pac. Rep. 169. The court below entered judgment as directed, which fact is not disputed. From that judgment, which this court directed to be entered, plaintiff now appeals; and respondent moves to dismiss the appeal for the obvious reason that no appeal lies from such a judgment.

When this court, upon appeal, affirms the judgment of the court below, or directs the entry of a specific judgment, and such judgment is entered by the lower court as directed, the litigation is over, and the case ended.

Query: Whether the attempt to appeal in this instance is not a contempt under subdivision 4 of section 1209 of the Code of Civil Procedure?

The appeal from the judgment is dismissed. The appeal of appellant from an order of the court below refusing to allow him to amend his complaint after the *remittitur* had reached that court, is also dismissed. *Kirby* v. *Superior Court*, 68 Cal. 604, 10 Pac. Rep. 119.

We concur: THORNTON, J.; SHARPSTEIN, J.

73 Cal. 241

PEOPLE *v.* HOTZ. (No. 20,304.)

(*Supreme Court of California.* August 29, 1887.)

CRIMINAL PRACTICE—NEW TRIAL—WEIGHT OF EVIDENCE—DISCRETION OF COURT.

A motion for a new trial, on the ground that the verdict is contrary to the evidence, is addressed to the sound discretion of the trial court, the exercise of which, in the absence of manifest abuse, will not be disturbed on appeal.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Indictment for an assault with a deadly weapon.

John J. West, for respondent. *Geo. A. Johnson*, Atty. Gen., for the People, appellants.

THORNTON, J. This is an appeal from an order granting the defendant a new trial. One of the grounds on which the motion for a new trial was made is that the verdict is contrary to the evidence. An order granting a new trial on such ground is addressed to the sound discretion of the court, and is never disturbed by this court unless there is a manifest abuse of discretion by the trial court. We find no such abuse here.

We find no error in the refusal of the instruction to which our attention is called.

The order is affirmed.

We concur: SEARLS, C. J.; McFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.; McKINSTRY, J.; PATERSON, J.

73 Cal. 276

HAUSLING *v.* HAUSMAN and another. (No. 12,001.)

(*Supreme Court of California.* August 30, 1887.)

JUDICIAL SALES—MOTION TO SET ASIDE SALE UNDER FORECLOSURE OF LIEN.

Sale of a mining claim was made under a decree of foreclosure of a laborer's lien taken *pro confesso*. The defendant moved to set aside the sale on the ground that the confession was induced by promises that the judgment should not be enforced without consent; that plaintiff would liquidate certain liens against the claim, take a conveyance thereof, dismiss his action, and reconvey an interest in the claim to defendant; that in accordance with such agreement defendant had conveyed the claim to plaintiff, but that thereupon plaintiff repudiated and refused to carry out

the agreement to reconvey. *Held*, that the court properly refused to set aside the sale, as the rights of the parties under the alleged agreement could be properly adjudicated only by an action brought in a court of equity.

Commissioners' decision. Department 2.

Appeal from superior court, Placer county; B. F. MYERS, Judge.

Otto Tum Suden and *W. B. Lardner*, for appellant. *C. A. & F. P. Tuttle* and *J. M. Fulweiler*, for respondent.

BELCHER, C. C. This is an appeal from an order made by the superior court of Placer county, refusing to vacate and set aside the sale of a certain mining claim under a decree of foreclosure of a laborer's lien, to restrain the sheriff from executing a deed of the property, and to enter satisfaction of the judgment and decree under which the sale was had. The decree was made and entered on the twenty-first of May, 1886, upon the complaint of plaintiff and the answer of the defendant Hausman, in which answer all the facts alleged in the complaint were admitted, and judgment and decree confessed and prayed for in accordance with the allegations and prayer of the complaint. The sale under the decree was made on the twelfth of July, 1886, the respondent being the purchaser, and the motion leading to the order appealed from was heard and denied on the twenty-third of November, 1886.

In support of his motion, defendant, appellant here, presented and filed his affidavit, from which it appeared that he was the owner of the mining claim, and that, on or about the first of August, 1885, he and respondent entered into a verbal agreement, by which the respondent was to superintend the working of the mine at a fixed salary per month, and was to purchase a one-tenth interest therein at a fixed sum, to be paid for by his labor; that, after August 1st, the mine was to be worked jointly by the parties, and the profits and losses were to be divided between them in proportion to their respective interests; that the appellant was to furnish all the money required to put the mine upon a paying basis, and the respondent was to be debited with the one-tenth part thereof; that both parties performed the conditions of the contract until about the first day of February, 1886; that between the first of August and the first of February the mine was worked at a great pecuniary loss, and the respondent's share of the loss was more than sufficient to balance the amount due him for labor; that on the first day of February the respondent filed a claim of lien upon the mining claim for the labor performed thereon by him, and thereafter in due time commenced the action to foreclose his lien, in which the decree in question was rendered; that various other parties filed liens upon the claim for labor performed by them, and in due time commenced a joint action to foreclose their liens; that the parties then made a new verbal agreement, under which the appellant was to confess judgment in favor of respondent as prayed for in his complaint, the judgment, however, not to be carried into execution without appellant's consent, and respondent was to buy in the claims of the other lienholders, the appellant furnishing the money therefor; and, on this being accomplished, the appellant was to convey to respondent the mining claim by a good and sufficient deed, and the respondent was then to dismiss his action, and reconvey to appellant the undivided nine-tenths part of the claim; that in accordance with this agreement the claims of the other lienholders were purchased, and the appellant then, on or about the twentieth of April, 1886, conveyed the mining claim to respondent, without any consideration other than that here set forth, and the respondent accepted the deed and caused it to be placed on record. The affidavit then further states that, having received and recorded the deed, respondent repudiated his agreement, set up a claim to the entire mine adverse to appellant, under the latter's deed, and that he now holds the mine adversely to appellant and claims to be the sole and only owner thereof.

In answer to the appellant's affidavit the respondent read two affidavits, one made by his attorney, John M. Fulweiler, and the other by himself. In his affidavit Fulweiler denies the statements of appellant about dismissing the action and not enforcing the judgment, and says that it was distinctly understood and agreed between the parties that the action was not to be dismissed, but that judgment might be entered and enforced. The respondent also denies that the action was to be dismissed, and says that the appellant voluntarily executed and delivered to him the confession of judgment, and that it was then and there mutually agreed by and between them that the judgment and decree of the court should be entered up in accordance with the confession, and within a reasonable time thereafter the amount of the judgment should be paid to respondent by appellant; that pending such payment the execution of the judgment was to be staid, and upon payment it was to be satisfied; that shortly thereafter appellant refused to pay as agreed, the amount due respondent, and that by reason of such failure and refusal respondent, on the twenty-first of May, 1886, procured the entry of judgment, upon appellant's confession, as he of right was entitled to do.

It further appears from the bill of exceptions that on the hearing of a similar motion made on the sixth of July, 1886, to set aside the same judgment, the attorneys for appellant admitted in open court that no part of the indebtedness claimed by respondent, and for which the judgment had been confessed and entered, had been paid, but the same was then due respondent from appellant.

Upon this showing we cannot say that the court erred in refusing to set aside the sale, and to order satisfaction of the judgment to be entered. There was a manifest conflict as to some of the material facts of the case; and, besides, the real contest seems to be in reference to the title to the mine. Counsel for appellant contend that when respondent accepted a deed of the property—and that it is an admitted fact that he did so—his debt was satisfied, his lien lost or merged, and he took, and thereafter held, nine-tenths of the title, in trust for appellant. It is further said that respondent has repudiated his trust, and set up an adverse claim to the whole property under his deed, and to permit him now to receive the sheriff's deed would tend to cloud appellant's title, and render it more difficult for him to establish his rights. Undoubtedly, if the facts be as claimed by appellant, the purchase of the property by respondent, under his decree, gave him no greater rights than he already had. The sheriff's deed would not confer any new rights, or extinguish or affect appellant's equities. But conceding this, what was appellant's remedy? He admits that the legal title is in respondent under the deed of April 20, 1886. Now, if the sale were set aside, and the judgment satisfied, the title would still be in respondent, and appellant would still be required to bring his action in equity to compel the conveyance to him of the nine-tenths interest which he claims. Courts do not ordinarily deal with questions by piece-meal, and, besides, the matter of preventing or removing clouds upon titles is one of purely equitable cognizance.

Upon the showing made, it seems to us, the appellant should have commenced an action in a court of equity, where all the questions involved could have been tried and the rights of both parties fully ascertained and determined.

We conclude therefore that the order appealed from should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

73 Cal. 249

BRYAN v. IDAHO QUARTZ MIN. CO. (No. 11,790.)

(*Supreme Court of California.* August 30, 1887.)

1. DEED—RIGHT OF WAY FOR FLUME—RESERVATION—WASTE WATER.
A deed granting to a mining company a right of way across grantor's land for a flume to its quartz mine, and for a reservoir and waste water ditch, reserving to the grantor the right to use so much of the waste water from the reservoir as he shall choose, does not imply a covenant that there shall be any waste water, nor, by its mention of the mine as the terminus of the flume, that all of the water conveyed thereby shall be used at such mine; and the grantee is not prevented from tapping its flume between the grantor's land and its mine, to supply water to another mine.
2. CONTRACT—CONSTRUCTION—PAROL EVIDENCE.
A contract being perfectly clear in its terms, parol evidence of prior conversations between the parties, and of what was understood respecting the consideration, is properly rejected.
3. APPEAL—REVIEW.
A finding of law cannot be reviewed on appeal, when it is, if anything, too favorable to appellant, and respondent has not appealed therefrom.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Frank Power and *Farley & Little*, for appellant. *Cross & Simonds* and *C. W. Kitts*, for respondent.

HAYNE, C. The plaintiff made a deed by which he granted, bargained, sold, and conveyed to the defendant the right to make and maintain a water ditch upon and across his land, along a line then surveyed, to a certain point upon the land, and the right to construct and maintain at such point a reservoir, not exceeding one and one-half acres, the exact site thereof to be thereafter determined, and the right to "lay down and maintain upon said premises an iron pipe, flume, ditch, or other conduit leading from said dam or reservoir to the Idaho quartz mine; also a strip of land, one rod in width, along the whole length of said pipe or ditch, said pipe and ditch to be the center of said strip; also the land upon which said reservoir shall be constructed, not exceeding one and one-half acres in extent; also the right of way, with sufficient land for a ditch to carry away the waste water from said dam or reservoir, said ditch to be constructed on such land as the grantee may hereafter determine; also the right of said grantee, or its successors, and its and their servants, officers, agents, and employes, to at all times enter upon and pass over and through said premises, for the purpose of repairing and maintaining said ditches, pipes, and reservoirs. * * * The land herein conveyed being simply for right of way for said ditch, reservoir, and pipe, and for no other purpose. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion, reversions, remainder, remainders, rents, issues, and profits thereof, to have and to hold all and singular of said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever." The deed contained also the following clause: "It being understood and a part of the consideration for this conveyance that the grantor shall have the right at all times to appropriate for his own use, and to conduct, wherever he shall desire, so much of the waste water flowing over said dam or reservoir as he shall choose."

The plaintiff's grievance is that the defendant allowed the Maryland Mining Company to tap its pipe "by a branch pipe or tap in said iron pipe leading to the said Idaho quartz mine at a long distance from said reservoir and said Idaho quartz mine, and intermediate the same;" and that by reason of such diversion there was not enough waste water for his purposes. But we do not think he has any legal ground of complaint. It does not appear that he was the owner of any of the water which was conducted across and collected upon

his land. All the water-right which he has comes from his contract with the defendant. And by this contract he is entitled only to the waste water. In order to say that the plaintiff is entitled to the water sold to the Maryland Company, we must affirm that such water is "waste water," which we are unable to do. It is perfectly true that the quantity of waste water is diminished by the use of the Maryland Company. But there is no covenant that there shall be any waste water. Nor is there anything in the contract imposing upon the defendant an obligation to use all the water at the Idaho mine. That mine is simply mentioned as the terminus of the flume leading from the reservoir. We see no restriction whatever upon the disposition which the defendant may make of the water. If the plaintiff desired any such restriction, he should have had it put in the contract.

The contract being perfectly clear, and the action being in affirmance of the contract, the court below was right in rejecting parol evidence of prior conversations, and as to what was understood, etc. If the branch pipe put in for the use of the Maryland Company were upon plaintiff's land, it might be objected by him that this additional burden was not authorized by his deed. But it appears from the findings that this branch pipe was put in "at a point *between* the land of plaintiff and the Idaho quartz mine." We think, therefore, that the judgment refusing any relief to the plaintiff was proper.

Upon the cross-complaint of the defendant the court decreed that the defendant "is the owner of the right of way forever over the lands hereinafter described, for a ditch, pipe, flume, conduit, and reservoir, to store and convey water, etc., * * * for any lawful purpose." The defendant argues that the decree ought to have adjudged that it is the owner in fee-simple of the land covered by the reservoir and the ditch, and not simply of a right of way. But not having appealed, it cannot be heard upon this question. So far as the plaintiff is concerned, the only doubt is whether this part of the judgment is not too favorable to him. The other matters argued do not require special mention.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

73 Cal. 257

PEOPLE *v.* DOBBINS. (No. 12,106.)

(*Supreme Court of California.* August 30, 1887.)

1. STATUTES—CONSTRUCTION—CONFLICTING SECTIONS.
 Section 4484, Pol. Code Cal., providing that, if conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, has no application where the sections are passed at different times.
2. SAME—CONFLICTING PROVISIONS AS TO FINES—LATEST AMENDMENT.
 The provisions of Pen. Code Cal. §§ 634, 636, as to the disposition of certain fines being in direct conflict, section 634, having been last amended when the fines in dispute were collected, is the latest expression of the legislative will, and controls in the matter of their disposition.
3. CONSTITUTIONAL LAW—SUBJECT OF STATUTE EXPRESSED IN TITLE.
 The title of the act of March 12, 1885, "An act to amend an act entitled 'An act to establish a Penal Code,' approved February 14, 1872, by amending section 634, relating to fish and game," sufficiently expresses its subject, and the act is valid.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

J. F. Wendell, for appellant. *A. B. Dibble* and *A. D. Mason*, for respondent.

BELCHER, C. C. This is an agreed case, and the only question involved is whether the provisions of sections 634 or 636 of the Penal Code govern as to the disposition of fines collected for violations of chapter 1, tit. 15, of that Code, the two sections being in direct conflict. It appears from the agreed statement that the district attorney of Solano county, the appellant here, had in his hands the sum of $305, being the one-fourth of certain fines collected in cases prosecuted by him for violation of that chapter in the justices' courts of his county, during the year 1885, and subsequent to May 12th of that year; and the question is what is to be done with that money. Of the other three-fourths, the sum of $610 was paid to the informers, and $305 to the district attorney, and about this there is no controversy.

Section 636 was amended on March 30, 1878, and, until it was again amended on March 24, 1887, in so far as it related to the disposition of moneys collected for fines, reads as follows: "One-half of all moneys collected for fines for violation of the provisions of this chapter shall be paid to informers, and one-half to the district attorney of the county in which the action is prosecuted."

Section 634 contained no provision relating to the moneys collected for fines until March 12, 1885, but it was then amended, the amendment taking effect May 12th, so as to contain the following provision: "One-half of all moneys collected for fines for violation of the provisions of this chapter shall be paid to the informer, one-quarter to the district attorney of the county in which the action is tried, and one-quarter shall be paid into the fish commission fund."

It is claimed for the appellant that section 636 must control as to the disposition of the money, because it is last in numerical order, and there is nothing in the chapter, apart from the conflicting provisions, to indicate an intention that the section first in numerical order should prevail; and section 4484 of the Political Code is cited as decisive of the question. That section provides as follows: "If conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article."

There can be no question that the four Codes constitute but one statute, (section 4480, Pol. Code; *People* v. *Applegarth*, 64 Cal. 229,) and that if the two conflicting sections had been passed at the same time, the rule invoked would apply. But the question here is, does that rule apply where the sections were passed at different times? We do not think it does. It is an old and well-settled rule that when two laws, upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail. So it has always been the rule that when different provisions of a statute, all passed at the same time, could not be reconciled, the one that came last in point of position must prevail. And this was upon the theory that effect should always be given to the latest, rather than to an earlier expression of the legislative will, presumption being that the latter part of the statute was last considered. Section 4484 ought not to be so construed as to change these old and well-established rules, unless it clearly appears that at the time of its passage such was the legislative intent. We are unable to see anything indicating such an intent; on the contrary, the section seems to be only the plain expression of what was already well-established law. In our opinion, therefore, section 634, being the latest expression of the legislative will, must be held to be the law, and must control as to the disposition of the moneys referred to therein.

The point is also made that the provision of section 634 for the disposition of the fines collected for violations of that chapter is unconstitutional, because that subject is not expressed in the title of the act. The act is entitled, "An act to amend an act entitled 'An act to establish a Penal Code,' approved February 14, 1872, by amending section 634, relating to fish and game." In

People v. *Parvin*, *ante*, 783, (decided August 23, 1887,) this court had under consideration an act passed by the legislature entitled, "An act to amend section 3481 of the Political Code." It was objected that that act was void because the subject of the act was not expressed in its title, but the court held the title sufficient and the act valid. Upon the point in hand that case is decisive of this.

In our opinion the judgment should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 283

ELMER *v.* GRAY and another. (No. 12,063.)

(*Supreme Court of California.* August 30, 1887.)

GUARDIAN AND WARD—ALLOWANCE FOR SUPPORT OF WARD—POWER UNDER WILL.

Where the same persons were named in the will as executors and guardians of the residuary legatee, and the will, in a clause giving plaintiff a monthly allowance during her life, directed the "executors" to expend such further sums for her care and comfort as they should deem necessary, the guardians, after their discharge as executors, have power to increase the allowance.

Commissioners' decision. Department 2.

Appeal from superior court, Sutter county; PHIL. W. KEYSER, Judge.

R. D. Clement, for appellant. *E. A. Davis* and *S. J. Stabler*, for respondent.

FOOTE, C. This is an action to construe a will. The defendants Gray and Wilbur were nominated in the will the executors thereof, and the guardians of the estate of the testator's child, who was the residuary legatee. The plaintiff is the person named in the fifth clause, which is as follows: "*Fifth.* I give and devise to my sister, Mary Elmer, now of San Francisco, Cal., the sum of $40 per month, from the date of my death during her natural life; and if it is necessary for her care and comfort, I will and direct that my executors pay to her, or expend for and on her behalf, such other and further sums as they in their best judgment may deem meet and proper; and in case of her death to give her a decent burial." The defendants paid this sum, together with an increase of $10, until the distribution of the estate to the residuary legatee, of whose estate they are now guardians by the terms of the will. They now doubt whether they have power to increase the allowance, because the above clause of the will vests the discretion in them as "executors," and they are no longer executors but are guardians. We think they have the power. The leading intention of the testator in this regard was to make a suitable provision for his sister during the rest of her life. For this purpose he gave her an allowance of $40 per month "during her natural life;" and because he could not foresee what her needs might be as increasing age crept upon her, he vested a discretion in certain persons to increase the allowance if they thought it was necessary. The word "executors" seems to us to have been used simply as a designation of the persons who were to exercise the discretion, and not as a limitation of the time in which it was to be exercised, and it is unimportant that the official name of these persons has been changed.

We therefore advise that the judgment be reversed, and the cause remanded for further proceedings.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for further proceedings.

73 Cal. 263

GREEHN v. SHUMWAY. (No. 11,642.)

(*Supreme Court of California.* August 30, 1887.)

APPEAL—APPEALABLE ORDER—REFUSAL TO ACT—REMEDY.

The denial by a trial court, after final judgment, of an order allowing the sheriff's bill of expenditures for an attachment and sale in the action, is simply a refusal to act, and therefore not appealable, the remedy, if any, being by *mandamus*.

Commissioners' decision. Department 1.

Appeal from superior court, Lassen county; JOHN G. PRESSLEY, Judge.

E. V. Spencer and *J. E. Raker*, for appellant. *Goodwin & Shinn*, for respondent.

HAYNE, C. The case of *Shumway* v. *Leakey*, *ante*, 841, (just decided,) was an action under section 4181 of the Political Code, to recover money in the sheriff's hands, which he had refused to pay over to the party entitled. No order had been made fixing the amount of the fees, and upon that ground it has just been decided that the sheriff was not entitled to retain what he claimed as his fees out of the money in his hands. Pending the trial of said case the sheriff made a motion for an order allowing his fees. Shumway (defendant in the attachment suit and plaintiff in the suit above-mentioned) objected, "on the ground that such proof was irrelevant, and that the court had no jurisdiction to hear, or settle, or allow the said bill of expenditures after the same had been paid. The said objection was sustained, and the motion denied by the court. To which ruling counsel for said sheriff duly excepted." The sheriff attempts to make this action of the court the subject of an appeal. If the court had acted upon the application, and made an order allowing or disallowing the fees, it would then be a question whether such order was appealable. It is apparent, however, that the court simply refused to take any action in the matter, one way or the other. And we think it clear that this "order" is not appealable. If the sheriff has any remedy, it is by *mandamus* to the proper court to take action in the matter. The "order" not being appealable, there is nothing before the court.

We concur. BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the proceedings upon attempted appeal are dismissed.

73 Cal. 271

GRUPE v. BYERS and another.

(*Supreme Court of California.* August 30, 1887.)

HOMESTEAD—DIVORCE—CONVEYANCE BY HUSBAND TO WIFE.

In a suit for the foreclosure of a mortgage, executed by a wife upon homestead property, *held*, that a deed, signed by the husband alone, conveying to his wife all his interest in the homestead, made subsequent to a decree of divorce, was valid, and divested the property of its homestead character.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

This suit is brought against the defendants, husband and wife, for the foreclosure of a mortgage, executed by the wife after their divorce. Some time previous to the divorce the wife had made a selection of the property covered by the mortgage, as a homestead, and executed a written declaration thereof for the joint benefit of herself and husband. The decree of divorce made no disposition of the homestead property; but, subsequently to the rendering of the decree, the husband made a deed of the same to his wife, which was signed by himself only, and thereafter the wife executed the mortgage in question,

which was not signed by the husband. The defendants claimed that the property still retained its homestead character.

Aug. Muenter and *W. B. Nutter*, for appellant. *J. C. Byers*, for respondent. *J. H. Budd*, for guardian *ad litem*. *Louttit, Woods & Levinsky, amici curiæ*.

BY THE COURT. We are of opinion that the deed to the wife executed by the husband, after the decree of divorce in this case, was a valid one, and conveyed all the interest of the grantor. The mortgage of the wife was therefore valid, and the plaintiff (mortgagee) is entitled to a judgment of foreclosure. The portion of the judgment appealed from is reversed, and the cause remanded for a new trial, and on such new trial the views above expressed are to be followed. Ordered accordingly.

73 Cal. 297

OULLAHAN *v.* MORRISEY. (No. 11,393.)

(*Supreme Court of California.* August 30, 1887.)

1. APPEAL—JUDGMENT BY CONFESSION.
 Where a party consents to the entry of judgment against himself he cannot appeal from it; or, if he can, can be heard only as to that portion to which he did not consent.
2. SAME—JURISDICTIONAL AMOUNT—COSTS.
 The supreme court of California has no jurisdiction of an appeal involving only the question of costs which amount to less than $300.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

D. S. Terry, *F. T. Baldwin*, and *J. C. Campbell*, for appellant. *Joseph H. Budd*, for respondent.

BY THE COURT. The plaintiff, having consented to the entry of the judgment against himself, cannot appeal from it; or, if he can, can be heard only as to that portion to which he did not consent. That in this case is at the most the demand for costs, which, being less than $300, does not give this court jurisdiction. The appeal must be dismissed. So ordered.

MCKINSTRY, J., expressing no opinion.

73 Cal. 317

CHANDLER *v.* PEOPLE'S BANK. (No. 11,524.)

(*Supreme Court of California.* August 31, 1887.)

NEW TRIAL—PROCEEDINGS BELOW—ISSUES TO BE TRIED.
Where a new trial is granted on the ground that plaintiff had not been allowed to show that certain balances were of an interest-bearing character, it is not the duty of the court below, on the new trial, to try all the issues anew, but it may confine the testimony to the issue improperly decided.

In bank. Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

H. O. Beatty, *Beatty & Denson*, and *A. L. Hart*, for appellant. *Joseph McKenna* and *Freeman & Bates*, for respondent.

BY THE COURT. In the above-entitled cause the judgment and order appealed from are affirmed, for the reasons given by department 1. 11 Pac. Rep. 791.

TEMPLE, THORNTON, and SHARPSTEIN, JJ., dissenting.

73 Cal. 295

HITCHCOCK *v.* SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 12,071.)

(*Supreme Court of California.* August 30, 1887.)

JUDGMENT BY DEFAULT—APPLICATION TO OPEN—REVIEW BY CERTIORARI.

The notice in proceedings to determine title to decedent's estate, under Code Civil Proc. Cal. § 1664, prescribing the practice in such cases, was served by publication, and on February 5, 1886, an order was made declaring all persons, named or not named, who had not appeared, to be in default. Petitioner, a non-resident, had not heard of the proceedings prior to July 14, 1886, and was not named in any of

the proceedings prior to September 7, 1886, when she filed her motion to open the default, and for leave to appear and answer. *Held*, that the court had jurisdiction to make an order denying petitioner's motion, and that the order could not be disturbed on *certiorari*.

In bank. Application for writ of review, superior court, San Francisco; J. V. COFFEY, Judge.

Section 1664, Code Civil Proc. Cal., prescribes that the notice referred to in the opinion shall be served in the same manner as a summons in a civil action, and that, upon proof of service, the court shall have jurisdiction to determine the interest of all persons in the property, and its determination shall be final and conclusive. By section 473 the court may allow a defendant upon whom the summons in an action was not personally served to answer within one year after rendering judgment. By section 1713 the provisions of part 2 of the Code, of which section 473 is a part, are made applicable to, and constitute the rules of practice in, the proceedings mentioned in the title embracing section 1664.

T. Z. Blakeman, (*Edward J. Pringle* and *Broadhead & Haeussler*, of counsel,) for petitioner.

Petitioner is entitled to one year in which to appear and move to set aside her default. Code Civil Proc. Cal. §§ 473, 1664, 1713; *Guy* v. *Ide*, 6 Cal. 99; *Francis* v. *Cox*, 33 Cal. 323; *Gracier* v. *Weir*, 45 Cal. 53. Unless the default is opened, and petitioner allowed to answer, she is deprived of her property without due process of law. *Davidson* v. *New Orleans*, 96 U. S. 97; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 277; *Bank of Columbia* v. *Okely*, 4 Wheat. 235; Cooley, Const. Lim. 357; *Boorman* v. *Santa Barbara*, 65 Cal. 314, 4 Pac. Rep. 31; *Galpin* v. *Page*, 18 Wall. 368; *Wilkinson* v. *Leland*, 2 Pet. 659; *Hollingsworth* v. *Barbour*, 4 Pet. 471; Cooley, Const. Lim. § 107; *Pennoyer* v. *Neff*, 95 U. S. 714; *Belcher* v. *Chambers*, 53 Cal. 636; *Anderson* v. *Goff*, 13 Pac. Rep. 73; *Ware* v. *Robinson*, 9 Cal. 111.

The error complained of may be corrected on *certiorari*. *Field* v. *Turner*, 1 Cal. 156; *Fraser* v. *Freelon*, 53 Cal. 645; *Whiting* v. *Board of Delegates*, 14 Cal. 501; *Whitney* v. *Fire Dept.*, Id. 479; *Hall* v. *Superior Court*, 12 Pac. Rep. 672; *Baker* v. *Superior Court*, Id. 685; *Levy* v. *Superior Court*, 66 Cal. 292, 5 Pac. Rep. 353; *Boorman* v. *Santa Barbara*, 65 Cal. 314, 4 Pac. Rep. 31.

McAllister & Bergin, for respondent.

MCFARLAND, J. This is a proceeding in *certiorari* to review an order of the respondent denying a motion of petitioner to open a default, and for leave to appear and answer, in certain proceedings pending in respondent's court in the matter of the estate of Thomas H. Blythe, deceased. After the expiration of one year from the issuing of letters of administration in said estate of Blythe, deceased, one Florence Blythe, proceeding under section 1664, Code Civil Proc., filed a petition for the purpose of ascertaining and declaring the rights of all persons to said estate. A notice was issued upon said petition in pursuance of said section, in which a large number of persons were named, but in which petitioner herein was not named. The notice was published in manner as required for the service of summons by publication, and on February 5, 1886, which was five days after the return-day of the notice, the court made an order adjudging all persons (named or not named) who had not appeared, to be in default. Thereafter, on February 25, 1886, said Florence Blythe filed her complaint as provided by said section 1664, alleging her sole heirship, but did not name petitioner herein in said complaint or in any subsequent proceedings prior to the seventh day of September, 1886. Petitioner is not a resident of, and has never been in, the state of California, and did not know and had not heard of said proceedings prior to July 14, 1886. On September 7, 1886, she filed her motion, in due form, to open the

default, and for leave to appear as an heir of said Blythe, deceased, and to answer the said complaint of said Florence Blythe, presenting at the same time her proposed answer, duly verified with affidavit of merits, etc. Her motion was denied February 15, 1887, and we are asked to annul, upon *certiorari*, the order denying this motion.

We are of opinion that the respondent had jurisdiction to make the order complained of, and that it cannot be disturbed on this proceeding. But whether the proceeding in which the ruling complained of occurred will be conclusive against petitioner at the final distribution of the estate, or whether, having had no notice and not having been made a party, she does not come within the express exception of the final clause of said section 1664, which provides that "nothing contained in this section shall be construed to exclude the right, upon final distribution of any estate, to contest the question of heirship, title, or interest in the estate so distributed, when the same *shall not have been determined* under the provisions of this section,"—these are questions which do not arise here. The prayer of the petitioner is denied, and the writ dismissed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; TEMPLE, J.; PATERSON, J.

73 Cal. 291

WARDER *v.* ENSLEN. (No. 11,843.)

(*Supreme Court of California.* August 30, 1887.)

1. MORTGAGE—ABSOLUTE DEED—REDEMPTION—ADVERSE POSSESSION.
 An absolute deed was given as security for the payment of a debt, under an agreement that, whenever the grantor could sell the premises for an amount sufficient to pay the debt, the defendant would reconvey the premises, on payment of said debt. Possession was given to the grantee, who was to have the rents and profits, etc., as interest upon the debt. The premises could have been sold for enough to pay the indebtedness any time after January, 1879, but plaintiff made no attempt to do so, and made no attempt to redeem until January 22, 1885, and defendant never denied plaintiff's right to redeem prior to that date. *Held*, that defendant's possession did not become adverse until January 22, 1885.[1]
2. SAME—ADVERSE POSSESSION BY MORTGAGE—REDEMPTION, WHEN BARRED.
 Under Code Civil Proc. Cal. § 346, the mortgagee must have held adverse possession for five years after the breach of some condition of the mortgage, before the mortgagor's right to redeem is barred.
3. TRIAL—FINDINGS—DISCREPANCY.
 If a discrepancy exists in findings of fact by the trial court, the more specific findings of particular facts must control.

Department 2. Appeal from superior court, Stanislaus county; WM. O. MINOR, Judge.

B. McKinne, Kittrell & Maddux and *Ben T. Rawlins*, for appellant. *W. L. Dudley* and *Wright & Hazen*, for respondent.

SHARPSTEIN, J. This is an appeal from a judgment, and the contention of appellant is that the facts found by the court below are insufficient to support the judgment. It is an action to redeem a mortgage. Substantially, the court found that the plaintiff, being indebted to the defendant in the sum of $12,440.38, for the sole purpose of securing the payment of said indebtedness, executed and delivered to defendant, August 29, 1877, an instrument in form of a deed absolute, purporting to convey the premises described in the com-

[1] A deed, though absolute in form, if intended merely as security for an indebtedness, will be treated as a mortgage, Knapp v. Bailey, (Me.) 9 Atl. Rep. 122; Nesbitt v. Cavender, (S. C.) 2 S. E. Rep. 702, and note; First Bank v. Ashmead, (Fla.) 2 South. Rep. 657, and note; Frey v. Campbell, (Ky.) 3 S. W. Rep. 368, and note.
Respecting adverse possession, as between mortgagor and mortgagee, see Bank v. Thomas, (Ky.) 3 S. W. Rep. 12, and note.

plaint, which was made by the plaintiff, and accepted by the defendant, as security for the payment of said sum of money, and for no other purpose whatsoever. "Simultaneously with the execution and delivery of said instrument, and on the same day, to-wit, the twenty-ninth day of August, 1874, the plaintiff and the defendant made and entered into an agreement by the terms of which the defendant agreed to and with the plaintiff, that, whenever the plaintiff could sell the above-described land and premises for a sufficient sum of money, to pay the defendant the amount of the aforesaid indebtedness, to-wit, the sum of $12,440.38, that then the defendant would, on demand, reconvey to this plaintiff the whole of said land and premises on payment to the defendant of said sum of $12,440.38. And the plaintiff at the same time promised and agreed upon his part that, whenever he could sell said land for a sufficient sum to pay said indebtedness to the defendant, he would, on demand of said defendant, sell said land and pay said indebtedness and redeem said land. And it was then and there further mutually agreed by and between the plaintiff and the defendant, that, until the sale or redemption of the said land, the defendant should have and receive the rents and profits, use and occupation of the said land and premises, and that the same were and should be deemed equal and equivalent to any and all interest that might or could accrue upon said sum of $12,440.38, and the defendant further agreed to pay all taxes upon, and the cost of all necessary repairs, and the insurance of the improvements on, the said premises; and the defendant, in consideration of having and receiving the use and occupation, rents and profits, of said premises, agreed that the same should be in full payment of said interest, and defendant further agreed, for a valuable consideration on the part of plaintiff, that he would pay and discharge said taxes, make said repairs, and would at all times keep said improvements fully insured. Thereupon, and in pursuance of said deed and agreement, the defendant entered upon and has since possessed the premises."

The plaintiff never afterwards made any effort to sell the land, although it would have sold for enough to pay the debt at any time after January, 1879, and the land has not been sold, and no part of the indebtedness has been paid. The defendant has never at any time demanded of plaintiff that he should sell or redeem said land. On the twenty-second day of January, 1885, the plaintiff offered to pay said sum of $12,440.38 to defendant, on condition that he would convey said land to plaintiff, plaintiff then having said money in a bank subject to his order. Defendant waived the actual production of said money, and demanded that plaintiff exhibit evidence of the alleged indebtedness, which plaintiff refused to do, or to state whether any existed. The defendant did not enter into the possession of said premises under claim of title exclusive of other right, founding such claim upon said deed from plaintiff, but he entered into the possession under and in pursuance of said agreement, to hold the same as security for said debt, and he never, at any time prior to January 22, 1885, gave the plaintiff notice that he, defendant, claimed the land as his own, or denied the right of plaintiff to redeem the same, except so far as his (defendant's) possession under said agreement, after the said land had become salable for enough to pay said indebtedness, was notice of an adverse holding.

The court further finds the defendant has, ever since the twenty-ninth day of August, 1874, been in the exclusive possession of said land, and ever since January 1, 1879, holding the same adversely to the plaintiff under claim of title under said deed, and at all times asserted said right when called upon to disclose his claim respecting said land. And also finds plaintiff's cause of action is barred by the provisions of section 346 and of sections 319, 322, and 343, Code Civil Proc.

The findings of an adverse holding and of the bar of the statute of limitations are attacked by appellant, on the ground that the court does not find that the action is barred by the provisions of section 346, Code Civil Proc.,

which alone applies to this case. That section reads as follows: "An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage." The contention of the appellant is that the findings show that the possession of defendant was not adverse before the twenty-second of January, 1885, and this action was commenced within a few days thereafter. The specific findings of fact certainly sustain that contention, and "if a discrepancy exist, the more specific findings of particular facts must control." *Hidden* v. *Jordan*, 28 Cal. 301. The specific findings show that the entry and possession of the defendant was not adverse to the plaintiff up to January 22, 1885. In *Frink* v. *Le Roy*, 49 Cal. 314, the defendant had entered into and held possession of the mortgaged premises under a contract not materially different from that under which the defendant entered into and held possession in this case. The court in that case said it would hardly be claimed that the plaintiff would be barred of the right to resume the possession upon payment or tender of the balance of the mortgage debt.

The possession of the defendant must be *adverse* for five years after the breach of some condition of the mortgage, in order to bar the plaintiff's right of action to redeem. We so held in *Cohen* v. *Mitchell*, 9 Pac. Rep. 649. Here the findings show that the possession was not adverse for any such period.

Judgment reversed and cause remanded for a new trial.

We concur: McFARLAND, J.; THORNTON, J.

BY THE COURT. In this cause we are of opinion that the judgment should be modified so as to read as follows: "The judgment is reversed, and the cause remanded to the court below, with directions to enter judgment on the findings for the plaintiff."

73 Cal. 320

McCLAIN *v.* BUCK. (No. 11,671.)

(*Supreme Court of California.* August 31, 1887.)

FRAUDULENT CONVEYANCE—PERSONAL PROPERTY—CHANGE OF POSSESSION—RIGHTS OF CREDITORS.

By an agreement supplemental to an absolute sale of personal property by plaintiff to R., plaintiff was authorized by R., on default in payment, to retake the property. R. made default, and refused to deliver to plaintiff the property, which, since the sale, had been in the continuous possession of R. Defendant, with knowledge of these facts, caused the property to be sold under an execution against R. In an action for conversion, *held*, that under Civil Code Cal. § 3440, declaring void as to creditors certain transfers not accompanied by an actual and continued change of possession, the transfer was void, as to defendant.[1]

Department 2. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

R. Clark and *T. J. Mize*, for appellant. *A. J. Dolbbins*, for respondent.

THORNTON, J. This action was brought to recover damages for the conversion by defendant of certain personal property, described as "all that certain lot of printing material situated in the town of Vacaville, Solano county,

[1] Respecting the change of possession sufficient to overcome the presumption of fraud, as against the creditors of the vendor, and when that is a question for the jury, see Stull v. Weigle, (Pa.) 8 Atl. Rep. 578; Hogan v. Cowell, (Cal.) *ante*, 780; Dodge v. Jones, (Mont.) *ante*, 707; Young v. Poole, (Cal.) 13 Pac. Rep. 492; Cook v. Rochford, (Cal.) 12 Pac. Rep. 568, and note.

Cal., and known and described as the 'Vacaville Reporter or Judicion newspaper material.'" At the trial it appeared that plaintiff sold the property in question, with other property, to one Raleigh Barcar, on the tenth day of October, 1884. The purchase price was $1,250, of which $500 was paid down, and for the balance Barcar executed to plaintiff two promissory notes, one for $500, with interest, payable one year after date, and the other for $250, with interest, payable 18 months after date. At the time of the sale, plaintiff executed and delivered to Barcar an absolute bill of sale, in which the consideration was recited and the property described. After the sale was made and plaintiff had gone away, but within two hours, as he testified, he "considered the thing was not safe enough," and went back and had Barcar execute a "supplementary agreement" in the following words: "It is hereby agreed that the party of the first part to the foregoing sale and agreement shall, upon default in the payment of either of the notes specified in said memorandum of sale and agreement between J. D. McClain and Raleigh Barcar, be authorized and permitted to enter upon and take possession of the printing presses, types, and stock and materials mentioned therein, to secure payment of said notes, said property being considered as pledged to secure payment of said notes." The possession of all the property sold was immediately delivered to Barcar, and he held it till the $500 note matured. Then plaintiff demanded from him payment of the note, and not receiving the money, demanded that possession of the property be given back. This was refused. On the next day plaintiff read to defendant his contract and "explained to him its terms and asked him to assist Barcar to pay it or fix it up." Defendant said he would see about it the next day. On the next day defendant caused the property to be attached as the property of Barcar, and thereafter had it sold under execution. Plaintiff demanded the property from the officer who held it under execution, and sought by injunction and other means to prevent its sale, but failed in all his efforts.

Upon these facts plaintiff submitted his case, and thereupon, on motion of defendant, a judgment of nonsuit was entered against him. He then moved for a new trial, and now prosecutes this appeal from the order denying his motion.

The nonsuit was properly granted. If title revested in the plaintiff under his agreement with Barcar, there was no delivery of the property followed by an actual and continued change of possession. The same is true if plaintiff had, under the agreement mentioned, a right to take possession from Barcar, for the right to the possession of personal property is a thing in action, and is therefore personal property. Civil Code, § 14, sub. 3. In either view, the transfer was not valid under the statute, against defendant, a creditor, (Civil Code, § 3440,) unless accompanied by an actual and continued change of possession. The notice of plaintiff's claim which defendant had was immaterial. Buck was a creditor, while Barcar remained in possession, and, as against such creditor, the transfer was void. Civil Code, § 3440, *supra*.

The order must be affirmed. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

73 Cal. 236

PRESCOTT *v.* MCNAMARA and others. (No. 12,104.)

(*Supreme Court of California.* August 27, 1887.)

1. LEVEE TAXES—PAYMENT—WARRANTS ON LEVEE FUND—COIN.

Under the California act of March 25, 1868, entitled "An act to provide for the protection of certain lands in the county of Sutter from overflow," levee taxes may be paid with either warrants drawn on the levee fund, or with money, but, when paid with money, the payment must be in gold or silver coin.

2. SAME—REGISTRY OF WARRANTS—ORDER OF PAYMENT.

Section 13 of the said act provides that the treasurer shall keep a register of warrants in the order of their presentation for payment, and, when no money is in the fund, to indorse on each warrant the date of its presentation, "and thereafter pay the same in the order of registry, as from time to time any money shall be paid over to him to the credit of the particular levee fund on which the same is drawn." *Held*, that the right to payment in order of time of presentation existed only when there was money in hand, and that the section did not qualify the right given by section 12 to use the warrants in payment of taxes without reference to the order of their registry.

Department 2. Appeal from superior court, Sutter county; PHIL. W. KEYSER, Judge.

On demurrer to complaint.

E. A. Davis and *J. H. Craddock*, for Prescott, appellant. *Stabler & Bayne* and *Sandborn & Phillips*, for McNamara and others, respondents.

MCFARLAND, J. This action was brought to restrain the tax collector of levee district No. 6, of Sutter county, and the treasurer of said county, from receiving in payment of levee taxes any warrants drawn on the levee fund, except in the order of their registration. A demurrer to the complaint was sustained in the court below; and plaintiff, declining to amend, judgment went for defendant, and plaintiff appeals from the judgment.

Appellant is the holder of a number of warrants issued and registered in 1871, and he contends—*First*, that all levee taxes must be paid in gold or silver coin; and, *second*, that at least no later warrants can be received for taxes while older registered warrants remain unpaid.

The last clause of section 12 of the act under which the district was organized is as follows: "Warrants drawn on any levee district fund shall be paid out of any money in the county treasury belonging to such fund, or they may be received by the tax collector in payment of the tax authorized to be levied for the construction of levee, or other work of protection, of said district." Section 16 provides that "all taxes levied and collected by virtue of this act shall be paid in gold or silver coin of the United States." And appellant contends that, as these two sections are in conflict, section 16, being the last in numerical order, and the latest expression of the legislative will, must obtain. But that rule of construction can be resorted to only when the conflict between two laws, or two parts of laws, is so complete as to baffle all attempts to reconcile them. All parts of a statute are to be reconciled, and effect is to be given to each part, if it can be done; and here it can be easily done. The statute, *upon its face*, means that the taxes may be paid either with warrants or with money, but that *when* paid with money it must be with a particular kind of money. And this appears still more clearly when we consider the historical fact that a few years before the passage of the act in question the state adopted the policy of excluding paper money from her fiscal system.

Section 13 provides that the treasurer shall keep a register of warrants in the order of their presentation for payment, and, when there is no money in the fund, shall indorse on the warrants the date of their presentation, "and thereafter pay the same in the order of its registry, as from time to time any money shall be paid over to him to the credit of the particular levee fund on which the same is drawn." This provision deals only with the right of holders of warrants to have them paid in money, in the order of registry, when "from time to time any money" shall be in the fund. It in no way qualifies the right given by section 12 to use warrants in payment of taxes without reference to the order of their registry. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

73 Cal. 329

McLERAN *v.* BENTON and another. (No. 9,220.)

(*Supreme Court of California.* August 31, 1887.)

1. MUNICIPAL ORDINANCE—VAN NESS ORDINANCE OF SAN FRANCISCO—CLAIMS TO REAL ESTATE—RELINQUISHMENT—POSSESSORS.
 Under the Van Ness ordinance of San Francisco, passed June 20, 1855, by which the city relinquished its claims to real estate within certain limits, to the possessors thereof on or before January 1, 1855, provided that such possession continued up to the time of the introduction of the ordinance, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process, *held*, that the proviso includes ousters before January 1, 1855, and one evicted before the ordinance took effect must recover possession by virtue of his prior possession, before his action thereon was barred by limitation, and not by virtue of any title vested in him by the ordinance.
2. LANDLORD AND TENANT—VOID LEASE—RELEASE BY TENANT—TENANTS IN COMMON—ADVERSE POSSESSION.
 A lessee, holding under a void lease from a tenant in common, released to persons who had contracted to purchase the premises from the tenant in common, if they should obtain such release. *Held*, that the releasees were neither tenants at will nor on sufferance, and that a deed to them made thereafter by such tenant in common, with a *bona fide* intention to pass the title, vested in them all the grantor's right of possession, so as to constitute their possession adverse as against the other co-tenants, and give them the benefit of the Van Ness ordinance of San Francisco relinquishing the city's title in favor of possessors.
3. LIMITATION OF ACTIONS—ESTATES OF DECEDENTS—PERSONAL REPRESENTATIVES—HEIRS.
 In California, the personal representatives having the exclusive right to bring suit on behalf of the estate, for the benefit of creditors, heirs, and devisees, an action barred by limitations against such representatives is also barred against the heirs, though they be under disability.
4. SAME—DISABILITY—ACCRUAL OF ACTION.
 A right of action having accrued to one under no disability, who died without bringing suit, the disability of those claiming under her does not stop the running of the statute.
5. APPEAL—DECISION—SECOND AND THIRD TRIAL—LAW OF THE CASE.
 Where, on the first and second trials of a cause, a lease has been introduced in evidence without objection, the decisions of such causes on appeal, where it was not questioned, do not make its validity the law of the case, so as to preclude the trial court to hold it invalid on the third trial, when it is merely introduced to show the nature of the lessee's possession.

In bank. Appeal from superior court, San Francisco; OLIVER P. EVANS, Judge.

The following is an epitome of the history of the case, and of the facts as found by the court: In 1849 Jacob Harmon and wife, Eleonora, entered into possession of a tract of land embracing the land in controversy, which consists of separate parcels lying in what is now a populous portion of the city of San Francisco, and generally known as "Woodward's Garden," "Benton's Church," and "Judson & Shepard's Acid Factory." The lands are within the boundaries of the territory described in the Van Ness ordinance. See St. 1858, p. 52 *et seq.* Harmon continued in the actual occupation thereof until the time of his death, November, 1850. Eleonora was divorced from Jacob in 1849, and by the decree was awarded an undivided half of the property. Jacob appealed from the judgment. Pending the appeal he died testate, and his executors were substituted as parties. To his son, Jacob, Jr., then five years of age, he bequeathed two undivided thirds of his property, and appointed the executors to be guardians of said Jacob, Jr. To his daughter (there were but two children) he gave the remaining one-third, when she arrived at the age of 18, if her conduct satisfied the executors, and with the proviso: "If it should so happen that her conduct should not be entirely unexceptionable, yet not lost to every sense of propriety, in that case it is my will and desire that my executors should relieve her urgent wants and necessities, but in no case to give her more than one-third of my entire property.

And if she should fail to comply with the conditions which I have imposed upon her, then and in that case I give the remaining one-third to my son, Jacob, Jr."

The decree referred to was affirmed by this court, (*Harman* v. *Harman*, 1 Cal. 215,) and by proceedings afterwards had in the court below the lands were sold at auction, by commissioners therefor appointed by the court, on March 28, 1851. At the sale Eleonora was the highest bidder, and upon payment to the commissioners they conveyed the land to her. The children were not made parties. Eleonora and her husband, Michael Foley,—to whom she was married November 20, 1852,—were put into possession under orders from the court, and the executors never afterwards occupied or claimed the property. An inventory, acknowledged by Foley and wife, was filed May 31, 1852, in which all of the lands in controversy are described as the separate property of Mrs. Foley. In September, 1851, Michael Comerford went into possession, under a parol agreement with Foley and wife, to cultivate the lands on shares, and remained in possession thereunder until August 16, 1852, when Foley and wife and Comerford executed an instrument in the form of a lease to said Comerford, from said sixteenth day of August, 1852, to the sixteenth day of January, 1856, at the monthly rental of $83.75. This instrument was never acknowledged by any of the parties to it, but was recorded August 24, 1852. Comerford continued in possession under and by virtue of the lease until January 27, 1853. The court found as a fact that during this last-named period Comerford was a tenant at will of Foley and wife, both parties having treated it at the trial as void, and, if admissible at all, only to show the character of Comerford's holding. On the eighteenth day of June, 1853, Foley and wife entered into a written agreement with Brannan and others, whereby they agreed to sell to the latter all of the lands, and assigned the lease in consideration of $6,000. Brannan & Co. paid Foley and wife $100 in consideration of the agreement, but it was understood and agreed that the conveyance was to be only in the event that satisfactory arrangements should be made with Comerford to deliver the possession to Brannan & Co. Interviews were had with Comerford by Foley and wife and Brannan & Co., which resulted in an assignment by him of all interest which he held under the instrument which they all regarded as a valid lease; and on the termination of Comerford's tenancy, and his surrender of possession to Brannan & Co., in consideration of $5,000, which they paid, Comerford was allowed to gather his crop then growing, which was done prior to December, 1853, and from that time until October, 1855, the court finds that said Comerford was a caretaker and bailiff in the employ of Brannan & Co.

As to those portions of the lands claimed by defendants Benton, Judson, and Woodward, however, said defendants were let into possession in 1854, under deeds from Brannan & Co. conveying them severally in fee-simple. On June 27, 1853, Brannan & Co. paid to Eleonora, personally, the balance of the $6,000 purchase price, and in pursuance of their agreement with Brannan & Co., Foley and wife attempted to convey the lands to Brannan & Co. by deed, but the deed was not acknowledged so as to constitute it a valid conveyance by Mrs. Foley, and it is admitted that it is void. The court found that "said defendants Benton, Judson, and Woodward, ever since their entry into possession in 1854, have been severally and respectively in the actual, continuous, exclusive, and adverse possession, holding the same against all the world, of the several parcels described in their answer, claiming the same under said conveyances in good faith, and having paid a valuable consideration therefor, and as early as 1854 made and have since continued to make large and valuable improvements thereon. * * * That such possession was continued without interruption ever since, and that they held and continued during all of said time in possession of said premises without any trespass or intrusion by any person or persons whatsoever."

Kitty Foley, daughter and only surviving child of Eleonora and Michael, was born July 8, 1853. Jacob, Jr., died unmarried and intestate in October, 1859, and Eleonora, his mother, died intestate in November following. Prior to her death she married (in 1859) one James Holmes, who survived her. Mary Ann Harmon was married to Peter Roussel, and afterwards, to-wit, on May 21, 1861, said Mary Ann and Peter conveyed the lands in controversy to plaintiff in consideration of $10, provided, however, that the undivided half of all lands which he, said plaintiff, might recover under said deed by virtue of proceedings he agreed to prosecute at his own expense, should be by him conveyed to said Mary Ann. In 1854 Eleonora and her children, Mary Ann, Jacob, and Kitty, removed to Santa Clara county, where Foley died the same year, and they did not have the actual possession any time thereafter. Plaintiff proved no other deraignment of title or right to the possession than his said deed from Mary Ann and Peter.

The court below found as conclusion of law that the defendants were the owners in fee, and gave judgment for them accordingly.

The Van Ness ordinance, herein referred to, was passed by the city council of San Francisco, June 20, 1855, and was approved and ratified by the legislature March 11, 1858. By it the city relinquished all claim to lands within certain limits, in favor of the possessors or lessors on or before January 1, 1855, excepting certain lots on the water front and others reserved for public purposes, "provided that such possession has been continued up to the time of the introduction of this ordinance in the city council, or if interrupted by an intruder or trespasser, has been or may be recovered by legal process." The ordinance further provided that its true intent was that leased property should be considered as in the possession of the landlord. Certain titles of Spanish origin, and others derived from grants prior to the incorporation of the city, were excepted from its operation.

A. L. Rhodes, for appellant. *Wilson & Wilson*, for respondents.

PATERSON, J. This action was commenced 25 years ago, and has been before this court several times on appeal. The tracts of land in controversy are of great value, and are popularly known as "Woodward's Garden," "Benton's Church," and "Judson & Shepard's Acid Factory." The property is within the exterior limits of the territory described in the Van Ness ordinance, and the principal questions involved relate to the title conferred by that ordinance, and to defendant's plea of the statute of limitations. After the second decision by this court, (43 Cal. 473,) the defendants filed in the court below an amended answer, setting up more fully the facts upon which they relied in their affirmative defense.

Inasmuch as the appellant places great reliance upon the decisions on the former appeals, it becomes necessary for us to review the matters adjudicated, and ascertain to what extent the law of the case has been established. It is said that because the lease was regarded and treated at the first and second trials, and on the former appeals, as valid by all the parties and by this court, the objection made at the last trial and on this appeal, that it is invalid because not acknowledged by Mrs. Foley, cannot be considered; that it must now be regarded as a valid lease. The fact is, as stated, that the lease was at the first and second trials regarded as valid, and creating a term for years, and was so treated by this court on appeal. 31 Cal. 30, and 43 Cal. 468. At the last trial, however, the lease was objected to, and held to be void as a lease for a term of years, but was introduced and considered in evidence, only "to show the character of Comerford's holding; to show a recognition of tenancy on the part of Comerford creating a tenancy at will, and to illustrate the possession that was taken subject to it." We do not think that the decisions upon this question on the former appeals have become the law of the case. The evidence and the purposes for which the pretended lease was introduced pre-

sent a different question on this appeal. It is only where the evidence is the same that the doctrine contended for by appellant applies. It is doubtless true, as a general proposition, that a previous ruling of the appellate court upon a matter directly in issue, is, as to all subsequent proceedings, a final adjudication, and becomes the law of the case, from which the court ought not to depart, nor allow the parties to be relieved. But when such a ruling relates to a matter of fact, the principle can be invoked only when the fact appears again to the appellate court under the same circumstances in which it was originally considered. *Mitchell* v. *Davis*, 23 Cal. 381, *Trinity Co.* v. *McCammon*, 25 Cal. 121; *Leese* v. *Clark*, 20 Cal. 418; *Nieto* v. *Carpenter*, 21 Cal. 483. In our opinion, therefore, the court below was not bound to consider the lease as a valid lease for a term of years; and that it created simply a tenancy at will we have no doubt. Tayl. Landl. & Ten. §§ 19, 112.

It is further contended that the decree and sale, followed by a deed from the commissioners to Eleonora, executed March 28, 1851, were void as to the children of Jacob Harmon, deceased, because they had not been made parties to the action after the death of their father, and, therefore, that Eleonora and the children were tenants in common.

On the second appeal it was said: "The decision on the former appeal, and in *Ewald* v. *Corbett*, [32 Cal. 493,] would be destitute of all basis if the estate of Jacob Harmon would not descend, or could not be distributed, under the statute regulating common property;" and it was in effect decided that the commissioners' deed of March 28, 1851, was void, and the fact that the defendants and others effected their purchase from Mrs. Foley in good faith was immaterial, the papers which the parties executed having shown that the premises were a portion of the Harmon estate, in which the children of Mrs. Foley had an interest, which Mrs. Foley had not competent power to convey. Under that decision we must hold that "the undivided half of the premises, that is to say, the undivided half of the interest therein which Harmon and wife held immediately preceding his death, vested in Eleonora, either by virtue of the decree of divorce or the statute of this state providing for the distribution of the common property upon the dissolution of the community by the death of the husband, and the remaining half vested in their two children; that the right and interest in the premises, acquired or held by Harmon by virtue of his possession, conceding they were the lands of the pueblo or the city, would descend to his heirs, if not devised by him, and that the same might be distributed under the statute relating to common property." It would seem to follow, therefore, that Eleonora and the children were tenants in common at the time the lease to Comerford was delivered, (43 Cal. 476;) and that if they had been in possession of the property on January 1, 1855, and remained till June 20, 1855, they would have received the Van Ness ordinance title. The same result probably would have followed had Comerford remained in possession under the lease until June 20, 1855. If we assume this to be true, then, up to the time of the assignment by Comerford of his interest in the lease to Brannan and others, December, 1853, the rights of Mrs. Foley and the children in the premises would be fully preserved. This brings us to the inquiry—a most important one, so far as Mrs. Foley's interest is concerned, at least—as to the legal effect of Comerford's assignment to Brannan and others. By the terms of the instrument it was provided "that, whereas, T. O. Laram * * * and Samuel Brannan have become the owners, by purchase, of the within described premises; now, therefore, in consideration of the sum of five thousand dollars, to me paid, * * * I do by these presents assign, transfer, and surrender to said * * * and Brannan all my right, title, and interest in the said premises, under and by virtue of the within lease." What right, title, or interest did Comerford hold by virtue of the lease which could be transferred by him? He was a mere tenant at will, and could not assign the remainder of the term named in the lease. A ten-

ancy at will is not assignable. If a tenant at will attempt to underlet or surrender, he thereby determines his will and relinquishes the estate. *Cooper* v. *Adams*, 6 Cush. 90; Tayl. Landl. & Ten. §§ 62, 83. Without the consent of Mrs. Foley, Brannan and others would be merely tenants at sufferance, and liable to an action of trespass against them. *Reckhow* v. *Schanck*, 43 N. Y. 451.

The tenant at sufferance has merely a naked possession; stands in no privity to the landlord; is not liable for rents, unless expressly made so by statute; nor is he entitled to notice to quit. The landlord may put an end to the tenancy when he thinks proper, and may, under certain circumstances, treat the one in possession as an intruder or trespasser. *Hauxhurst* v. *Lobree*, 38 Cal. 563; *Meirer* v. *Thiemann*, 15 Mo. App. 307; Tayl. Landl. & Ten. § 65. The relation of Brannan and others to the Foleys, therefore, depended upon the understanding and oral agreement of all the parties, and there is no question as to what that agreement was. The court found, and the finding is supported by evidence, that the preliminary agreement of sale under which Brannan and others were let into possession, was a mere temporary arrangement, with a view, before completion of the purchase, to securing from Comerford a termination of his tenancy; and it was not until after this was accomplished that the purchase price was paid by Brannan and others to the Foleys. There was no recognition by the Foleys of Brannan and others as tenants. The transaction was, as between the Foleys and Brannan and others, to be a sale of all right, title, and interest of the former, or the $100 which had been paid was to be returned to the latter. The consent of Comerford was not necessary to terminate his interest in the property. The Foleys could have terminated it without his consent; and the sale by them to Brannan and others was itself a sufficient expression of their will to end the tenancy, and precludes the idea of a tenancy at will on the part of Brannan and others. *Pratt* v. *Farrar*, 10 Allen, 520.

If the Foleys had sold to strangers, instead of to Brannan and others, the latter would not have been entitled to a notice to quit, from the purchaser. The conveyance of the property, *ipso facto*, destroys all privity or relationship between the owners and the tenant at sufferance. *Esty* v. *Baker*, 50 Me. 325. The same result must follow when the sale is made to the tenant at sufferance himself, especially when, as in this case, it is expressly understood that the sale depends upon the result of negotiations on the part of the purchaser and seller to secure the surrender of all claim on the part of the tenant at will, so that the full title may vest in the purchaser. There was no relation of landlord and tenant between the Foleys and Brannan and others. Such relationship was never contemplated. The Foleys recognized Brannan and others as purchasers of the land. The parties all acted in good faith, believing that all the right, title, and possession of the Foleys had passed to their grantees. Comerford paid rent to no one after they all arrived at this understanding, but was permitted to remain on the place till the fall of that year, to gather his crop, at which time he surrendered possession to Brannan and others, who paid him $5,000 therefor. After such surrender, the court finds that he acted as the bailiff, or care-taker, for the purchasers. The Foleys received $6,000, the purchase price in full, from the purchasers, in June, 1853, left the premises, and never afterwards claimed any right to the same; nor has any one on their behalf ever offered to repay any money received by them. The fact that the writings which passed between the parties turned out to be void, cannot change the acts; nor can it alter the intention of the parties, verbally expressed, and that intention was that Brannan and others should have actual possession of the premises, to have and to hold the same in their own right, without interference or claim, trespass or intrusion. Such possession they took in 1854 and held until the commencement of this suit, eight years later; and, unless we are mistaken as to the effect of the attempted

assignment by Comerford to them, they received by virtue of the possession thus given to them the Van Ness ordinance title, to the extent, at least, of the interest held and controlled by Mrs. Foley, who voluntarily relinquished the premises.

The possession of Brannan and others was clearly adverse, and the statute began to run in their favor and against the executors from the time of their entry. *Packard* v. *Moss*, 68 Cal. 123, 8 Pac. Rep. 818; *Mulford* v. *Le Franc*, 26 Cal. 90; Ang. Lim. §§ 388–410.

Another and more difficult question relates to the interest which descended to the heirs of Harmon. The executors have never been discharged. When Harmon died, (in 1850,) Mary Ann and Jacob, Jr., were, respectively, seven and four years of age. Neither Mrs. Foley nor her children had possession of the premises after December 16, 1853, and this action was not commenced until June 4, 1862; and, upon the authorities construing the statutes then in force, and determining the rights of minors in property represented by executors, we must hold that there was during the period mentioned no saving of infancy. The will was duly probated. The executors took possession of the property, and retained the same until put out by the sheriff under order of the court, made in the action for divorce and division of the property. If the entry of the defendants was wrongful, the devisees of Harmon could not maintain an action, for that right existed exclusively in the executors, who in all suits for the benefit of the estate represented both the creditors and the heirs. *Cunningham* v. *Ashley*, 45 Cal. 493; *Halleck* v. *Mixer*, 16 Cal. 579. It would seem to follow, therefore, that when the executor is barred of his action, the heir is barred, although the heir or devisee be laboring under a disability. *Wilmerding* v. *Russ*, 33 Conn. 68. The general rule is that when a trustee is barred by the statute of limitations, the *cestui que trust* is likewise barred, even though an infant, (Hill, Trustees, 267, 403, 504,) and that the heir or devisee is dependent upon the diligence of the executor for the maintenance of his rights with respect to the real property, but is not without a remedy by an action for damages against his executor and his sureties, or by a proper proceeding to compel him to bring suit. *Tyler* v. *Houghton*, 25 Cal. 29. This subject has been very carefully considered, and the decisions and statutes of this state elaborately reviewed by the circuit court and the supreme court of the United States, and the conclusion reached that, where the administrator in this state neglects to bring an action to recover property of the estate until it is barred under the statute of limitations applicable to the subject, the heir is also barred, even though the heir be a minor at the time the action accrues to the administrator. *Meeks* v. *Vassault*, 3 Sawy. 214; *Meeks* v. *Olpherts*, 100 U. S. 564.

But it is claimed by the appellant that he is not seeking a recovery upon the title or right of possession held by Jacob Harmon in his life-time; that the only purpose of proving prior possession was to prove and identify the persons in whom the Van Ness ordinance title vested; that it is upon that title that this action is brought, and, as that title never was in Harmon or his estate, the executor could not maintain an action upon the title; and that the interruption by an intruder or trespasser, referred to in the ordinance, means an ouster between the first of January, 1855, and the twentieth of June, 1855; also that the statute did not commence to run against the Van Ness ordinance title until it vested in plaintiff's grantor, which was not until May 11, 1858. Unfortunately, however, for the appellant, all of these contentions have been disposed of adversely to him by the decisions of this court. There was no ouster during the interval referred to, and the proviso under which they claim title embraces persons evicted by intruders and trespassers, as well before the first of January, as those evicted afterwards and before the twentieth of June. The statute commenced running on the eleventh day of April, 1855, and one who was ousted by an intruder before the ordinance took effect, in order to

acquire the ordinance title, must recover possession from the intruder by virtue of his prior possession, in a suit commenced before his right of action on his prior possession is barred by the statute of limitations. He cannot recover from such intruder by virtue of any title vested in him by the ordinance. *Pickett* v. *Hastings*, 47 Cal. 269; *McLeran* v. *Benton*, 43 Cal. 467; *McManus* v. *O'Sullivan*, 48 Cal. 7. On the day that the statute of limitations commenced to run, April 11, 1855, Mrs. Foley was a widow, and could have maintained an action. She died in November, 1859; but, as the statute had commenced to run, it did not stop at her death because of the disability at that time of any person claiming under her. The disability must exist at the time the right of action first accrues. The statute commenced to run against the executors on the eleventh day of April, 1855. Their cause of action was, therefore, barred on the eleventh of April, 1860, and this bar operated equally against the devisees of Harmon. The finding of the court as to ownership is sufficient. *Murphy* v. *Bennett*, 68 Cal. 530, 9 Pac. Rep. 738.

We have examined the evidence and think that it supports the findings. There are some errors relied upon by appellant, but we find nothing prejudicial in any of them, and the judgment and order must be affirmed, except as to those parcels of land described in the stipulation of counsel, upon which an order of dismissal has been entered herein.

We concur: McFARLAND, J.; SHARPSTEIN, J.; McKINSTRY, J.; TEMPLE, J.

SEARLS, C. J., not having been present at the argument, expressed no opinion.

73 Cal. 325

BROUGHTON *v.* VASQUEZ. (No. 11,617.)

(*Supreme Court of California.* September 1, 1887.)

FRAUDULENT CONVEYANCE—DEED IN CONTEMPLATION OF INSOLVENCY.

A deed of certain lots was executed and delivered as security for the payment of a note in pursuance of an oral agreement made more than four months previous. The grantor was subsequently shown to have been insolvent at the date of delivery, and was legally adjudged so within 30 days thereafter. *Held*, that the deed in question was a mortgage, and not a conveyance made in contemplation of insolvency; and, in the absence of fraud, would be treated as delivered at the time it was agreed to be made.

In bank. Appeal from superior court, Stanislaus county; C. H. MARKS, Judge of superior court, Merced county.

C. A. Stonesifer, for appellant. *Schell & Bond* and *W. E. Turner*, for respondent.

BY THE COURT. The judgment and order appealed from are affirmed, for the reasons given in the former opinion rendered by Department 2. 11 Pac. Rep. 806.

THORNTON and TEMPLE, JJ., dissenting.

73 Cal. 302

CROSS *v.* REID and another. (No. 12,086.)

(*Supreme Court of California.* August 31, 1887.)

1. PLEDGE—PLEDGEE ESTOPPED TO CLAIM ADVERSELY TO PLEDGEOR.

So long as the pledgee of stock holds it as collateral security for a debt, and has a right to so hold it, he cannot assert that he holds it adversely to the pledgeor, and thus show title under the statute of limitations.

2. Same—Pledge of Corporate Stock—Title of Pledgee.
Under Civil Code Cal. § 2889, one to whom a certificate of shares of corporate stock is issued as security for a debt, does not, as against the pledgeor, obtain the legal title to the stock.

3. Appeal—Right of Appellant to Question Judgment as between Appellees.
In an action against a corporation to recover a sum of money alleged to be due plaintiff as dividends, the company paid the amount into court to abide its decision, and two other persons, claimants of the fund, were substituted as defendants. The court rendered judgment in favor of one of the defendants, by consent of both, and ordered the money to be paid to him. *Held*, that the plaintiff, having no title himself, could not, on appeal, question the correctness of the judgment, as between the two defendants.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; F. D. Soward, Judge.

Freeman, Bates & Rankin and *H. A. Reardon*, for appellant. *R. H. Taylor* and *E. H. Gaylord*, for respondent.

Belcher, C. C. The plaintiff, as administrator of the estate of T. W. Sigourney, deceased, brought this action against the Eureka Lake & Yuba Canal Company, a corporation, to recover the sum of $15,000 for dividends, alleged to have been declared by the company after December 1, 1878, upon 750 shares of its capital stock owned by the estate of Sigourney. The complaint was filed on the fourteenth of June, 1884, and thereafter, under the provisions of section 386 of the Code of Civil Procedure, the company paid the money into court, and James Reid and M. Zellerbach were substituted as defendants. Reid and Zellerbach filed an answer to the complaint in which they denied that on the first day of January, 1867, or at any other time, Sigourney was, or until his death continued to be, the owner of the stock; and they averred that in pursuance of a certain written agreement, made by and between Sigourney and Zellerbach, on the twenty-third day of August, 1865, the stock was deposited in the hands of John Parrott, who delivered it to Sigourney, and that Zellerbach became entitled to receive back the stock before Sigourney's death, and was thereafter entitled to receive the same from his estate, and from the plaintiff as the administrator of the estate; that subsequently, on or about the seventh day of January, 1881, Zellerbach sold, assigned, and transferred all his interest in the stock and the proceeds thereof, and all dividends accrued or to accrue thereon, to Reid, and that Reid then became and ever since has been the owner of the stock, and entitled to receive all dividends declared thereon. The plaintiff filed an answer to "that part and those allegations of the pleading filed herein by the said Reid and Zellerbach, the interpleaders, upon which they base their claim to affirmative relief, and to the funds and moneys sought to be recovered by plaintiff in this action," in which he denied each and all of the facts set up by the interpleaders.

The case was afterwards tried by the court, without a jury, and findings of fact were filed as follows: "(3) In 1866 Zellerbach deposited with one John Parrott 1,250 shares of the stock of said corporation, as security for the payment of two promissory notes made by him, Zellerbach, to said T. W. Sigourney, one note for $40,000 and one for $10,000. Afterwards Zellerbach deposited with said Parrott the 750 shares above mentioned, as additional security for said notes. (4) During the time said 1,250 shares and 750 shares were in the hands of Parrott, said Zellerbach voted them at the meetings of the corporation, and received to his own use all the dividends thereon. (5) On the twentieth day of April, A. D. 1881, plaintiff, as administrator of the estate of T. W. Sigourney, deceased, filed a supplemental complaint in the superior court of Nevada county, in the action commenced by said Sigourney, July 1, 1864, in the district court for said county. In said supplemental complaint the said $40,000 and $10,000 notes were sued on. In said action a judgment and decree was rendered, under which the 1,250 shares were sold, and realized a sum sufficient to satisfy said notes, together with all interest

thereon, and all costs of the action, and costs and expenses of sale, leaving the said 750 shares the property of Zellerbach, free and clear of any charge or incumbrance. The said Reid was not a party to said action. Zellerbach continued to be the owner of the stock until January 7, 1881. (6) On the seventh day of January, A. D. 1881, said Zellerbach assigned to said Reid the said 750 shares of stock, and also all and singular his claim and demand against the estate of T. W. Sigourney, deceased, for the said stock or the value thereof. At that date said Reid became and still is the owner of said 750 shares of stock. (7) There is no evidence to show when the dividends, amounting to said sum of $15,000, were declared, except that they were declared since December 1, 1878. (8) The said $15,000 is deposited and remains in this court to abide the decision of this action."

Upon these findings, judgment was entered in favor of Reid, "for the sum of $15,000, the amount in controversy between him and the plaintiff," and directing that the said sum be paid to him out of the money deposited in court in the action. The plaintiff then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

It is now claimed for the appellant that the clause, "afterwards Zellerbach deposited with Parrott the 750 shares above mentioned as additional security for said notes," found in finding 3, and the clauses, "leaving the said 750 shares, the property of Zellerbach, free and clear of any charge or incumbrance," and "Zellerbach continued to be the owner of the stock until January 7, 1881," found in finding 5, and the clause, "At that date said Reid became and still is the owner of said 750 shares of stock," found in finding 6, are not supported by, but are contrary to the evidence. This is said to be so, because—*First*, it appears from the evidence that the 750 shares were deposited to secure Sigourney for a balance due him upon a previous transaction in which Zellerbach had settled with him in greenbacks, and had agreed to pay the difference between greenbacks and gold, that difference being $15,500; and, *second*, the plaintiff and his intestate had held the stock, claiming it adversely to Zellerbach, for a time more than sufficient to give them title to it under the statute of limitations.

As to the evidence, it is sufficient to say that there was a substantial conflict between that produced by plaintiff and defendants. The defendants' evidence fully supports the findings, and they cannot, therefore, be set aside for the reason urged. And as to the claim of title under the statute of limitations, the answer is that if the stock was in fact pledged, as the court found it to have been, then Sigourney had a right to retain it until the debt for which it was pledged was satisfied. But that debt was not fully satisfied until the judgment of this court, affirming the judgment of the lower court in *Cross, Administrator*, v. *Mark Zellerbach and Eureka Lake & Yuba Canal Company, Consolidated, No.* 9,796, was entered. The case is not reported, but the record here shows that the judgment of affirmance was entered on the thirtieth day of November, 1885. It is evident, therefore, that, while Sigourney held the stock as additional security for the $40,000 and $10,000 notes, and had a right to so hold it, he could not assert that he held it adversely, and thereby acquire a right to it under the statute.

It is also claimed that when the certificate for the 750 shares was issued to Sigourney, he became the owner of the legal title to the stock, and that that title must prevail here, this being a mere action at law. This claim cannot be maintained. Sigourney was only the pledgee of the stock, and as between him and the pledgeor the general property remained in the latter. Section 2889, Civil Code; *Dewey* v. *Bowman*, 8 Cal. 151; *Brewster* v. *Hartley*, 37 Cal. 25. And when the debt, to secure which the pledge was given, was paid, the lien was extinguished. Besides, this is not an action to recover the stock, but dividends declared upon the stock, in which the plaintiff has no interest.

The point is made that the assignment of the stock to Reid did not carry antecedently-accrued dividends, and that, as the court did not find that the dividends in question were declared subsequent to the time of that assignment, Reid was not entitled to them. There might be something in this point if Reid was seeking to recover the dividends from the plaintiff, or the estate of Sigourney. In that event the plaintiff could probably resist payment until a full and complete right to the money was established in the party claiming it. But that is not the case. Here the money is in court, and both parties are actors in seeking to obtain it. The plaintiff, as has been shown, has no interest in the money, and whether it should be paid over to Reid or Zellerbach is a matter that does not concern him. Zellerbach united with Reid in asking for the judgment rendered, and if it be conceded to be wrong, the plaintiff cannot be heard to complain of it.

Several other points are made, but they do not require special notice. The judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are confirmed.

73 Cal. 365

Ex parte MIRANDE. (No. 20,335.)

(*Supreme Court of California.* 1887.)

1. LICENSE TAX—ORDINANCE REQUIRING LICENSE FOR SHEEP RAISING—CONSTITUTIONALITY.
 Under Const. Cal. art. 1, §§ 11, 12, relating to local municipal regulations and taxation, and section 25, subd. 27, of the county government act of California, passed in March, 1883, authorizing boards of supervisors, for purposes of revenue or regulation, to license all lawful businesses in the county, an ordinance of a board of supervisors of Mono county requiring every person engaged in raising, herding, grazing, or pasturing sheep in the county to procure a license, paying therefor certain sums proportioned at $50 per thousand sheep, and providing that every person engaging in that business without a license shall be guilty of a misdemeanor punishable by fine, and if the fine is not paid, by imprisonment, is valid, whether passed for purposes of taxation or regulation.

2. SAME—SPECIAL PRIVILEGES AND IMMUNITIES.
 Such ordinance, not imposing any other or greater burden on any person than on all others similarly situated, is not in violation of Const. U. S. amend. 14, or of Const. Cal. art 1, § 21, prohibiting special privileges and immunities.

3. SAME—PROPERTY TAX AD VALOREM.
 The constitutional provision in relation to uniform taxation does not prevent the imposition of a license tax upon a business, the property used in which is subject to and has paid a property tax *ad valorem*.

4. BOARD OF SUPERVISORS—PROCEEDINGS—RECESS.
 There is no irregularity in the proceedings of the board of supervisors of a county, from the fact that the board took a recess as a board of supervisors from July 10th to July 19th, and, in the interim, acted as a board of equalization.

5. SAME—POWER OF ADJOURNMENT.
 A board of supervisors of a county has power to adjourn from time to time until its business is completed, and the use of the word "recess" instead of "adjourn" by the clerk is unimportant.

6. HABEAS CORPUS—TO REVIEW ERRORS.
 A writ of *habeas corpus* cannot be made the vehicle for determining mere errors where a conviction has been had, and the commitment thereon is in due form.

7. LICENSE TAX—COMPLAINT FOR NOT TAKING OUT LICENSE.
 A complaint charging defendant with having committed a misdemeanor in the county of M. between June 25, 1887, and July 8, 1887, by willfully being engaged in, and carrying on, the business of grazing, herding, and pasturing sheep in said county, without taking out or providing a license therefor, in violation of ordinances of the board of supervisors of said county known as "Ordinance No. 18"

and "Ordinance No. 21," specifying the dates of passage and the substance of their provisions, is sufficient to give the court jurisdiction, and, the other proceedings being regular, to authorize the entry of judgment against defendant.

In bank. Application for discharge on writ of *habeas corpus* to justice's court, Bridgeport township, Mono county; FRANCIS HANSON, Justice.

Jas. E. Goodall and *W. O. Parker*, for petitioner. *Richard S. Miner*, for the People.

SEARLS, C. J. Petitioner was convicted on a charge of violating the provisions of an ordinance of the board of supervisors of the county of Mono, relating to the business of "raising, grazing, herding of sheep" in said county; which ordinance is in the following language:

"ORDINANCE NO. 18.

"The board of supervisors of the county of Mono, state of California, do ordain as follows:

"Section 1. Every person engaged in the business of raising, grazing, herding, or pasturing sheep in the county of Mono, state of California, must annually procure a license therefor from the tax collector, and make therefor the following payment: (1) Those owning or having in their possession and under their control 5,000 sheep or more, shall constitute the first class, and must pay $250 per annum for the first 5,000 sheep, and for every additional 1,000 sheep the sum of $50. (2) Those owning or having in their possession and under their control 4,000 sheep, and less than 5,000, constitute the second class, and must pay $200 per annum. (3) Those owning or having in their possession and under their control 3,000 sheep, and less than 4,000, constitute the third class, and must pay $150 per annum. (4) Those owning or having in their possession and under their control 2,000 sheep, and less than 3,000, constitute the fourth class, and must pay $100 per annum. (5) Those owning or having in their possession and under their control 1,500 sheep, or less than 2,000, constitute the fifth class, and must pay $75 per annum. (6) Those owning and having in their possession and under their control 1,000 sheep, and less than 1,500, constitute the sixth class, and must pay $50 per annum. (7) Those owning or having in their possession and under their control less than 1,000 sheep, constitute the seventh class, and must pay $25 per annum.

"Sec. 2. Every person who shall engage in the business of raising, grazing, herding, or pasturing sheep, or be so engaged within the county of Mono, state of California, without first obtaining a license therefor, as prescribed by section 1 of this ordinance, is guilty of misdemeanor.

"Sec. 3. The tax collector shall have the collection of the license provided for by this ordinance, and it is hereby made his duty to collect the same, and he may enforce the collection, as provided by section 3360 of the Political Code of the state of California.

"Sec. 4. The county auditor shall prepare and have printed suitable blank licenses for the tax collector, to carry out the provisions of this ordinance, with blank receipts for the tax collector when sold.

"Sec. 5. The tax collector shall collect a fee of one dollar for each license sold, which shall be paid into the salary fund of the county.

"Sec. 6. All money collected for license under the provisions of this ordinance shall be paid over to the county treasurer as other moneys, and placed to the credit of the general fund of the county.

"Sec. 7. This ordinance shall take effect and be in force on and after fifteen days from its passage, and all ordinances or parts of ordinances in conflict herewith are hereby repealed."

"The above ordinance was passed by the board of supervisors of Mono county, state of California, at a regular meeting, July 19, 1886, by the fol-

lowing vote: Ayes—Geo. Watterson, H. Boone, William Davison, A. F. Hector. Nays—. GEO. WATTERSON,
"Chairman *pro tem.* of the Board of Supervisors of Mono County, State of California.
"Attest: BEN H. MILLER, Clerk."

Ordinance No. 18 was amended on the seventh day of April, 1887, as follows:

"ORDINANCE NO. 21.

"The board of supervisors of the county of Mono, state of California, do ordain as follows:

"1. Every person who commences or carries on, in the county of Mono, any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any ordinance of the board of supervisors of said county, without taking out or procuring the license prescribed by each ordinance, is guilty of a misdemeanor, and shall be punished by a fine not exceeding $200, and unless said fine be paid shall be imprisoned in the county jail of said county until such fine be satisfied, such imprisonment not to exceed one day for each dollar of the fine. Such fines, when collected, to be paid into the county treasury for the use of the general fund of the county.

"2. This ordinance shall be published in the Bridgeport Chronicle Union, a newspaper published in said Mono county, at least two weeks, said publication to be made for the period of fifteen days after the adoption thereof, and said ordinance to take effect in fifteen days after its adoption.

"The above ordinance was passed by the board of supervisors of Mono county, state of California, at a regular meeting of said board, April 7, 1887, by the following vote: Ayes—H. Boone, L. Goodnow, William Davison, A. F. Hector, and J. A. Creaser. Noes—None.

"LLOYD GOODNOW, Chairman.

"Attest: O. H. KISTER, Clerk."
Indorsed: "Ordinance No. 21.
"Filed and recorded in Liber B, page 2, April 7, 1887.
"O. H. KISTER, Clerk."

It is objected by petitioners that ordinance No. 18 is void, because not passed at a regular meeting of the board. It appears that the board met on the sixth day of July, 1886, pursuant to its ordinance fixing the terms thereof, in accordance with the act of March 14, 1883, known as the "County Government Act." Not having finished the business pending before it, the board "took a recess" from time to time up to and including July 19th, on which last day the ordinance in question was passed. The board had power to adjourn from day to day, or from time to time, until its business was completed. *Ex parte Benninger*, 64 Cal. 291; *Ex parte Benjamin*, 65 Cal. 310, 4 Pac. Rep. 23. The fact that, in adjourning from time to time, the clerk used the term "recess" instead of "adjourn," we deem unimportant. The object of an adjournment to a given time, and of a record thereof, is to give to persons having business before the board notice of the time when they may have a hearing, as well as to retain the power of the board to act during the remainder of the term, by showing that jurisdiction so to do is still claimed. These objects are as well attained by the announcement that the board takes a recess until a specified hour or day, as by the use of the term "adjourn." Nor do we think there was any irregularity in the proceedings of the board, in the fact that when it took a recess, from, say July 10th to July 19th, as a board of supervisors, and in the interim acted as a board of equalization.

By the complaint defendant is charged with having committed a misdemeanor, in the county of Mono, between June 25, 1887, and July 8, 1887, by willfully being engaged in, and carrying on, the business of grazing, herding, and pasturing sheep in said county, without taking out or providing a

license therefor, in violation of ordinances of the board of supervisors of said county, known as "Ordinance No. 18" and "Ordinance No. 21," specifying the dates of passage and the substance of their provisions. This was sufficient to give the court jurisdiction of the subject-matter, and, upon the proceedings had in the cause, to authorize the entry of judgment as rendered against defendant, unless such ordinances are void. A writ of *habeas corpus* cannot be made the vehicle of determining mere errors, where a conviction has been had, and the commitment thereon is in due form. If the court below had no jurisdiction of the offense charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which, under the law, constitutes no crime, the judgment is void, and the prisoner should be discharged. *Ex parte Kearney*, 55 Cal. 214.

The further contention of petitioner may be summarized as follows: Ordinances 18 and 21 are void because unreasonable, unjust, oppressive, partial, discriminating, unfair, special, in contravention of the general policy of state legislation, and violative of article 1, § 21, of the constitution of the state of California, and of the fourteenth amendment of the federal constitution.

Sections 11 and 12 of article 11 of our state constitution provide as follows:

"Sec. 11. Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

"Sec. 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes,—but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

In *People* v. *Martin*, 60 Cal. 153, this court had occasion to pass upon section 12 of the present constitution, and in referring to taxes imposed for county purposes, used these words: "The power to impose such taxes for such purposes, in our opinion, no longer remains with the legislature; but the constitution expressly gives it the power, by general laws, to vest in the corporate authorities of the counties, cities, towns, or other public municipal corporations, the power to assess and collect taxes for those purposes. The taking of the power to impose such taxes from the legislature, and vesting it in the local authorities, is but another of the many evidences, to be found in the new constitution, of the intention to bring matters of a local concern home to the people." This decision was rendered in March, 1882.

The county government act, above referred to, was enacted in March, 1883. Subdivision 27 of section 25 of said act, defining powers and duties of supervisors, reads as follows: "To license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted or carried on in such county, and all shows, exhibitions, and lawful games carried on therein; to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

In view of the judicial interpretation given to similar legislation by this court, and by the tribunals of sister states, we are unable to see wherein the ordinances under review are subject to the criticism of being unjust, excessive, oppressive, discriminating, special, unequal, and partial. Ordinance No. 18 is general, in the sense that it applies alike to every person engaged in the business of raising, grazing, herding, or pasturing sheep in the county of Mono, and the rate of the license is left entirely to the discretion and judgment of the board of supervisors. Upon this subject Judge Cooley says: "A license tax cannot be deemed unequal, because reaching one occupation only, if it is to reach all who follow that. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality, or are scattered all over the state." Cooley, Tax'n, 128. "If a revenue authority is what seems to be conferred,

the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purpose of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose." Id. 408. In the case of *Ex parte Frank*, 52 Cal., on page 610, this court, referring to similar objections which were made to an ordinance, said: "But an ordinance will not be pronounced invalid by the courts on either of these grounds, unless in a plain case," and adopted the rule applicable to this class of cases as stated in *St. Louis* v. *Weber*, 44 Mo. 547. In the case of *Cooper* v. *District*, 4 McArthur, 250, the same objections to a similar ordinance were discussed by the court. In that case the defendant was prosecuted for selling, as a produce dealer in the Washington market, without obtaining a license as required by an ordinance of the District of Columbia. In passing upon the objections that the ordinance was unequal, unjust, discriminating, and unreasonable, the court said: "It is not for the court to decide whether the act is wise, or whether the members of the court would have voted for it. The discretion on the subject has been committed to the district government. When power is given to a municipality to pass laws necessary or proper to carry the power into effect, the degree of their necessity or propriety should not be minutely scrutinized." *Glenn* v. *Baltimore*, 5 Gill. & J. 424. Also: "But by unreasonableness the courts do not simply mean that the tax must not be larger than the judges think was wise. It would be presumed to be reasonable, if laid by an authority endowed with discretion on the subject." "The objection that the license is in restraint of trade cannot avail when the power to impose it is granted." In this case the court refer to the *Railroad Cases*, 92 U. S. 612, and quote from the decision therein as follows: "Perfect equality and perfect uniformity of taxation, as regards individuals and corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system that most nearly attains this is best; but the most complete system that can be devised must be imperfect." *County* v. *Kennedy*, 11 Pac. Rep. 757.

We do not deem it necessary to discuss the question as to whether the license in question is imposed for revenue purposes or for the purposes of regulation, for the reason that the board possessed authority to impose it for either or for both. *Ex parte Mount*, 66 Cal. 448, 6 Pac. Rep. 78. Herding and grazing stock is, or may be, a business, and it is upon such *business* that the license is imposed. That the property used in any particular calling is subject to, and has paid, a property tax, *ad valorem*, as in this case, does not interdict the right to impose a license upon the business in which such property is used. The constitutional provision in relation to uniformity of taxation does not apply to prevent such license tax for such reasons. *St. Louis* v. *Green*, 6 Mo. App. 590; Cooley, Tax'n, 389, 390. We do not find that any other or greater burden is imposed upon the defendant by the ordinances in question than are imposed upon all others similarly situated, and fail to see wherein there is any violation of the fourteenth amendment to the constitution of the United States, or of section 21 of article 1 of our state constitution. The case of *County* v. *Cone*, *ante*, 100, is clearly distinguishable from the case at bar. There the ordinance sought to discriminate against nonresidents of Lassen county, and therein was unequal and violative alike of the state and federal constitution.

Upon the whole case as presented by the record, we are of opinion that the writ should be dismissed, and the prisoner remanded.

We concur: THORNTON, J.; TEMPLE, J.; PATERSON, J.: MCFARLAND, J.; MCKINSTRY, J.

73 Cal. 376

PEOPLE v. BRYAN. (No. 11,891.)

(*Supreme Court of California.* September 14, 1887.)

1. PUBLIC LANDS — STATE SWAMP LANDS — DEFECTIVE APPLICATION — SUIT TO CANCEL PATENT.

The complaint in a suit to cancel a swamp-land patent, alleged that one Mack made application to purchase swamp land; that said application was approved, purchase money paid, and certificate of purchase issued to him; that he subsequently conveyed to one L. "the land described in said certificate of purchase," and that a patent was issued to L. This patent contained nothing to connect it with the application of Mack, nor was there any averment in the complaint connecting the patent with such application. *Held*, that the patent may have been issued to L. upon his own application, and the presumption was in favor of its regularity.

2. SAME—STATE MUST RETURN PURCHASE MONEY.

The state of California sought to have a land patent canceled for an innocent mistake in the procedure. *Held*, that she must offer to return the purchase money.

Commissioners' decision. Department 2.

Appeal from superior court, Shasta county; AARON BELL, Judge.

E. C. Marshall and *Jackson Hatch*, for appellants. *Edward Sweeney* and *Clay W. Taylor*, (*W. C. Belcher*, of counsel,) for respondent.

HAYNE, C. This is a suit in equity to have a swamp-land patent canceled, on the ground of an alleged defect in the application filed in the surveyor general's office. Final judgment was entered for defendant upon demurrer to the complaint.

1. The complaint alleges that one Mack made an application to purchase; that said application was approved, and a certificate of location issued; that Mack paid the purchase money, and that a certificate of purchase was thereupon issued to him; that he subsequently conveyed to one Libby "the land described in said certificate of purchase," and that on September 5, 1883, a patent was issued to Libby. This patent, which is set forth in the complaint, contains nothing whatever to connect it with the application of Mack; nor is there any averment in the complaint connecting the patent with such application. For anything appearing in the complaint to the contrary, the patent may have been issued to Libby upon his own application, which may have been perfectly regular. There is a presumption in favor of the regularity of the patent, and the pleading is to be construed most strongly against the pleader. If Libby's patent was, in fact, issued on Mack's application, that fact should have been stated in the complaint.

2. It is expressly alleged that the land was open to purchase; and the good faith of the applicant is not questioned. This being the case, if the state can come into equity for the purpose of having her patent canceled for an innocent mistake in the procedure, (which is not entirely clear,) she must conform to equitable principles, and offer to return the purchase money. *U. S.* v. *White*, 9 Sawy. 131, 17 Fed. Rep. 561. The case of *U. S.* v. *Minor*, 114 U. S. 238, 5 Sup. Ct. Rep. 836, is not in conflict with this. In that case the patent was set aside for actual fraud, and the government was not required to return the purchase money, because it was forfeited under section 2662 of the Revised Statutes by the false oath of the applicant.

We think the demurrer was properly sustained, and that the judgment should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

73 Cal. 405

PEOPLE *v.* TIPTON. (No. 20,307.)

(*Supreme Court of California.* September 15, 1887.)

1. CRIMINAL PRACTICE—INSTRUCTION RELATING TO ANOTHER OFFENSE.
On the trial of an indictment for stealing a cow, where the prosecuting witness testified to having found on defendant's premises pieces of the hide of the missing cow and her horns and head which was skinned, the court instructed the jury that "all persons slaughtering cattle must keep the hides with the ears attached for 15 days; and all persons having such hides in their possession must exhibit the same for examination on demand being made by any person," such being the provision of Pol. Code Cal. § 3185. *Held*, that such instruction was in effect invoking against defendant the commission of another offense, and was therefore erroneous.

2. SAME—RECEIVING EVIDENCE OUT OF COURT.
Where, on the trial of an indictment for larceny in stealing a cow, horns, about which there was nothing peculiar, and which had been introduced in evidence on the general statement of a witness that they were the horns of the stolen cow, were handled and examined by one of the jurors during a recess in the court, such examination does not amount to receiving evidence out of court within the meaning of Pen. Code Cal. § 1181, subd. 2, providing that a new trial may be granted where the jury has received any evidence out of court.

3. SAME—APPEAL—ALLEGATION OF VENUE IN BILL OF EXCEPTIONS.
In a bill of exceptions, which commenced with a venue, and subsequently recited the bringing of an information against the defendants by the district attorney of S. county, (the county of the venue,) the testimony, the substance of which only was set out, was given as stating the offense to have been committed "in said county and state." *Held*, to furnish some proof of the county in which the offense was committed, and sufficient to sustain the verdict.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Z. G. Peck, H. C. Rolfe, Harris & Gregg, and *Hight & Damron*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SEARLS, C. J. The defendant was charged, with one Atkins, with the crime of grand larceny, for the felonious taking and stealing of a cow, the property of one J. M. Corbett. Defendant was convicted, and appeals from the judgment and from an order denying a new trial.

It appears from the record that at the trial the prosecution offered in evidence the horns of an animal claimed by the witness to be the horns of the stolen cow, and that during a recess of the court, and in the absence of the judge and a portion of the jurors, J. V. Gilbert, one of the jurors, picked up and examined said horns, held them in his hands for some time, turned them over, and looked at them. This conduct is assigned as a cause for which a new trial should have been granted, under subdivision 2 of section 1181, Pen. Code, which provides that the court may grant a new trial "when the jury has received any evidence out of court other than that resulting from a view of the premises." The prosecuting witness had identified the horns as those of his cow, and they were in evidence as such, but there was nothing peculiar about them so far as appears, and their identification depended entirely upon the general statement by the witness that they were the horns of the cow he had lost. Under such circumstances, it is hard to discover how an examination of them by the juror amounted to evidence in the case. Evidence is that which tends to prove or disprove any matter in question, or influence the belief respecting it. Viewed by themselves, the horns proved nothing, except their existence as such, and that was not a material fact in the case. The evidence depended upon the credit to be attached to the statement of the witness that they were the horns of his cow, and that statement was not strengthened by an examination of the horns by the juror. Had the witness described the horns, and certain peculiarities possessed by them, and then presented them in support of his claim that they were the horns of his animal, it might at least be plausibly urged that comparing them with the testimony af-

forded evidence, but nothing of the kind was attempted, so far as appears from the record. We are of opinion the examination made by the juror did not amount to receiving "evidence out of court," within the meaning of the statute.

There was evidence tending to show that the larceny was committed in the county of San Bernardino. The bill of exceptions commences with the title of the cause, and proceeds as follows:

"*State of California, County of San Bernardino.—ss.* Be it remembered, that the above-named defendants were jointly informed against by the district attorney of San Bernardino county, state of California," etc. The bill of exceptions only purports to give the substance of the testimony of the witnesses. In detailing the testimony of J. M. Corbett, the complaining witness, the following language is used: "J. M. Corbett, the complaining witness, being first duly sworn, testified as follows: 'That on the second day of April, 1887, I was the owner and in the possession of a certain black milch cow, which on said day was stolen from Metcalf's field, where I had staked her out, in said county and state. I last saw her there about 6 o'clock in the evening of April 2d, when I milked her. I found the next morning at Tipton's slaughter-house, in said county and state, certain pieces of the cow's hide, and her horns and head which was skinned, which I identified,'" etc.

Were this a pleading, the allegation as to venue would be sufficient, and as evidence it furnishes some proof of the county in which the offense, if any, was committed. The verdict was not, therefore, for this reason contrary to evidence; and as upon other points there was ample evidence to sustain a conviction, the contention under this head needs no further consideration.

The giving of the following instruction is assigned as error: "All persons slaughtering cattle must keep the hides, with the ears attached, for fifteen days; and all persons having such hides in their possession must exhibit the same for examination, on demand being made by any person." The instruction is in the language of section 3185 of the Political Code. This section is assailed by the appellant as being in violation of section 19 of article 1 of our state constitution, which guaranties the rights of the people "in their persons, houses, papers, and effects against unreasonable seizures and searches." Treated as a police regulation, we are not prepared to say, without a more complete showing than is here presented, that the regulation is so unreasonable as to render it void. But as applied to the case at bar an equally serious question arises. There is no penalty whatever affixed to a violation of section 3185, and, if any liability can accrue from such violation, it must be established in a civil action in favor of a party injured thereby. A failure to comply with the requirements of the statute is not made a crime, or the evidence of a crime, and as it had no application to the case on trial, the instruction should not have been given. It may be claimed, however, that the instruction contained a mere enunciation of an existing law, from which the defendant was not injured. But is this true in the present case? Would not the jury be most likely to draw an inference of guilt from the fact that the hide in question was not preserved, coupled with the instruction given? The facts, so far as they appeared in reference to the disposition of the property alleged to be stolen, or any part thereof, were proper to be considered by the jury in determining the guilt or innocence of the defendant. They were evidence to be considered. The statute in question was not evidence on the point, and yet, as given, we think it was likely to be taken by the jury as an important factor in the problem of guilt or innocence.

It is a familiar doctrine of the common law that a defendant can only be convicted of the crime with which he is charged, or of a lesser crime included in such charge, and that evidence of his having committed another and distinct offense is not to be received for the purpose of rendering it probable that he is guilty of the offense charged. If he has violated every law of the

land except that involved in the charge against him, it cannot be shown to enhance the probabilities of his guilt. Yet in this case a violation of section 3185 is invoked against defendant to aid in establishing his guilt under an information for larceny. If he is guilty, it is because he committed grand larceny, and not because he violated section 3185. The judgment and order appealed from should for this cause be reversed.

There is a portion of the charge given by the court not entirely free from objection, viz., that wherein the jury are informed that circumstantial evidence is legal evidence: "Therefore, if you are satisfied beyond a reasonable doubt, by the reasoning of common sense, by which men of common sense are guided in forming their opinion as to the conduct of others, that the defendant committed the offense in manner and form," etc., "you are bound to convict," etc. Common sense is a valuable adjunct in reasoning, and in the deduction of facts from testimony, but the jury should be satisfied of the guilt of a defendant from the evidence, and the "reasoning of common sense" can never authorize a conviction in the absence of testimony. No doubt the court below intended to inform the jury, in substance, that in deducing facts from the testimony they should pursue the methods followed by men of common sense. The language used was probably a mere oversight, and, while perhaps not very material, may better be corrected.

The judgment and order appealed from are reversed, and a new trial ordered.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J; MCKINSTRY, J.; THORNTON, J.

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73 Cal. 348

PEOPLE v. CLOUGH and another. (No. 20,558.)

(*Supreme Court of California.* September 10, 1887.)

1. CRIMINAL PRACTICE—EVIDENCE—TESTIMONY OF ACCOMPLICE.

The court instructed the jury: "If you believe that an accomplice has testified in this case, and you believe beyond all reasonable doubt from his testimony, to a moral certainty, that the defendant is guilty of the alleged offense in the information mentioned, and then in connection therewith you believe there is evidence, outside of that, which tends to connect the defendant with the commission of the offense,—outside of showing the commission of the offense itself and the circumstances thereof, then it would be your bounden duty to convict him." *Held*, that this was consistent with Pen. Code Cal. § 1111, providing that "a conviction cannot be had on the testimony of an accomplice, unless he is corrobrated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."[1]

2. SAME.

Under Pen. Code Cal. § 1111, the evidence corroborating the testimony of an accomplice need not tend to establish the precise facts testified to by the accomplice. It is sufficient if it tends to connect the defendant with the commission of the crime.[1]

In bank. Appeal from superior court, Tulare county; WM. W. CROSS, Judge.

Atwell & Bradley, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

MCKINSTRY, J. The defendant Clough was convicted of burglary of the first degree. As portion of his charge, the judge of the superior court instructed the jury, in the precise language of section 1111 of the Penal Code, as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense or the circumstances thereof." And in another portion of his charge the learned judge said: "Where a number of persons have been engaged in the commission of an offense, when any one of them turns state's evidence and testifies to the circumstances

[1] Respecting the sufficiency of accomplice testimony, see People v. Elliott, (N. Y.) 12 N. E. Rep. 602, and note; People v. Kunz, (Cal.) 14 Pac. Rep. 836. As to who is an accomplice within the rule, see Smith v. State, (Tex.) 5 S. W. Rep. 219, and note.

under which the alleged crime was committed, no one of the parties engaged in the commission of the crime can be convicted upon the testimony of the accomplice, unless there is other evidence outside of his testimony which tends to connect the defendant with the commission of the offense, and the connection is not sufficient if it simply shows the offense or the circumstances of the offense itself."

The language last quoted added no force to the charge previously given in the language of section 1111 of the Penal Code, but we are of opinion that it could not have been understood by the jury as laying down any different rule from that declared in the section referred to. It was, in effect, a statement that, to justify a conviction, there must be evidence independent of the testimony of the accomplice, tending to connect the defendant with the commission of the offense, and that such independent evidence was not sufficient if it merely showed the commission of the offense or the circumstances thereof. After calling the attention of the jury to the distinction between proof of a fact and evidence tending to prove it, the learned judge proceeded: "Whenever the prosecution introduces evidence which tends to connect the defendant with the commission of the given offense, then the jury may take into consideration, and should do so, the evidence of the accomplice, for the purpose of determining whether or not the defendant is guilty of the given offense; but this evidence, which tends to prove the connection of the defendant with the commission of the alleged offense, must be evidence upon propositions other than those showing the fact of the offense itself committed and the circumstances thereof." The judge then told the jury, in substance, that, even if they should believe, beyond a reasonable doubt, from the testimony of the accomplice, that the defendant was guilty, yet if there was no other independent evidence tending to connect the defendant with the commission of the offense, it was their bounden duty to acquit him. And immediately afterwards the judge said: "But if you believe that an accomplice has testified in this case, and you believe beyond all reasonable doubt from his testimony, to a moral certainty, that the defendant is guilty of the alleged offense in the information mentioned, and then in connection therewith you believe there is evidence, outside of that, which tends to connect the defendant with the commission of the offense,—outside of showing the commission of the offense itself and the circumstances thereof,—then it would be your bounden duty to convict him."

We do not think the repetition of the word "outside" in the foregoing citation could have misled. As first used it was evidently intended to exclude the testimony of the accomplice, and to require the corroborating evidence to consist of matter substantiated otherwise than by such testimony. The instruction last cited is excepted to by appellant, on the ground that "it invades the province of the jury, and sets aside the provisions of section 1111 of the Penal Code, because that section does not make it incumbent upon the jury to convict upon the evidence of an accomplice, although it may be corroborated in some slight respects." And it was said in argument: "The jury is to be the judge of the evidence, and to say to the jury that it *must* convict a defendant upon any corroboration of the testimony of an accomplice, is to say that which no court in this state has a right to say." But the court did not tell the jury that it was their bounden duty to convict the defendant if there was any evidence tending to corroborate the accomplice, but, in effect, if they believed the testimony of the accomplice, and that testimony proved defendant's guilt beyond reasonable doubt, they should convict, provided there was evidence, independent of such testimony, which "tended" to connect the defendant with the offense. The statute does not make it necessary that the evidence bearing upon the corroborative fact shall prove the ultimate fact beyond all reasonable doubt. "The corroborating evidence may be slight; nevertheless the requirements of the statute are fulfilled if there be any cor-

roborating evidence which, of itself, *tends* to connect the accused with the commission of the offense." *People* v. *Melvane*, 39 Cal. 616.

The point in opposition to the instruction may be stated thus: A jury has no legal right to believe the testimony of an accomplice unless he is corroborated in the manner prescribed in the Penal Code; they can only convict upon the testimony of the accomplice *and* its corroborations; in other words, in case the independent circumstances tending to connect the defendant with the alleged offense do not establish his guilt beyond a reasonable doubt, they must of themselves persuade and lead to a belief of the accomplice's testimony. It might be contended that the instruction was erroneous because some evidence tending to corroborate might not corroborate the testimony of the accomplice and render it credible; and thus the accomplice's testimony and the slight evidence of corroboration might fail to establish the defendant's guilt to a moral certainty. But section 1111 of the Penal Code does not require that the corroborating evidence shall be such as shall prove that the accomplice has told the truth; nor does it declare that he must be presumed to have sworn falsely—such presumption to be overcome only in case the other evidence shall show he has told the truth. It simply requires that in addition to his testimony—however trustworthy that testimony—there must, to justify a conviction, be evidence tending to connect the defendant with the commission of the offense. Of course mere evidence of the *corpus delicti* is not such evidence. The purpose of the statute is made more apparent by a view of the law as it stood prior to its passage. In Power's Rosc. Crim. Ev. it is said that the condition of the English law as to the corroboration of accomplices was "somewhat peculiar." Crim. Ev. 121. It has been repeatedly laid down, both in England and the United States, that a conviction on the testimony of an accomplice, uncorroborated, is legal. *Rex* v. *Atwood*, 1 Leach, 464; *Rex* v. *Durham*, Id. 478, and other cases cited in Roscoe; 2 Roy. Rec. 38; 1 Wheeler, Crim. Cas. 448; 5 Roy. Rec. 94; *People* v. *Costello*, 1 Denio, 83; *State* v. *Brown*, 3 Strob. 508; *Stocking* v. *State*, 7 Ind. 326; *Dick* v. *State*, 30 Miss. 593; *State* v. *Stebbins*, 29 Conn. 463; *State* v. *Watson*, 31 Mo. 361; *Steinham* v. *U. S.*, 2 Paine, 168. While the law was fully established in England that one charged with crime could be convicted upon the uncorroborated testimony of an accomplice, the judges almost invariably advised juries not to convict upon such uncorroborated testimony. They sometimes went further and directed an acquittal where the testimony of an accomplice was the only evidence. In Roscoe it is said the law was in an anomalous state. "For it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a judge would be wrong who did not advise the jury not to convict; whereas the court of criminal appeal would be bound to pronounce an opinion that the judge who did not so advise them was right."

The apparent anomaly is done away with by section 1111 of our Penal Code. Under it, although the jurors are the sole determinators of the facts proved by the evidence, yet if there is *no* evidence, other than the testimony of the accomplice, tending to connect the defendant with the commission of the offense, the judge may direct an acquittal. This, however, simply because the statute prohibits a verdict based upon testimony of an accomplice alone, even although the jury may believe such testimony to be entirely true, and that it establishes the defendant's guilt beyond reasonable doubt; not because the jurors are prohibited from *believing* the testimony of the accomplice in the absence of the corroboration mentioned in the statute. The legislature might have declared an accomplice incompetent to be a witness; but he may be a witness, and the legislature have not said that he shall not be believed if uncorroborated, but that a *conviction* shall not be had upon his testimony, unless there is other evidence tending to prove the defendant's complicity in the offense charged. As to those who have faith in their movements, the worlds move notwithstanding any attempt to forbid such faith. The law-makers have deemed the

motives to intellectual assent too complicated and too sacred to be interfered with. But they have limited the practical consequences of the reliance of jurors upon the testimony of an accomplice, by providing that no verdict shall be based on his testimony, in the absence of other evidence tending to prove the guilt of the defendant. If, however, there is *any* independent evidence tending to prove such connection of the defendant with the crime, the superior court will not be justified in directing an acquittal; and it is obvious that the power so to direct must be exercised with extreme caution.

On the argument it was suggested that the court below excluded from the consideration of the jury all the evidence, except the testimony of the accomplice, and any independent evidence tending to connect the defendant with the offense charged. But the instructions left it with the jury to decide whether they should believe the testimony of the accomplice. In deciding that question they were bound to take into consideration all testimony contradictory of that of the accomplice, and all circumstances—including the fact that he *was* an accomplice, if he was one—tending in their nature to affect his credibility. The jury were told carefully to scrutinize all the testimony, and were properly charged as to reasonable doubt. The instructions with respect to the testimony of an accomplice were needlessly prolix and repetitive, but there was no substantial error in the charge prejudicial to the rights of defendant. There was evidence, other than the testimony of the accomplice, tending to connect the defendant with the offense charged.

Judgment and order affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

73 Cal. 355

PEOPLE *v.* DAVIS. (No. 20,327.)

(*Supreme Court of California.* September 10, 1887.)

1. HOMICIDE—INFORMATION—CHARGING FELONIOUS INTENT.
 An information for murder charged that defendant "did willfully, feloniously, premeditately, and of his malice aforethought, make an assault in and upon one William Krumdick, a human being, and did then and there inflict upon the body of said William Krumdick a mortal wound, of which said mortal wound, so inflicted by said James Davis, the said William Krumdick did afterwards * * * die," etc. *Held*, that the charge was not merely that the *assault*, but also the infliction of the mortal wound, was felonious and of defendant's malice aforethought.

2. SAME—SUFFICIENCY OF INFORMATION.
 Under Pen. Code Cal. §§ 950, 959, prescribing the requisites of indictments and informations, and requiring a statement of the facts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, an information for murder is sufficient if it charges that the defendant did unlawfully, feloniously, and of his malice aforethought, kill the deceased, naming him, and stating the appropriate time and place.

3. JURY—CHALLENGE TO PANEL.
 A departure from the forms prescribed by articles 3 and 4, *c.* 1, Code Civil Proc. Cal., with respect to the "drawing and return" of the jury, such as may deprive a defendant of an opportunity to secure a competent and impartial jury, is ground for a challenge to the panel.

In bank. Appeal from superior court, Lake county; R. J. HUDSON, Judge.

Spencer & Henning and *Crawford & Tabor*, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

MCKINSTRY, J. Appellant was found guilty of murder of the second degree, and sentenced to imprisonment in the state prison. The information is as follows:

"*State of California* against *James Davis*—Information for murder.

"James Davis is accused by the district attorney of said Lake county by this information of the crime of murder, committed as follows: 'The said James Davis, on the ninth day of December, A. D. eighteen hundred and eighty-six, at the said county of Lake, and state of California, did willfully, feloniously, premeditately, and of his malice aforethought, make an assault in and upon one William Krumdick, a human being, and did then and there inflict upon the body of the said William Krumdick a mortal wound, of which said mortal wound, *so inflicted* by said James Davis, the said William Krumdick did afterwards, to-wit, on the thirteenth day of February, 1887, die, in the county of Lake aforesaid, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California.'"

Under our statutes an indictment or information is sufficient if it charges that the defendant did unlawfully, feloniously, and of his malice aforethought, kill the deceased, naming him, and the time and appropriate place being stated. *People* v. *Cronin*, 34 Cal. 200; *People* v. *Murphy*, 39 Cal. 55. And in the cases cited it was held that the sufficiency of an indictment is not to be tested by the rules of the common law, but by the requirements of our statute. In *People* v. *Martin*, 47 Cal. 102, the indictment averred that the defendants "willfully, unlawfully, feloniously, and of their malice aforethought, in and upon one Valentine Eichler, did make an assault, and with an ax, in and upon the head of said Valentine Eichler, then and there feloniously, willfully, and of their malice aforethought, did strike and beat, giving to said Valentine Eichler then and there, and with the ax aforesaid * * * divers mortal wounds, of which the said Valentine Eichler instantly died," contrary, etc. The indictment was held good, notwithstanding it did not conclude with words to the effect, "and so the grand jury say that the defendants, the said Valentine Eichler, in manner and form aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder," contrary, etc. That case holds, in effect, that, although it is not necessary to state the instrument wherewith the mortal blow was given, yet if the indictment charges that the defendant inflicted the mortal blow of which deceased died, "feloniously, willfully, and of his malice aforethought," it is sufficient.

In the present case the information was demurred to on the ground that it neither charges that defendant killed the deceased willfully and of malice aforethought, nor that he inflicted the wound, of which the deceased died, willfully and of his malice aforethought. Does the information charge that the mortal blow was stricken "willfully, unlawfully, feloniously, premeditately, and of malice aforethought?" If so, it is sufficient, within the authority of the cases above cited.

In *State* v. *Owen*, 1 Murph. 458, it was said that, at the common law, where the death is occasioned by a wound, bruise, or other assault, the stroke should be expressly laid. In that case it was charged that the defendant, "in and upon one Patrick Conway, in the peace of God and the state then and there being, feloniously, willfully, and of his malice aforethought, did make an assault, and that he, the said John Owen, with a certain stick of no value, which he, said John Owen, in both his hands, then and there had and held, in and upon the head and face of him, the said Patrick Conway, then and there feloniously, willfully, and of his malice aforethought, did strike and beat, giving to the said Patrick Conway *then* and *there*, with the stick aforesaid, in and upon the head and face of him, the said Patrick Conway, several mortal wounds, of which said several mortal wounds the said Patrick Conway then and there instantly died." In that case it was held that the words "then and there," preceding the averment that the wounds were mortal, so connected that averment with the allegation that the blows

were struck "feloniously, willfully, and of his malice aforethought," as to make these last words applicable to the giving of the mortal wounds. And in their opinion the supreme court of North Carolina refer with approbation to certain English decisions. Thus: "Where the indictment charged that A. feloniously and of his malice aforethought assaulted B., and with a sword, etc., and *then and there* struck him, etc., (held) the first allegation 'feloniously and of his malice aforethought,' applied to the assault, ran also to the stroke to which it is essential." And so where an indictment stated that the prisoner did willfully, feloniously, and of her malice aforethought, mix poison with the intent the same should be taken and eaten by the deceased, "*and* the said poison *then* and *there* delivered to the deceased," the indictment was held sufficient by all the judges, without the words "feloniously and of her malice aforethought," immediately preceding the allegation of delivering the poison; for they considered that these words ran by the word "and" and the words "then and there," and became applicable to the delivery of the poison.

We think like reasoning is applicable to the information before us, and that the charge is not merely that the *assault*, but also the infliction of the mortal wound, was felonious and of defendant's malice aforethought. The acts constituting the alleged offense—murder—are stated "in ordinary and concise language, and in such manner as to enable a person of ordinary understanding to know what is intended." The acts charged in the information as constituting murder are "clearly and distinctly set forth in ordinary and concise language," etc. Pen. Code, §§ 950, 959. The demurrer was properly overruled, and the motion in arrest of judgment properly denied.

The defendant challenged the panel of jurors upon the ground that the panel was not selected and drawn in conformity with the requirements of articles 3 and 4, *c.* 1, tit. 3, of the Code of Civil Procedure; and specified certain particulars in which the provisions of the Code had been departed from. The challenge was denied by the prosecution, and the court proceeded to try the same. A strict conformity to the statutory method of selecting, returning, and drawing grand and trial jurors is practicable, and cannot be too strongly recommended. A departure from the forms prescribed with respect to the "drawing and return" of the jury, such as may deprive a defendant of an opportunity to secure a competent and impartial jury, is ground for challenge to the panel. It is difficult to lay down a rule which shall indicate in every case as the question arises what is or is not sufficient compliance with the statute; but we are satisfied that in the case before us there was no such "material departure" from the forms prescribed with respect to the drawing or return of the jury as required the court below to allow the challenge to the panel. Pen. Code, §§ 1059, 1065.

Judgment and order affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.

73 Cal. 360

CERF *v.* REICHERT, Surveyor General. (No. 12,201.)

(*Supreme Court of California.* September 12, 1887.)

1. PUBLIC LANDS—PURCHASER AT EXECUTION SALE—RIGHT TO PATENT.

A. purchased a quantity of state land, paid a portion of the purchase money, and received the usual certificate of purchase. Plaintiff purchased the land at execution sale, received a sheriff's deed, paid the residue of the purchase money, but was refused a patent by the register of the land-office for failure to present the certificate of purchase, as provided by Pol. Code Cal. §§ 3518, 3519. The certificate had been assigned to another party by A. *Held*, that plaintiff was entitled to a patent for the land under section 2, act of March 27, 1872, (St. Cal. 1871–72, p. 587,) providing that where lands have been sold by the state, and certificates of purchase issued

upon part payment of the purchase money, and such lands have been subsequently sold under execution, and a sheriff's deed issued therefor, the register of the state land-office shall issue to the grantee named in such deed a patent for such lands upon making full payment, etc.

2. SAME—CAL. ACT MARCH 27, 1872, NOT REPEALED BY AMENDMENT OF 1874.
The act of March 27, 1872, (St. Cal. 1871–72, p. 587,) provides that where lands have been sold by the state, and certificates of purchase issued upon part payment of the purchase money, and such lands have been subsequently sold under execution, and a sheriff's deed issued therefor, the register of the land-office shall issue to the grantee named in such deed, or his assignee, a patent for such lands, upon the production and surrender of the sheriff's deed and assignment, if any, and upon making full payment, etc. *Held*, that as that act was passed during the session of 1872, it prevails over the provisions of the Political Code inconsistent therewith, the latter being presumed to have been enacted on the first day of the session; and hence the act of March 27, 1872, is not to be repealed by implication by the amendment of 1874 to section 3518 of the Political Code, permitting the *owner* of a certificate of purchase, *lost, destroyed, or beyond his control*, to make proof thereof, and to procure a duplicate certificate.

3. STATUTES—ENACTMENT—CALIFORNIA POLITICAL CODE ENACTED ON FIRST DAY OF SESSION.
The provisions of the Political Code of California are to be construed as having been passed on the first day of the session of the legislature of 1872, and the laws of that session, where inconsistent with the Code, are to prevail.

In bank. Application for writ of mandate from Sacramento county.
A. C. Bolton, for petitioner. *Geo. A. Johnson*, Atty. Gen., for respondent.

SEARLS, C. J. This is an application for a *mandamus* to compel the respondent, as register of the state land-office, to issue to the petitioner a patent to the W. ½ of the S. E. ¼, and lots 3 and 4 of section 16, in township 10 S., range 2 W., Mt. Diablo B. and M. An alternative writ issued, to which respondent made answer, and the cause is submitted upon an agreed statement of facts. In July, 1868, one Otis Ashley applied to purchase the land in question, paid 20 per cent. of the purchase price thereof, and, in due time, received the usual certificate of purchase. In 1883 a judgment was obtained against Ashley, under which an execution issued, pursuant to which his interest in the land above specified was sold by the sheriff, and purchased by the petitioner. There having been no redemption, Cerf, in due time, received a sheriff's deed of the premises, paid the residue of the purchase money, presented a receipt showing such payment, together with his sheriff's deed to the respondent, and demanded a deed, which was refused. After petitioner received his sheriff's deed, Ashley assigned his certificate of purchase, but to whom does not appear, and no report of such assignment had been made to the respondent when the patent was demanded.

Upon these facts the contention of the attorney general is that the respondent was not bound to deliver the patent to petitioner until the certificate of purchase, or a duplicate thereof, issued in lieu thereof, was surrendered.

The Political Code was approved March 12, 1872, and took effect January 1, 1873. Section 3519 of such Code provided that upon final payment for any tract of state land, and "upon the surrender of the certificate of purchase by the person entitled to the same," a patent should be prepared, etc. No provision was made for issuing a patent, except upon the surrender of the certificate of purchase. Section 3518 of the same Code provided that if a certificate of purchase was *lost or destroyed*, a duplicate might issue upon the proofs and notice specified therein, which duplicate should have the force and effect of the original. In *Duncan* v. *Gardner*, 46 Cal. 25, this court held that the certificate must be surrendered before the register could be compelled to issue a patent, and that a writ of *mandamus* would not lie without an offer to surrender the certificate. The Code made no provision for cases where the certificate, though not lost or destroyed, was yet beyond the reach or control of

the owner. Certificates of purchase, and all rights acquired thereunder, were subject to sale by deed or assignment, duly executed. Pol. Code, § 3515.

On the twenty-seventh day of March, 1872, an act was approved entitled "An act for the relief of the purchasers of state lands," by the second section of which it was provided that, where lands had been sold by the state, and certificates of purchase issued upon part payment of the purchase money, and such lands had been subsequently sold under execution, and a sheriff's deed issued therefor, the register of the state land office was directed to issue to the grantee named in such deed, or his assignee, a patent for such lands, upon the production and surrender of the sheriff's deed and assignment, if any, and upon making full payment, etc.

The provisions of the Political Code are to be construed as having been passed on the first day of the session of the legislature of 1872, and the laws of that session are, where inconsistent with the Code, to prevail. It follows that the act of March 27, 1872, (St. 1871–72, p. 587,) became a law, whether consistent with the Code or not. It applied to cases where the holder under a sheriff's deed, who could not usually present the certificate of purchase, and who, though holding the title of the original purchaser, could not procure a patent under the Code of 1872.

In 1874 section 3518 of the Political Code was amended so as to permit the *owner* of a certificate of purchase, *lost, destroyed, or beyond his control*, to make proof thereof as provided in the section, and to procure a duplicate certificate. The amendment extended the right to receive a duplicate to cases where, although not lost or destroyed, the certificate was *beyond the control* of the owner. The amendment does not in terms repeal the act of March 27, 1872, but respondent contends that its effect is to repeal by necessary implication that act. Repeal by implication is not favored, and it is only in cases of clear repugnancy that a repeal by implication occurs.

In *Ex parte Smith*, 40 Cal. 419, it was said: "An act of the legislature is repealed by a subsequent act when it appears from the last act that it was intended to take the place of or repeal the former, and when the two acts are so inconsistent that effect cannot be given to both. That they are repugnant in principle merely forms no reason why both may not stand." It was further said in the same case that "an exception is not repugnant to the general rule, or, if it be, it is only to the extent of the exception."

The legislature of 1872 found a class of cases to which the general law, that the certificate of purchase must be presented to the register, could not well be applied; for those cases they provided that the sheriff's deed should stand in lieu of the certificate; thus creating an exception to the general rule which specified the certificate as the only evidence upon which the patent could issue. This legislation still left a class of cases unprovided for. As the exception only applied to sheriff's deeds, a party claiming under a tax deed, or by any other title than such sheriff's deed, and who could not aver that he was the owner of the certificate, and that it was lost or destroyed, and not having such certificate in his possession, was without remedy. We may well suppose that the object of the amendment of 1874 to section 3518 was intended to apply to this class of cases. At all events, we fail to detect any repugnancy in the law which provides generally for the evidence of ownership of state lands, which shall entitle parties to patents, and at the same time creates an exception under which different evidence shall suffice in a single class of cases.

We are of opinion that the act of March 27, 1872, was not repealed by the amendment of 1874 to section 3518 of the Political Code, and that it remains in full force and vigor. The holder of the certificate of purchase is not a party to the proceeding, and his rights (if any he has) cannot be concluded by the effect of our action.

Let the writ be made peremptory, so as to require respondent to prepare a patent and certificate, as required by law, and submit the same to the governor,

and upon such patent being signed by the latter, and duly attested and sealed, to countersign and deliver the same to petitioner, Cerf.

We concur: McFARLAND, J.; SHARPSTEIN, J.; McKINSTRY, J.; THORNTON, J.; PATERSON, J.; TEMPLE, J.

73 Cal. 378

PEOPLE v. RASCHKE. (No. 20,291.)

(*Supreme Court of California.* September 14, 1887.)

1. APPEAL—BILL OF EXCEPTIONS—SIGNING AFTER PRESCRIBED TIME—PRESUMPTION.
When a bill of exceptions is settled, but not within the time required by statute, the reasons of the court for signing it after the prescribed time will not be inquired into, but it will be presumed that they were sufficient.

2. LARCENY—FELONIOUS INTENT—INSTRUCTION.
Defendant obtained goods under contract, and with the consent of the owner, but with the felonious intent to steal them. On the trial for larceny, the instruction of the court omitted the element of *felonious intent*, charging that if the jury believed that defendant intended to convert the goods to his own use, and did so convert them, then he was guilty of larceny. There was no language used which was equivalent to felonious intent, or which conveyed the idea of stealing. *Held* error McKINSTRY and THORNTON, JJ., dissenting.

3. SAME—SPECIAL PROPERTY IN DEFENDANT.
Under Penal Code of California, where possession of goods is obtained under contract, and with the consent of the owner, and a *special property* in them passes to the taker, but there is a felonious intent to steal at the time possession of the goods is obtained, this is such felonious taking as constitutes larceny.

4. SAME—GRAND LARCENY—VALUE OF PROPERTY FOUND IN DEFENDANT'S POSSESSION.
Defendant, with his confederates, feloniously obtained goods amounting in value to more than the sum fixed for grand larceny. *Held*, that he was guilty of grand larceny, even though the goods found upon his premises did not amount to more than that sum.

In bank. Appeal from superior court, San Francisco; T. K. WILSON, Judge.

R. Percy Wright, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

McFARLAND, J. The attorney general contends that the bill of exceptions in this case cannot be considered because it was not presented and settled within the time mentioned in the Code; but as it *was* settled "we will not inquire into the reasons which may have induced the action of the judge in signing the bill of exceptions after the statutory period, but will presume they were sufficient." *People* v. *Sprague*, 53 Cal. 422; *People* v. *Lee*, 14 Cal. 510.

The information accused the appellant, jointly with one T. Furlong, of the crime of grand larceny. He was convicted as charged, and appeals from the judgment. The information charges that the appellant and said Furlong "did feloniously steal, take, and carry away," a large number of small articles, principally glass and crockery ware, and amounting in value to $58.60, "the personal property of one I. Bernard."

Appellant's point that the verdict was against the evidence—that is, that the findings of fact which the jury must have made are not supported by the evidence—is not tenable. There was considerable evidence on all contested questions of fact.

Appellant contends also that admitting all the facts as claimed by the prosecution, such facts do not constitute larceny; and that, therefore, the verdict is against law. And these facts, which the jury had the right to find, were substantially as follows: The appellant, together with said Furlong and one Lewandowsky, by false representations as to their property, financial ability, future intentions, etc., induced said Bernard to sell and deliver to them the property alleged to have been stolen. Bernard delivered the property to them at a place on the corner of Folsom and Twenty-third streets, in San Fran-

cisco, where they proposed to open and conduct a saloon and fruit store, and took from two of them a promissory note due in 30 days; but the understanding was that the property in the goods was to remain in Bernard until the note was paid. A couple of weeks afterwards, but before the maturity of the note, Bernard, hearing that there was some trouble at the place above named, went there and found the saloon closed and the property gone. Procuring a search-warrant, he went to appellant's residence, and found some of the property secreted there—appellant having denied that he had it. There were other circumstances in proof not necessary to state here, from all of which the jury might have found a felonious intent on the part of appellant and his associates from the beginning of the transaction. The contention of appellant, however, is that, as the possession of the goods was obtained by appellant and his associates under the contract, and with the consent of their owner, and as a *special property* in them also passed, therefore there could not have been that felonious taking which is necessary to constitute larceny.

Larceny, under the present provisions of the Penal Code—so far, at least, as they are applicable to this case—is substantially the same as at common law. We have examined a great many adjudicated cases, both English and American, where the question was, what is a sufficient "taking" within the definition of the crime of larceny? At first it was, no doubt, the rule that the element of trespass was a necessary ingredient of the crime; and that, when the possession of the thing charged to have been stolen had been originally obtained by the consent of the owner, there could be no larceny. It was soon held, however, that there might be larceny where there had been, in fact, a delivery by the owner, but where there had been no change of property, nor of legal possession, and where there was a mere temporary custody given for a special purpose, or where the possession had been obtained fraudulently, with a felonious intent. 2 Russ. Crimes, (8th Amer. Ed.) 21 *et seq.* The most difficult phases of the question arise where a defendant charged with larceny has by false and fraudulent pretenses obtained possession of the property under the guise of a purchase and sale. It is clear that in such a case, where there has been a change both of the legal possession and the entire property of the owner in the thing delivered, there can be no larceny; otherwise where there has been a change of possession, but *no change* of property. Some doubt has been entertained, however, on the question whether or not there could be larceny where there had been a change of possession without a change of the general title, but accompanied by the creation of some sort of trust or special right in the fraudulent buyer; but with respect to that question the law is undoubtedly settled to be that if there was a felonious intent to steal, at the time possession of the goods was obtained, then there was a sufficient "taking" to constitute larceny. As early as the time when "East's Pleas of the Crown" was written, the learned author of that treatise, after an exhaustive review of the cases decided down to that date, declared the rule to be as follows: "*First*, that where, notwithstanding a delivery by the owner in fact, the legal possession remains exclusively in him, larceny may be committed exactly the same as if no delivery had been made; *secondly*, that where by the delivery a special property, and consequently a legal possession, apart from any felonious intent, would be transferred, if it be found that such delivery were fraudulently procured with a felonious intent to convert the property so acquired, then, also, the taking amounts to larceny." 2 East, P. C. 682. The rule thus stated was clearly the law established by the adjudicated cases reported at that time; it has not been changed, but has been recognized by subsequent cases down to the present time, and is to-day a part of the English and American common law. The principal case noticed by text writers as indicating a different rule is *Wilson* v. *State*, 1 Port. (Ala.) 118; but an examination of that case will show that the syllabus, which does indicate a different rule, is not justified, either by the facts of the case or the text of the

opinion of the court. The rule, as above stated, no doubt gives a somewhat dangerous power to a jury. As was said by the supreme court of Pennsylvania, the secret intention of a defendant, and the time when that intention was formed in his mind—whether before or after he obtained the property—are matters about which a jury, in many cases, can have no certain knowledge; and their power, in times of excitement, might be arbitrarily exercised to satisfy their own prejudices or public expectation. *Lewer* v. *Com.*, 15 Serg. & R. 99. On the other hand, Judge COWEN regretted that the rule had not been applied to cases where the absolute title to the property passed. *Ross* v. *People*, 5 Hill. 294. At all events we must declare the law as we find it; and if change be desirable, the change must be made by the legislature. The general authorities on the question are too numerous to cite here. Most of them are referred to in the first pages of the second volume of Russell on Crimes, (8th Amer. Ed.) and in East's Pleas of the Crown, under the head of "Larceny and Robbery." A case precisely like the one at bar has not arisen in this state to our knowledge; but this court has recognized the rule as above stated in *People* v. *Stone*, 16 Cal. 370; *People* v. *Jersey*, 18 Cal. 338; *People* v. *Smith*, 23 Cal. 280; and in other cases.

The point made by appellant that the goods found on his premises did not amount to more than $50, and that, therefore, he was not guilty of grand larceny, cannot be successfully maintained. If he was guilty of larceny at all, it was because he, with his alleged confederates, in the first instance, feloniously obtained the goods from Bernard, and the goods thus obtained amounted in value to over $50.

We have discussed the foregoing questions because they will necessarily arise if the case be tried again; for the judgment must clearly be reversed, because the instructions to the jury were erroneous in one important and material matter. The charge of the court followed the rule hereinbefore stated with one marked exception; it did not include the element of *felonious intent*. The court, referring to the specific features of the case as presented by the evidence, told the jury several times, and in various forms of language, (substantially,) that if appellant, or those whom he aided and abetted, obtained possession of the goods by false representations, and the title did not pass, and that, at the time possession was so obtained, the party obtaining possession of the goods intended to convert them to his own use, and did so convert them, then appellant was guilty of larceny. But nowhere in the instructions on that point were the jury told that the appellant, at the time possession of the goods was obtained, must have had a "felonious intent;" nor was any language used which was the equivalent of felonious intent, or which conveyed the idea of *stealing*. Of course, the intent to convert the property to his own use, in a certain sense, and perhaps in a popular sense, as understood by the jury, is present with the buyer at every sale, whether the sale be honest or fraudulent. But every fraudulent purchaser of property who intends to convert it to his own use, is not guilty of larceny. It would hardly be contended that an insolvent merchant could be convicted of that crime because he bought goods on credit when he knew that he could not, and would not, pay for them. Persons frequently gain advantages over others in trades, by false representations, without having that felonious intent to steal which actuates thieves when they commit genuine larcenies. In a case, therefore, like the one at bar, when the charge sought to be proven was in the nature of a *constructive* larceny, and where a jury might have confused mere moral delinquency with crime, it was material to the appellant's rights to have the jury instructed that the felonious intent must have existed at the time possession of the goods was obtained. For this reason the judgment must be reversed.

Judgment is reversed and cause remanded.

We concur: SEARLS, C. J.; TEMPLE, J.; PATERSON, J.

McKINSTRY, J. I concur in the judgment, and with what is said by Mr. Justice McFARLAND, except as to what is said with respect to the charge of the court. I agree, however, that the charge was ambiguous, and was such as may have misled and confused the minds of the jurors.

THORNTON, J. I dissent. The foregoing opinion drawn up by McFARLAND, J., as to the charge to the jury by the trial court, directly conflicts with *People* v. *Smallman*, 55 Cal. 185, where the point passed on in this case is distinctly made, considered, and decided. The obtaining possession of personal property by artifice or fraud, where title does not pass to the taker, with an intent, at the time of the taking, to convert it to the taker's use, and the subsequent conversion of it to his use by the taker, is a felonious taking, and is larceny. *People* v. *Smallman*, *supra*; *U. S.* v. *Durkee*, 1 McAll. 196–206. I am of the opinion that the judgment should be affirmed.

73 Cal. 394

ROBERTS *v.* ELDRED. (No. 11,937.)

(*Supreme Court of California.* September 15, 1887.)

1. PARTNERSHIP—DISSOLUTION—ACCOUNTING—BOOKS OF ACCOUNT.
 In an action for the dissolution of a partnership, and for an accounting, the evidence showed that the defendant, who had charge of the books, had made false entries, not giving plaintiff credit when he should, making improper charges against him, and improper credits in his own favor. The referee to whom the cause was referred found a balance in favor of plaintiff, and the report of the referee was adopted by the trial court; but the books of the firm showed a small balance in favor of defendant. *Held*, that the judgment of the lower court would not be disturbed on appeal, there being nothing in the record to show that the result arrived at by the referee and the court below was not correct.
2. SAME—EXPERT BOOKS—EVIDENCE.
 In an action for the dissolution of a partnership, and for an accounting, when the evidence showed that the books had been so improperly kept by the defendant that it was impossible to tell anything about the condition of the affairs of the partnership from said books, the attorneys stipulated that experts should be employed by the referee to reduce the books to intelligible shape. The experts made out a set of new books from the old books. *Held*, that the expert books were properly admitted in evidence in connection with the report of the referee.
3. SAME—REAL ESTATE—FIRM PROPERTY.
 Real estate purchased by partners and deeded to them in their individual names, and paid for out of the firm's moneys, assessed for taxation in the firm's name, and used in the prosecution of the firm's business, is firm property.[1]
4. SAME—ITEMS ACCRUING SINCE SUIT COMMENCED.
 In an action for the dissolution of a partnership, and for an accounting, the amount of a payment on a note and mortgage on firm property, made by plaintiff since the commencement of the suit, was considered in the accounting. *Held*, that the averment in the complaint that the mortgage was unpaid was a mere matter of evidence, and not to be regarded; and that it was proper to include the payment in the accounting.
5. PLEADING—MISJOINDER—WAIVER.
 Where an item is set forth in the complaint, and there is no demurrer for misjoinder, it is too late to raise the objection on appeal.
6. ANSWER—VERIFICATION—PRESUMPTION.
 Where the record states that the answer was verified, but does not say by whom, there being but one defendant, the court will infer that it was verified by him, unless the contrary is made to appear.
7. APPEAL—ERROR IN RELIEF—NEW TRIAL.
 An error in the relief awarded by the court, upon the facts found, cannot be considered on motion for a new trial, but can only be presented upon appeal from the judgment.

Commissioners' decision. Department 2.

[1] Real property owned by a partnership, with partnership means, is to be treated in equity as personal property, for the purpose of settling the partnership affairs. Davis v. Smith, (Ala.) 3 South. Rep. ——; Pepper v. Thomas, (Ky.) 4 S. W. Rep. 297, and note; Sherley v. Thomasson, (Ky.) 1 S. W. Rep. 530, and note.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

J. C. Byers and *L. W. Elliott*, for appellant. *J. A. Louttit*, (*S. D. Woods* and *A. L. Levinsky*, of counsel,) for respondent.

HAYNE, C. Action for dissolution of copartnership and accounting. The case was referred to the court commissioner to report the state of the accounts. After taking testimony the commissioner made his report, which consisted principally of matters of mere evidence, and showed that the balance coming to plaintiff was $8,610.35. There was then a trial before the court. The court filed findings of its own, which referred to and adopted the report of the commissioner. Judgment was thereupon entered for dissolution of the copartnership, and the sale of the firm property, and the application of the proceeds to the payment of certain specified debts of the firm, and of the sum found due to the plaintiff, viz., $8,610.35; and that judgment be docketed against defendant for any balance which might remain due to the plaintiff after such application of proceeds. The decree also declared these sums to be secured by lien on the firm property. The record is tangled and confused, and almost everything that occurred is alleged as error. We deem it sufficient to notice the following points:

1. It is said that the evidence does not show that so large a sum as $8,610.35 was due to the plaintiff. But we cannot say from the record that it was not. The record shows that the conduct of the defendant was most reprehensible. For two years before suit "he didn't do anything but spend his time at Haines & Snyder's stable across the street." He had charge of the books, but kept them in a grossly improper manner, omitting to make entry of sums paid in by plaintiff, and making improper charges against plaintiff, and improper credits in his own favor. These books, although introduced in evidence, are very naturally not in the record. The fact that the "expert books" showed a balance in favor of plaintiff of only $100, which is so much insisted on by appellant, does not seem to us to be very material. These expert books were merely an intelligible presentation of what was in the books of the firm, which were grossly incorrect and insufficient. In response to a question of the court as to whether everything was in the new books that was in the old books, the expert answered: "No, sir; our report will tell you they are not all entered. We did not claim to take the position of referee; we left that out very carefully. We posted every entry of cash, and all the entries that we found in the cash-books, into the new books, and made up a complete new set. We opened an account with every one that Mr. Eldred's books showed had paid in or received cash, *and made no changes in the account*, except some that were made under the testimony, and as directed by Mr. Eldred, the defendant, who was with us a good deal." Eldred's books, however, were incomplete. "He kept no ledger account to amount to anything, no account of sales or purchases, stock, bills receivable, profit and loss—nothing, in fact, but cash account, such as it was." Many of the accounts which he did keep were false, and credit was not given to plaintiff in cases where it ought to have been. It will not do for defendant to take refuge behind such books as these. If the result which the referee and the court arrived at was not correct, the record should have made the error appear. The only thing which is clearly apparent from this record, besides the misconduct of the defendant, is hopeless confusion in the accounts. It is eminently a case where the action of the court below should not be disturbed.

2. There was no error in admitting what are called the expert books. As above stated, the defendant failed in his duty in the matter of keeping accounts. "It was impossible to tell anything about the condition of the affairs according to the books of the firm as kept by Mr. Eldred." In view of this condition of affairs, the attorneys stipulated that experts should be employed

by the referee to reduce the accounts to some intelligible shape. These experts made out a set of books from the old books, as stated above, and we think that under the circumstances the court properly admitted them in connection with the report of the referee to enable the judge to comprehend the state of the accounts.

3. It is stated with confidence that there was no evidence that the real property ordered to be sold was partnership property. But it was bought while the parties were partners. The deed was made to "E. R. Roberts and H. P. Eldred." The defendant himself testifies that part of the price was a note "we gave him for part of the purchase price;" that plaintiff borrowed money on his own note for another portion of the price; that the firm paid this note, and that "I gave credit in the cash-book for it as a disbursement of the firm;" that "from the time we purchased this lot up to this date it has been used in the prosecution of the business of said firm as our shop and place of business;" that he caused the property to be assessed as firm property, and gave the assessor sworn statements to that effect; that he paid the taxes and credited himself on the books of the firm with such payments. And the plaintiff testified that "we bought the real estate in the complaint named as a firm, and for the firm, and it has always been used by the firm in its business." We think this evidence justified the court in treating it as firm property.

4. It is urged that the amount of a payment of a note and mortgage on the above real property, paid by plaintiff since the commencement of the action, should not have been considered in the accounting. But it was proper to include this payment. A court of equity will not make an incomplete settlement of accounts, but will go on and adjust the whole matter, even if it involves items accruing after the commencement of the suit. The evidence of this payment by plaintiff does not contradict any material allegation of the complaint. The averment that the mortgage was unpaid was true at the time it was made, and, besides, was a matter of mere evidence, and therefore was not to be regarded. It amounted merely to giving one item of the indebtedness. If it was proper to give one item of the indebtedness, it would be to give any other; and if it be proper to put in the debit side, it would be to put in the credit side; and in this way a complaint for an accounting would contain all the accounts.

5. When the defendant bought into the firm, he agreed to pay plaintiff $1,796, which has not been paid; and this sum is part of the claim of plaintiff in his complaint. It is argued for the defendant that this indebtedness accrued before the formation of the partnership, and therefore was not properly a part of the accounting. Assuming this to be so, the claim was set forth in the complaint, and there was no demurrer for misjoinder. It is now too late to raise the objection.

6. There was no error in admitting the answer of the defendant, Eldred, in the attachment suit. The record states that this answer was verified, but does not say by whom. The natural inference is that the verification was by the defendant in the case, there being no other party defendant. If this was not the fact, it should have been made to appear. Compare *Clark* v. *Sawyer*, 48 Cal. 141, 142. Numerous other assignments of error in the admission of evidence are made, but we are unable to see that there was any error prejudicial to the defendant.

7. It is contended that the court went too far in decreeing that the sum due from defendant for his interest in the firm should be a lien on the partnership property, as it was not a matter between them as partners. But assuming this to be so, it is not an error which can be considered on motion for new trial. It is simply error in the relief awarded by the court upon the facts found, and hence can be presented only on appeal from the judgment. *Jenkins* v. *Frink*, 30 Cal. 595, 596; *Shepard* v. *McNeil*, 38 Cal. 74. In this case the appeal taken from the judgment has been dismissed.

We therefore advise that the order denying a new trial be affirmed

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed.

73 Cal. 385

ROSE v. NEVADA & G. V. W. & L. CO. (No. 11,715.)

(*Supreme Court of California.* September 15, 1887.)

PUBLIC LANDS—ADDITIONAL ENTRY BY SOLDIERS AND SAILORS—OCCUPANCY—ALIENATION.

Rev. St. U. S. § 2306, which provides for an allowance of an additional entry of land to honorably discharged soldiers and sailors, is entirely independent of other sections of chapter 5, among which it is placed, and the provisions of other sections of that chapter respecting residence upon land entered are inapplicable to additional entries under section 2306; and one who has patented land under this section has the right to alien the land without having entered upon it.

Department 1. Appeal from superior court, Nevada county; F. D. SOWARD, Judge, of Sierra county, presiding.

Cross & Simonds, and *Gaylord & Searls*, for appellant. *Chas. W. Kitts* and *A. J. Ridge*, for respondent.

PATERSON, J. The patent to plaintiff's grantor was issued under the provisions of section 2306, Rev. St. U. S. This section was a part of the act of congress passed April 4, 1872, and is entirely independent of other sections of chapter 5, among which it is placed. Section 5596, Rev. St. U. S. Unlike our Codes, the Revised Statutes of the United States are not to be read as one act, it being expressly provided that "the arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed." Section 5600, Rev. St. U. S. Under the act referred to as amended in June, 1872, the additional entry allowed to honorably discharged soldiers and sailors was confined to lands contiguous to the tract embraced in the first entry. 17 St. at Large, 333. A year later this restriction was removed, and the section as originally passed was restored. The natural and logical conclusion to be drawn from these acts is that occupancy on the part of the claimant is not required. The government certainly did not intend that the beneficiary should abandon his original homestead, which he has cultivated and improved, in order to secure the additional number of acres which he is authorized by the statute to locate at another place. The provisions of other sections of chapter 5, respecting residences upon the land entered, are, therefore, inapplicable to the additional homestead entries under section 2306. *Knight* v. *Leary*, 54 Wis. 459, 11 N. W. Rep. 600. Assuming the irrevocable power of attorney from Gano and wife to Talbot to be as claimed by appellant, an assignment of the applicant's right to the land, and of Gano's right to his additional homestead, still we find nothing in the statutes referred to which will authorize us in holding such power of attorney to be null and void. As stated before, section 2306 is independent of the other provisions of chapter 5, and in the absence of an express prohibition against an alienation of the property by the claimant, after the issuance of a certificate from the general land-office, to locate in person or by agent a certain number of acres, we cannot say that the right so to alienate does not exist. It is a right which need not in terms be granted by the sovereign authority, for it exists if not expressly prohibited, or opposed to public policy. The location and entry were made in the name of Gano, the beneficiary of the act. Congress has not said that the right to sell should not exist before actual

entry, nor has it required any occupation, consideration, or duty of any kind, as a condition precedent. In all cases where it has been the intention of congress to prevent alienation by the beneficiary, such intention has been clearly expressed. Thus, the act of congress of 1854, under which the Sioux half-breed scrip was issued, provided expressly that no transfer or conveyance of the certificate should be valid. *Myers* v. *Croft*, 13 Wall. 291; *Mullen* v. *Wine*, 26 Fed. Rep. 206.

The commissioner of the general land-office has authority to make such regulations respecting the disposal of the public lands as he may deem proper, and such regulations, when not repugnant to the acts of congress, have the force and effect of laws. *Poppe* v. *Athearn*, 42 Cal. 607. The right of claimants to enter additional lands under section 2306, through attorneys and assignees, has been the subject of much discussion among the officers of the land department of the government. In a letter to the secretary of the interior, dated February 17, 1877, the commissioner called attention to the injustice and hardship of rules which had been formulated and adopted by the department regulating entries under section 2306. Acting upon the suggestions therein contained, Secretary Chandler directed a modification of his former decision so as to allow entries to be made by agents and assignees under certain restrictions. The officers of the land department received Gano's entry under his power of attorney to Talbot, considered the evidence respecting his claim to the land described in the complaint, and upon their decision the patent of the government has been issued to him in his name. There is nothing in the regulations under which they acted repugnant to the acts of congress, and their action is final and conclusive.

We have considered this case upon its merits, disregarding the question of the sufficiency of appellant's assignments of error, or his right to attack the validity of the patent without showing that his claim is connected with the paramount source of title.

The judgment and order are affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

73 Cal. 389

GOLDEN STATE & MINERS' IRON-WORKS *v.* DAVIDSON and another.

(No. 11,608.)

(*Supreme Court of California.* September 15, 1887.)

1. ACTION AGAINST PARTNERSHIP—PARTNERS NOT SERVED—MORTGAGE—PRIORITY BEFORE JUDGMENT.

Two of several mining partners mortgaged their interest in the mining property to plaintiff, and subsequently defendants brought an action against the partnership for supplies furnished. In this action two of the partners were not served with summons, and did not appear. The action was not brought under Code Civil Proc. Cal. § 388, which provides for the suing of associates transacting business under a common name, by such name; service upon one being service upon all, and the judgment binding the joint property of all the associates. *Held*, that under Code Civil Proc. Cal. § 414, providing that "where an action is against two or more defendants, jointly or severally liable, and the summons is served on one or more, but not on all, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants," the partners not served were not bound by the judgment, and, the partners who were bound having mortgaged their interest to plaintiff before the judgment was obtained by defendants, such mortgage was a prior lien upon the property.

2. SAME—PRIORITY OF FIRM CREDITORS—REALTY—RULE OF EQUITY.

Defendants held a judgment against the joint property of a partnership, and plaintiff was a mortgagee of the interest of two of the partners; the mortgage having been executed before defendants obtained their judgment. Having foreclosed the mortgage, plaintiff brought an action of ejectment against defendants, who had purchased the property at the execution sale under their judgment. *Held*, that

the rule as to the priority of firm creditors, so far as real property is concerned, is a rule of equity, and not of law, and could not avail defendants in the action at law where the equitable right was not set up.

Commissioners' decision. Department 1.

Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Gray & Haven, for appellant. *A. C. Adams*, *W. K. Boucher*, and *A. L. Rhodes*, for respondent.

Ejectment for an undivided seven-tenths of a mine.

HAYNE, C. On November 13, 1880, and subsequently, Richard F. Knox, Joseph Osborne, W. T. Robinson, S. P. Ely, and Phillip V. R. Ely were mining partners engaged in working the Esperance mine, the legal title to which stood as follows: Eight-tenths in Knox and Osborne, (one of these eight-tenths being held in trust for Robinson) three-twentieths in S. P. Ely, and one-twentieth in Phillip V. R. Ely. On December 13, 1880, Knox and Osborne mortgaged their seven-tenths to the plaintiff. It does not appear whether or not this mortgage was recorded. On October 10, 1882, the property as mortgaged was sold under a decree of foreclosure. Although the defendants were parties to the suit, the decree reserved the question as to the priority of their judgment mentioned below. The plaintiff became the purchaser at the sale, and in due time obtained the sheriff's deed. The defendants' title is as follows: Between February 28, 1881, and September 12th of the same year, the partnership became indebted to the defendants for supplies furnished and money paid in and about the working of the mine; and on September 23, 1881, the defendants commenced an action at law against the five partners to recover what was due on such indebtedness. No service of summons was had upon the two Elys, who were non-residents, and they did not appear. On December 13, 1881, a judgment was rendered against all the partners, by which it was ordered, adjudged, and decreed that the plaintiffs in said action (defendants herein) "do have and recover of and from the said defendants, Richard F. Knox, Joseph Osborne, W. T. Robinson, Samuel P. Ely, and Phillip V. R. Ely, partners and associates doing business under the firm name of Knox & Osborne, the sum of $5,035.17, in gold coin of the United States, together with plaintiffs' costs and disbursements amounting to the sum of $72." The judgment contained the following provision: "And it is further ordered and adjudged that the said plaintiffs do have execution against the separate property of the defendants, Richard F. Knox, Joseph Osborne, and W. T. Robinson, or either of them, *the parties served with process in this action*, as well as against the joint property of all the said defendants, partners, and associates, as aforesaid."

An appeal was taken from this judgment, but no stay of execution was had, and pending the appeal execution was issued, and on February 27, 1882, the property was sold to the defendants, who, after the usual period, received the sheriff's deed. Upon the appeal it was held that the action was not brought under section 388 of the Code of Civil Procedure, in relation to persons transacting business under a common name; and that section 414 of the Code did not authorize a judgment against the joint property; and that inasmuch as the two Elys had not been served with process, and had not appeared, the judgment should be modified by striking out their names. The court did not, however, order the clause above quoted, as to the joint property, to be stricken out. *Davidson* v. *Knox*, 67 Cal. 143, 7 Pac. Rep. 413. It will be perceived, therefore, that since the title acquired under the foreclosure proceedings related back to the date of the mortgage (*Bank* v. *Hodgdon*, 64 Cal. 98) the plaintiffs herein had the elder title, but only as to the interests of two of the partners; while the defendants had the junior title, although it purported to include the interests of all the partners, and was derived through a debt against the firm.

The court below gave judgment for the defendants, upon the theory that partnership creditors have a priority against creditors of individual partners. We think this was erroneous, for two reasons:

1. Even if it be assumed in favor of respondents that the judgment in *Davidson* v. *Knox* could be enforced against the joint property of the partners, it does not follow that the purchasers at an execution sale under this judgment acquired the legal title as against the appellant's mortgage. Conceding the rule as to the priority of firm creditors to its fullest extent, it is, at all events so far as real property is concerned, a rule of equity and not of law. See *Duryea* v. *Burt*, 28 Cal. 580. The priority is worked out through the lien of the partners. *Jones* v. *Parsons*, 25 Cal. 104, 105; Story, Partn. § 97. And if it be true that the purchaser of a specific tract at a sheriff's sale under a judgment at law is subrogated to this lien, it must be asserted by appropriate proceedings in equity, and cannot avail him in an action at law where the equitable rights are not set up. See *Ross* v. *Heintzen*, 36 Cal. 320; *McCauley* v. *Fulton*, 44 Cal. 362; and compare *Allen* v. *Phelps*, 4 Cal. 258, 259.

2. But the judgment in *Davidson* v. *Knox* was not against all the partners, nor could it be enforced against their joint property. This was held upon the appeal in that case, (67 Cal. 143, 7 Pac. Rep. 413.) It is true that the execution sale took place before this decision was rendered, and was under the judgment before it was modified. But the case is authority for the proposition that the action was not brought under section 388 of the Code of Civil Procedure. And if that be so, there was no way in which the joint or the several interest of the Elys could be affected, without service of summons upon them, or their appearance. Hence the purchaser at the execution sale did not acquire their interest in the partnership property. *Wiseman* v. *McNulty*, 25 Cal. 230. Leaving out their interests, and the interest of Robinson, (because it was merely equitable, and cannot be considered in ejectment,) it is manifest that the respondents can claim to have acquired only the interest of Knox and Osborne, which passed under a prior lien to the appellants.

We think that upon the evidence the court below should have rendered judgment in favor of the plaintiff for seven-tenths of the property. And we therefore advise that the judgment and order appealed from be reversed, and cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

73 Cal. 411

CORBIN *v.* WACHHORST. (No. 12,103.)

(*Supreme Court of California.* September 19, 1887.)

NEGOTIABLE INSTRUMENTS—CONSIDERATIONS—MONEY LOANED FOR GAMBLING PURPOSES. A promissory note given to plaintiff for money loaned to be used in throwing dice can be enforced, where it appears that plaintiff loaned the money in good faith to the defendant, and it does not appear that plaintiff won any of the consideration of the note, or defendant lost any of it, in the game, or that there was any fraud or conspiracy to cheat defendant or induce him to play.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

W. A. Anderson and *Grove L. Johnson*, for appellant. *Lincoln & White*, for respondent.

FOOTE, C. Plaintiff brought an action against the defendant founded upon the following promissory note:

"$350. SACRAMENTO, January 30, 1886.

"One day after date, for value received, I promise to pay to Jas. H. Corbin, or order, three hundred and fifty dollars. H. WACHHORST."

From the judgment rendered against him, and an order denying a new trial of the action, the latter has appealed. The grounds of his defense as set up in the action were: (1) That about the time he executed the note he was intoxicated, and that he was further plied with intoxicating liquors by the plaintiff, and fraudulently induced to sign the note without knowing what he did, and without any consideration whatever. (2) That the note was given for a consideration, if any, which is contrary to the policy of the law and to good morals in this: "That on said thirtieth day of January, 1886, the defendant visited the saloon of the plaintiff, and while in a state of intoxication was further plied with intoxicating liquors, and then induced by plaintiff to engage in a gambling dice game with plaintiff, and while in a condition not to know what he was doing, fraudulently, and with the intent to deprive defendant of his money, was induced by plaintiff to wager large sums of money upon a throw of dice; upon which defendant is informed by plaintiff that he lost a large sum of money with plaintiff, and that for these alleged losses plaintiff, taking advantage of the incapacitated condition of the defendant, fraudulently obtained his signature to the alleged instrument. That there was no other consideration for said alleged promissory note, and that the same was for money alleged to have been lost by defendant while playing at dice with plaintiff."

Upon evidence which is sufficient to sustain them, the findings of the court upon the issues thus made were: That on the day of the date of the note sued on, the defendant made and delivered it to the plaintiff. That the plaintiff is still the owner and holder of the note, and that no part thereof has been paid, although the defendant had been requested to pay it before suit brought. That "on the evening of the said thirtieth of January, between 5 and 6 o'clock, defendant entered the saloon of plaintiff, in Sacramento city, and requested plaintiff to engage with him in the game of throwing dice. Plaintiff consented, and after they had played a short time, a third person came into the saloon and joined with them in the game; subsequently a fourth person also played with them. The game was played for money, and also occasionally for drinks, and was continued until about 10 o'clock P. M. Plaintiff did not play all the time; he would quit sometimes to attend to matters of business about the saloon, but he played in the game most of the time. During the evening defendant borrowed money a number of times from plaintiff. When a sum was borrowed the amount was written generally by defendant himself on a card, and when another loan was made the last card was torn up, and the whole amount written upon a new one. About, or a little after, 9 o'clock the whole amount thus borrowed was $350. Plaintiff then took a blank promissory note from a book containing numerous blanks of that kind, and, after dating it, wrote in the sum of $350 and handed it to defendant, telling him that it was a note for $350, the amount which he owed him, and asked him to sign it. Defendant took the note, looked at it a few minutes, and then, signed it and handed it to plaintiff. No part of the consideration of the note was money won by plaintiff from defendant; it was all for money loaned by plaintiff to defendant, which plaintiff took out of his money drawer and his safe. Plaintiff himself was not winner at the game, and of the players it does not appear who was winner or loser when the game ended, about 10 o'clock. There is no evidence of any fraud, or any conspiracy to cheat defendant or to induce him to play. The allegation of the answer, that at the time the note was signed defendant was 'in a state of intoxication which incapacitated him from entering into the alleged or any contract whatever,' is not sustained by the evidence, and I therefore find it to be not true. I find that none of the averments of subdivisions 2, 3, and 4 are true."

The game in which these parties were engaged was not one forbidden by any statute of this state. Admitting that the plaintiff knew the money which the defendant borrowed from him was to be used afterwards in the game of dice-throwing, he did not loan it with a view to have it used in a game declared by law to be unlawful, and was entitled to recover on a contract the consideration of which was money loaned. It is claimed that the Civil Code provides that a contract is not lawful when it is "contrary to good morals." Conceding, without deciding, that a note given for money lost at dice-throwing is a contract based upon "an immoral consideration," and still the defendant was liable on the note, for he borrowed money from the plaintiff, and gave the note therefor, and if the defendant used it in playing at dice-throwing as he did, and the plaintiff knew it would be so used when he loaned it, and the plaintiff, as he did, loaned the money in good faith to the defendant, who knew what he was doing, and the plaintiff is not shown to have won the money for which the note was given, nor the defendant to have lost it in the game, the latter is liable on the note. *Poorman* v. *Mills*, 39 Cal. 345. For *non constat* from the findings but what the money loaned in good faith to a man competent to contract, may be still in his possession, or have been used for some other purpose to his advantage.

There is no prejudicial error shown by the record, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 399

GOULD *v.* HUNTLEY. (No. 11,647.)

(*Supreme Court of California.* September 15, 1887.)

1. FRAUDULENT CONVEYANCES—SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION.
In an action to recover a mare levied on by defendant under an execution against G. and H., it appeared that plaintiff bought the mare with a ranch of G., his father, taking immediate possession and management of the ranch. G. then went east, where he remained six months, and then returned, and lived with plaintiff on the ranch pursuant to a stipulation in the conveyance. Previous to the sale plaintiff had cared for the mare, and used her in G.'s employ. After the sale G. occasionally drove her, and she was being led by him when levied on. *Held*, that there was sufficient evidence of an immediate delivery, and an actual and continued change of possession, to sustain a judgment for plaintiff, under Civil Code Cal. § 3440, relating to fraudulent conveyances.[1]

2. SAME.
In an action to recover a header levied on by defendant under execution against G. and H., the evidence showed that plaintiff and H. bought the header in partnership, and, after a few days, H. transferred his interest to plaintiff, on plaintiff's agreement to pay their vendors for the header, which plaintiff did. Plaintiff afterwards had exclusive use of the header, and it was on his ranch when levied on. H. was on the ranch part of the time, but owned a place where he was most of the time. *Held*, that there was sufficient evidence of a sale, accompanied by an immediate delivery, and an actual and continued change of possession, within the statute relating to fraudulent conveyances. Civil Code Cal. § 3440.[1]

Commissioners' decision. Department 2.

Appeal from superior court, Placer county; B. F. MYRES, Judge.

J. E. Prewett and *Freeman, Johnson & Bates*, for appellant. *Taylor & Holl*, for respondent.

[1] Respecting the change of possession sufficient to overcome the presumption of fraud, as against the creditors of the vendor, and when that is question for the jury, see Stull v. Weigle, (Pa.) 8 Atl. Rep. 578; McClain v. Buck, (Cal.) 14 Pac. Rep. 876; Hogan v. Cowell, (Cal.) 14 Pac. Rep. 780; Dodge v. Jones, (Mont.) 14 Pac. Rep. 707; Young v. Poole, (Cal.) 13 Pac. Rep. 492; Cook v. Rochford, (Cal.) 12 Pac. Rep. 568, and note.

BELCHER, C. C. This is an action to recover the possession or value of one bay mare and one header, which were levied upon and sold by the defendant, as sheriff of the county of Placer, under an execution duly issued upon a judgment against Joseph G. Gould and C. A. Hines, and it is stipulated that the only question involved is as to the sufficiency of the plaintiff's possession of the mare and header, to enable him to hold them as against the creditors of his vendors. It appears from the record that Joseph G. Gould was the father of plaintiff, and owned a ranch in Placer county, known as the "Gould Place." Concerning the ranch and mare the plaintiff testified as follows: "The 'Gould Place' spoken of was my father's ranch up to September, 1884. At that time my father conveyed this ranch to me, and I immediately went into possession of the entire ranch, buildings and everything, and from that time to the present I have been in possession of the same, and have conducted the business of farming there. Immediately after my father conveyed the ranch to me he went east and remained until March, 1885. When he came back he came to the ranch, and since then he has lived in the same house with me, because he reserved this right in the conveyance to me. He is seventy-nine years old. I bought the mare the same time the ranch was conveyed to me, and I have ever since had exclusive possession of the ranch and mare, except that my father lived in the house with me and drove the mare several times to Sacramento. * * * I bought the mare from my father in September, 1884. I had used her in my father's employ for over six months before the purchase, and had principally cared for her during that time. I kept her both before and after the sale on the Gould place. * * * My father has not exercised any authority or control over the mare since I bought her, or over anything on the ranch since he conveyed it to me, except as above stated."

Concerning the header the plaintiff testified:

"C. A. Hines and I bought the header in the spring of 1884, and also the beds, and brought them into the field and ran them in partnership for a few days; then he turned his interest in them over to me on condition that I would pay our vendors for them, which I afterwards did. Hines did not afterwards use the header. * * * After Hines let me have his interest in the header and beds, I ran the machine myself during the balance of the season, cutting grain whenever I could get a job; Hines had nothing more to do with it, and after the ranch was conveyed to me by my father, I took the header and beds home and put them under shelter, where they remained until they were attached. Hines, who is married to my sister, has been on the ranch some of the time since I owned it, but not continuously. He has a place of his own, 50 miles away, where he has been most of the time." The above is substantially all the testimony there is in the case, except that a deputy-sheriff was called as a witness for the defendant, and, having stated that he levied the execution on the twenty-fifth of March, 1885, said: "At the time I found her [the mare] and levied upon her, J. G. Gould had her by the halter. He was leading her for the purpose of putting her to a horse. C. E. Gould was not present." Upon this testimony the court below gave judgment in favor of plaintiff, and denied the defendant's motion for a new trial.

It is now claimed for the appellant that the plaintiff's possession of the property in question was not such as is required by section 3440 of the Civil Code, and that the court therefore erred in giving the plaintiff judgment. So far as it relates to the header, we are satisfied that the judgment was right, and the motion properly denied. There can be no question that when Hines sold to the plaintiff his interest in the header, the sale was accompanied by an immediate delivery, and followed by an actual and continued change of possession.

And, so far as it relates to the mare, we think the judgment must also be sustained. The ranch was conveyed to plaintiff in September, and he took and held the actual and exclusive possession of it for six months. The mare

was sold to the plaintiff at the same time, and, so far as we can see, his possession of her during the whole six months was open and unequivocal, carrying with it the usual marks and indications of ownership. It was such as to give evidence to the world of the claims of the new owner. It was an open, visible change manifested by such outward signs as rendered it evident that the possession of the vendor had wholly ceased. *Stevens* v. *Irwin*, 15 Cal. 506; *Cahoon* v. *Marshall*, 25 Cal. 201. And it was not necessary that the plaintiff's possession of the mare be continued indefinitely. It was said by REDFIELD, J., in delivering the opinion of the supreme court of Vermont in *Dewey* v. *Thrall*, 13 Vt. 284: "After a sale of personal chattels has become perfected by such a visible, notorious, and continued change of possession, that the creditors of the vendor may be presumed to have notice of it, the vendee may lend or let, or employ the vendor to sell, or perform any other service about the thing with the same safety he may a stranger." So in *Stevens* v. *Irwin*, *supra*, this court said: "This possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not, necessarily, continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the *status* of the property, and the claim to it by the vendee." See, also, *Godchaux* v. *Mulford*, 26 Cal. 316. In the light of these decisions we cannot say that the plaintiff's possession of the mare was not sufficient, the court below having found that it was, and we think, therefore, that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 403

PEOPLE v. RAMIREZ. (No. 20,338.)

(*Supreme Court of California.* September 15, 1887.)

1. DYING DECLARATION—IMPENDING DEATH.
Upon the trial of an indictment for murder, a dying declaration was offered in evidence, the first sentence of which was, "I, A., believing I am about to die, do make this, my dying statement." The surgeon who attended deceased testified to his condition, and the character of his wounds, and that on the day before the declaration was made witness informed deceased that he was going to die, and he thereupon expressed a wish to make a dying declaration. *Held*, that the admission of such declaration in evidence was not erroneous.[1]

2. HOMICIDE—WITNESS—CROSS-EXAMINATION.
Where, on a trial for murder, the testimony of defendant's witness tended to show that deceased was exhibiting a belligerent propensity just before the killing, and that one P., a co-defendant, was endeavoring to restore peace by inducing deceased to withdraw from the company, he may be asked, on cross-examination, whether P. did not "come out and run the deceased over a hundred yards at that time."

3. SAME.
Such witness may be asked, on cross-examination, also, whether P. did not come out and point a pistol at deceased, and say, "Don't you fight that man R."

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

J. R. Patton, for appellant. *Geo. A. Johnson*, Atty. Gen., for the State.

SHARPSTEIN, J. Appellant was tried on a charge of murder, convicted, and sentenced to be hanged. This appeal is from the judgment and order denying his motion for a new trial. One of the grounds upon which he insists that his motion for a new trial should be granted is that the dying declaration of the deceased was improperly admitted in evidence. The condition of the deceased and the character of his wounds were testified to by his attending physician and surgeon, who further testified to having informed the deceased the day before he made his dying declaration that he was going to die, and he thereupon expressed a wish to make a dying declaration. The opening sentence of the declaration is as follows: "I, Fernando Asero, believing I am about to die, do make this, my dying statement." We think it sufficiently appears from all the evidence before us on this point that this declaration was made under a sense of impending death, and therefore was properly admitted. As reported, the facts in *People* v. *Hodgdon*, 55 Cal. 72, are not the same as in this case.

The defendant's witness, Torres, testified on his examination in chief to what occurred between the deceased and one Prado and some other persons just prior to the homicide. On his cross-examination witness was asked this question: "Didn't Prado come out and run the deceased over a hundred yards at that time?" The question was objected to as immaterial and incompetent. The objection was overruled, and the defendant excepted. The objection was properly overruled. The evidence of this witness tended to prove that deceased was exhibiting a belligerent propensity just before the shooting commenced, and that Prado was endeavoring to restore peace by inducing deceased to withdraw from the company he was in. Prado and defendant were jointly charged, although the latter had a separate trial. It was material for the defendant to prove that deceased brought on the affray, and for the prosecution to show the reverse. This witness was also asked on cross-examination: "Didn't Prado come out and point a pistol at deceased and say, 'Don't you fight that man Roderiguez?'" To which there was the same objection as to the preceding question, the same ruling and exception. We think the rul-

[1] Respecting the circumstances that will justify the admission of dying declarations, see State v. Newhouse, (La.) 2 South Rep. 799, and note; Luker v. Com., (Ky.) 5 S. W. Rep. —.

ing of the court constitutes no error. It does not appear that the question was answered. But the witness did state, after narrating some other events, that he saw no other weapon than a pocket-knife which deceased had.

We discover no ground for disturbing the judgment or order denying the motion for a new trial. Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; MCKINSTRY, J.; MCFARLAND, J.; PATERSON, J.; TEMPLE, J.

73 Cal. 420

MANNING *v.* DALLAS. (No. 12,002.)

(*Supreme Court of California.* September 20, 1887.)

1. LIMITATION OF ACTIONS—PLEADING THE STATUTE.
 Under Code Civil Proc. Cal. § 458, the defendant cannot take advantage of the statute of limitations as a defense, unless it is specially pleaded either by setting forth the facts constituting the defense, or by citing the particular section and subdivision of the Code under which it is claimed the action is barred.
2. ASSUMPSIT—LABOR AND SERVICES.
 Where under a complaint for services rendered, the plaintiff was entitled to recover such a sum as the defendant had agreed to give for his services, or, if no price was agreed upon, then such sum as his services were reasonably worth, the court instructed the jury that, "though the plaintiff has brought suit for a certain sum, you are authorized to bring in a verdict for such a sum as you may think his services were reasonably worth, if you find he is entitled to anything." *Held* no error.
3. SAME—COMPENSATION AT EMPLOYER'S DISCRETION.
 The court refused to give the following instruction: "If from the evidence you find that the compensation M. was to receive from D. for his services was to be at the entire discretion of D., then I charge you that you must render a verdict for the defendant, no matter what you may think his services are worth," but instructed the jury that, "when services are rendered upon an understanding that the remuneration is to be at the discretion of the employer, no action is maintainable for the value of such services." *Held*, that whatever error there may have been in the court's refusal to give the former instruction was cured by the giving of the latter.

Commissioners' decision. Department 2.

Appeal from superior court, Stanislaus county; WM. O. MINOR, Judge.

Turner & Maddux, for appellant. *Stonesifer & Minor*, for respondent.

BELCHER, C. C. This action was brought to recover the balance due on a mutual, open, and current account for work and labor, alleged to have been performed by plaintiff for defendant between the ninth day of December, 1881, and the tenth day of January, 1886. The answer denied any indebtedness on a mutual, open, and current account, and alleged payment, and also alleged that so much of the account as accrued "during the years 1881, 1882, and 1883, has long since been barred and is barred by the provisions of chapter 3, tit. 2, pt. 2, of the Code of Civil Procedure of the state of California." The case was tried before a jury, resulting in a verdict and judgment in favor of the plaintiff. The defendant then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

Several points are made on the statute of limitations, but they need not be separately considered. The statute was evidently not pleaded. There are only two ways of pleading the statute,—one by stating the facts showing the defense, and the other by stating "generally that the cause of action is barred by the provisions of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." Section 458, Code Civil Proc. As neither of these ways was adopted, the attempt to plead it must be treated as altogether a failure. But if the statute had been properly pleaded, the same result must have been reached. There was testimony from which the jury might find, as they did, that the account was mutual, open, and current, and that no part thereof was barred.

At the request of the plaintiff the court instructed the jury as follows: "Though in this case the plaintiff has brought suit for a certain sum, yet I charge you that you are authorized to bring in a verdict for such a sum as under the evidence you may think his services were reasonably worth, if you find he is entitled to anything." It is claimed that this instruction was erroneous, because "the plaintiff bases his right to recover on a contract that he was to receive a certain amount for his services, and not on a *quantum meruit*." The instruction was properly given. Under the complaint the plaintiff was entitled to recover, if he had performed services for the defendant, such sum as the defendant had agreed to pay him for his services, or, if no price was fixed, then such sum as his services were reasonably worth. *Freeborn* v. *Glazer*, 10 Cal. 337; *Leitensdorfer* v. *King*, 7 Colo. 436, 4 Pac. Rep. 37; *Sussdorff* v. *Schmidt*, 55 N. Y. 324.

The court refused to instruct the jury, at the request of the defendant, as follows: "If from the evidence you find that the compensation Manning was to receive from Dallas for his services was to be at the entire discretion of Dallas, then I charge you that you must render a verdict for the defendant, no matter what you may think his services are worth," etc. It is insisted that this instruction was a proper one, and that the court erred in refusing to give it, citing *Moulin* v. *Columbet*, 22 Cal. 510. The answer is that the court, at the request of the defendant, did instruct the jury in the following language: "When services are rendered upon an understanding that the remuneration is to be at the discretion of the employer, no action is maintainable for the value of such services." If there was error in refusing to give the instruction as first asked, that error was obviously cured by the instruction as given.

The other points do not need special notice. After carefully looking at the whole record, we are satisfied that no error was committed prejudicial to the defendant, and the judgment and order should therefore be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

70 Cal. 474

McCORMICK, Adm'r, etc., *v.* ROSSI. (No. 11,096.)

(*Supreme Court of California.* August 27, 1886.)

VENDOR AND VENDEE—BREACH OF CONTRACT—PART PAYMENT—EQUITY WILL NOT DECREE FORFEITURE.

Equity will not decree a forfeiture of a vendee's rights under a contract for the sale of a mining claim, and thereby deprive him of the possession of the mine and of the amount paid towards the purchase price, although he may have failed to work the mine as required by the contract, and to pay the balance of the purchase price when due.

Commissioners' decision. Department 1.

Appeal from superior court, Placer county.

BELCHER, C. C. This is an action upon a contract made by the plaintiff's intestate for the sale of a mining claim, to the defendant, for the sum of $6,500. It is alleged in the complaint that the defendant had paid only $1,300 of the agreed purchase price; that he had failed to work the mine as required by the contract; that the full amount of the purchase money had become due, and that in consequence of his failure to pay the same he had by the terms of the contract forfeited all his rights thereunder. The prayer is that it be "decreed that defendant has committed a breach of said contract, and has forfeited all his rights thereunder and to the possession of said property." The defendant in his answer alleged that he had paid $1,504.50 of the purchase

money; and he denied that by not paying the balance thereof or otherwise he had failed to comply with the terms of the contract, or had forfeited all or any of his rights under it. Judgment was entered declaring forfeited all the defendant's rights under the contract, and ordering the possession of the property to be restored to the plaintiff; and the defendant appealed. In *Keller* v. *Lewis*, 53 Cal. 118, the court said: "It is a universal rule in equity never to enforce either a penalty or forfeiture. 2 Story, Eq. Jur. § 1319, and cases cited. On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture law." Judgment declaring a forfeiture had been entered in that case, and was reversed. This case is in all essential particulars like that, and the judgment here should also be reversed, and the cause remanded, with leave to the plaintiff to amend his complaint if so advised.

SEARLS and FOOTE, CC., concurred.

BY THE COURT. For reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with leave to the plaintiff to amend his complaint if so advised.

2 Cal. Unrep. 793

NEWMAN *v.* BANK OF CALIFORNIA and another. (No. 12,088.)

(*Supreme Court of California.* August 30, 1887.)

APPEAL—FILING TRANSCRIPT.

The filing of a transcript on appeal, within 40 days after the bill of exceptions is settled, is a sufficient compliance with rule 2, supreme court of California, requiring the transcript to be filed within 40 days after appeal taken.

In bank.

Motion to dismiss appeal on the ground that the transcript was not served and filed within 40 days after the appeal was taken. It appeared from the clerk's certificate of proceedings in the lower court that the motion to set aside the judgment and grant a new trial was made and denied on February 11, 1887, and that the time to prepare a bill of exceptions was extended from time to time, and finally settled on April 22, 1887. The transcript was filed within 40 days from that date. Rule 2 of the supreme court, upon which the motion was based, is as follows: "The appellant in a civil action shall, within 40 days after the appeal is perfected, and the bill of exceptions and the statement (if there be any) are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken."

BY THE COURT. The motion to dismiss the appeal herein is denied. We do not see that the appellant is in any default for not having filed the transcript on appeal; the bill of exceptions not having been settled until the twenty-second of April, 1887. Rule 2 of this court. Motion denied.

73 Cal. 228

Ex parte JOHNSON. (No. 20,322.)

(*Supreme Court of California.* August 25, 1887.)

BAWDY-HOUSE—ORDINANCE PROHIBITING RESORT TO—VALIDITY.

An ordinance of the city of Stockton declaring it to be unlawful for any person to visit, for the purpose of prostitution, any place maintained for the purpose of prostitution, and providing a penalty of a fine not exceeding $500, or imprisonment not exceeding 3 months, or both, is valid, and not in conflict with the general laws of the state.

In bank. On writ of *habeas corpus* from superior court, San Joaquin county.

Petitioner was arrested for visiting a house for the purpose of prostitution, in violation of the following ordinance:

"The mayor and city council of the city of Stockton do ordain as follows, [ordinance No. 229:]

"Section 1. It shall be unlawful for any person or persons to keep, conduct, occupy or maintain, for the purpose of prostitution, any building, house, room, or place within the corporate limits of the city of Stockton.

"Sec. 2. It shall be unlawful for any person to be or become an inmate of, or, for the purpose of prostitution, to frequent, any building, house, room, or place kept, conducted, occupied, or maintained for the purpose of prostitution.

"Sec. 3. It shall be unlawful for any male person to frequent any building or buildings, house or houses, place or places, kept, conducted, occupied, or maintained for the purpose of prostitution.

"Sec. 4. It shall be unlawful for any person or persons knowingly to rent, furnish, or permit to be used for the purpose of prostitution, any building, house, room, or place owned or controlled by such person or persons.

"Sec. 5. It shall be unlawful for any person, for the purpose of sexual intercourse, to visit, be, or remain in any building, house, room, or place kept, conducted, occupied, or maintained for the purpose of prostitution.

"Sec. 6. It shall be unlawful for any male person to live, room, or habitu-

ally associate with any female or females who keep, conduct, or maintain, or who are inmates of, or who, for the purpose of prostitution, frequent, any building, house, room, or place kept, conducted, occupied, or maintained for the purpose of prostitution.

"Sec. 7. It shall be unlawful for any person by words, actions, or signs, or by any means whatever, to solicit, entice, or attempt to entice, any person for the purpose of prostitution.

"Sec. 8. It shall be unlawful for any person to aid, abet, or assist any person or persons to do any of the things which are declared to be unlawful by the provisions of this ordinance.

"Sec. 9. Any person convicted of violating any of the provisions of this ordinance shall be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment."

J. C. Campbell and *J. H. Budd*, for petitioner. *Frank R. Smith*, for respondent.

BY THE COURT. We are of the opinion that the city council of Stockton had authority to enact the ordinance under which petitioner was convicted, and that so far as it affects this prosecution it is not in conflict with the general laws of the state. The writ is dismissed, and the prisoner remanded.

73 Cal. 226

PEOPLE *v.* GUIDICE. (No. 20,333.)

(*Supreme Court of California.* August 25, 1887.)

1. ASSAULT WITH DEADLY WEAPON—SIMPLE ASSAULT—INSTRUCTIONS.
On a trial for assault with a deadly weapon, there being no evidence tending to show that a simple assault only had been committed, instructions are not erroneous which require the jury to acquit, or find the defendant guilty as charged.

2. SAME—SELF-DEFENSE—INSTRUCTIONS.
An instruction, as to the right of self-defense, that if the prosecuting witness made the first hostile demonstration in such a manner as would have justified a reasonable man, in defendant's situation, in believing that prosecutor intended to inflict upon him great bodily injury, and if, acting upon these appearances, and believing it necessary for his own protection, and to prevent great bodily injury to himself, defendant struck the prosecuting witness with a deadly weapon, he was justified in doing so, is correct.

In bank. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

The charge of the trial court as to the right of self-defense, which is referred to in the opinion, was as follows:

"In this case it is not denied by defendant that he struck the prosecuting witness with an axe, but he claims it was done in necessary self-defense, and to repel a dangerous attack which the prosecuting witness was then making, or about to make, upon him. The right of self-defense of a party violently assaulted by another to repel such attack, and fully protect himself, is a law of nature. It antedates all written enactments, and is fully recognized in the laws and regulations of all civilized people. The right is expressly recognized by our own statute, and the conditions under which it may be asserted are clearly defined. These are that the party was not himself the first aggressor, or, if the aggressor, that he had in good faith withdrawn from the contest before he struck the blow. *Second*, that the striking was necessary to prevent the infliction upon himself of a great bodily injury by the party stricken.

"To justify the use of a deadly weapon in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the attack upon the prosecuting witness was absolutely necessary; and it must appear that the prosecuting

witness was the assailant, or that the defendant had really and in good faith endeavored to decline further struggle before the blow was given. A bare fear of the commission of the offense, to prevent which defendant used a deadly weapon, is not sufficient to justify it; but the circumstances must be sufficient to excite the fears of a reasonable man, and the party attacking must have acted under the influence of such fears alone. It is not necessary, however, to justify the use of a deadly weapon, that the danger be actual. It is enough that it be an apparent danger; such an appearance as would induce a reasonable person, in defendant's position, to believe that he was in immediate danger of great bodily injury. Upon such appearances a party may act with safety; nor will he be held accountable though it should afterwards appear that the indications upon which he acted were wholly fallacious, and that he was in no actual peril. The rule in such cases is this: What would a reasonable person,—a person of ordinary caution, judgment, and observation,—in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and acting upon such appearances.

"The defendant is not necessarily justified because he actually believed that he was in imminent danger. When the danger is only apparent, and not actual and real, the question is, would a reasonable man, under all the circumstances, be justified in such belief? If so, the defendant will be so justified. If this was defendant's position, it was his right to repel the aggression, and fully protect himself from such apparent danger. If he could have withdrawn from the danger, it was his duty to retreat. Between his duty to flee and his right to kill he must fly, or, as the books have it, must retreat to the wall. But by this is not meant that a party must always fly, or even attempt flight. The circumstances of the attack must be such, the weapon with which he is menaced of such a character, that retreat might well increase his peril. By 'retreating to the wall' is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted, and the necessity of striking his assailant avoided. 'But if the attack is of such a nature, the weapon of such a character, that to attempt a retreat might increase the danger, the party need retreat no farther.' 'These definitions and interpretations of the law of self-defense are general rules that are to be applied by the jury to the situation and conduct of both the defendant and the prosecuting witnesses, as they shall determine that position and conduct to have been from the evidence in this cause.' 'Mere words of insult or of reproach, however grievous, will not justify an assault, a blow, or a threatening demonstration with a deadly weapon. But, while mere words will not justify an assault, they may possess significance, as illustrating or explaining the subsequent acts of the parties, and determining who is the first aggressor, especially if threats or menacing expressions are uttered. Leaving out of consideration the mere words of reproach, which of these parties was the aggressor? Which made the first attack?'

"If from the evidence you believe that, without any overt act or physical demonstration upon the part of the prosecuting witness Bowman sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he, the defendant, struck witness Bowman with a deadly weapon, such striking, under such circumstances, was not justifiable. Upon the other hand, if you believe that the prosecuting witness himself made the first hostile demonstration against the defendant by drawing, or attempting to draw, a pistol, or otherwise assaulting him, in such a manner and under such circumstances as would have justified a reasonable man, in defendant's situation, in believing that the prosecuting witness was about to inflict upon defendant great bodily injury, the defendant was justified in acting upon

these appearances and belief; and if necessary for his own protection, and to prevent great bodily injury to himself, he struck prosecuting witness with a deadly weapon, he was justified in so doing, and your verdict should be one of acquittal.

"I believe, gentlemen, that is a full, complete, and intelligent definition of self-defense, and I presume you understand now how to apply it to the facts and circumstances in the case before you. You will now go to your room, and find whether the prisoner is innocent or guilty. If you find for the state, you will find the verdict as guilty; say so under the proper heading. If you find, under all the circumstances, that the defendant is not guilty, then your verdict will be just in those words, 'Not guilty.'"

J. Edward Marks, for appellant. *William T. Jetter* and *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. The defendant was charged with an assault with a deadly weapon, and, having been convicted, complains of certain instructions given by the court. It appeared in the evidence that the assault was made with an axe. The prosecuting witness and the defendant agree as to the mode in which the axe was used, and on this point the evidence is not conflicting. In effect, the court told the jury that they must find the defendant guilty as charged, or must acquit; thereby failing to charge that the crime of simple assault was included in the information, and that it was competent for them to find the defendant guilty of the lesser offense. If there was any evidence tending to show that a simple assault had been committed, the instruction was erroneous. We find no such evidence in the record. The real issue raised by the defendant was that he was acting in self-defense. The prosecuting witness said that he was assaulted by the defendant, who struck him with an axe, with such force as to knock him down. The defendant's account of the blow given is as follows: "I was afraid he would shoot, so I struck him with the blunt end of the axe I had in my hand. I tried to hit him on the arm that held up the pistol, but I missed his arm and struck him in the side. He fell down. He still held onto the pistol. I hit him twice more."

It may be true that an axe is not necessarily a deadly weapon; that whether, in the particular case, it is so or not, will depend upon the mode in which it is used. But here was a blow struck with force, intended to be sufficient to disable an antagonist, and actually knocking him down. So used, it was necessarily a deadly weapon, and the defendant was not injured by the failure of the court to instruct the jury as to simple assault. Besides, the defendant did not request any instruction upon that point.

The instruction in regard to the right to act in self-defense was taken from the case of *People* v. *Iams*, 57 Cal. 115, and has been approved by this court. It correctly lays down the law on that subject. In the case of *People* v. *Flahave*, 58 Cal. 249, it was said in the charge there reviewed that it must appear that it was absolutely necessary to prevent death or great bodily injury, to justify the use of a deadly weapon in self-defense. This instruction was not qualified by any statement of the right to act upon apparent danger. Here the right of the defendant to act upon appearances was fully and clearly stated.

Order and judgment affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

2 Cal. Unrep. 803

MERRICK v. SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO. (No. 12,311.)

(*Supreme Court of California.* September 7, 1887.)

WRIT OF REVIEW—SUFFICIENCY OF PETITION.

In a petition for a writ of review, the petitioner alleged, as cause therefor, that the judge of the superior court had rendered judgment against him, when neither he nor his counsel was present, in excess of its jurisdiction, and contrary to the rule of court regarding the notice to be given when the court calendar will be taken up. *Held*, that the petition was insufficient.

Department 2.

Petition for writ of review. The petitioner, Merrick, claimed that in an action brought by one Stiles against him, commenced in a justice's court, and appealed to the superior court of San Francisco, the judge of the superior court rendered judgment against him without his counsel or himself being present in court, in excess of its jurisdiction, and contrary to a rule of said court regarding the giving of notice when the court calendar will be taken up, etc.

John J. Coffey, for petitioner.

BY THE COURT. The petition is insufficient, and the application for the writ of review must be denied. Ordered accordingly.

(2 Cal. Unrep. 803)

ROSS v. WILLIAMS. (No. 11,848.)

(*Supreme Court of California.* September 19, 1887.)

DEED—MISTAKE IN DESCRIPTION—RIGHTS OF PARTIES—REFORMATION.

A settler on public lands gave a wrong description of the land in his application for a patent, owing to a mistake of the government surveyor in marking the stakes, and a patent for the land issued containing such wrong description. The property, after several conveyances, was conveyed to plaintiff, but the original patentee remained in possession under an agreement with plaintiff by which he was to have the privilege to repurchase the land by a certain time. After the mistake in the description was discovered, plaintiff conveyed the land to the government, and received a patent in the name of the original patentee for the land as actually settled by the patentee. *Held*, that plaintiff was entitled to a reformation of the deeds from his grantor, and to the possession of the land taken in by the reformation.[1]

Commissioners' decision. Department 1.

Appeal from superior court, Larson county; M. MARSTELLER, Judge.

This is an action brought by A. E. Ross, plaintiff, against Joseph Williams, Michael Coffee, and D. M. Gloster, defendants, to reform certain conveyances, and to recover from defendant Williams the possession of the land put in by such reformation, with damages for its detention. The defendant Williams, as a pre-emptor, settled upon and improved "lots numbered 2, 3, and 4, and the S. W. ¼ of the S. E. ¼ of section 12, in township 24 N., of range 17 E., of Mount Diablo base and meridian, containing one hundred and forty-three 95-100 acres;" but in proceeding to obtain a patent therefor, and in issuing the patent therefor, the land was by mistake described as "lots numbered 2, 3, and 4, and the S. W. ¼ of the S. E. ¼ of section 13." He also, under the homestead laws, settled upon and improved the "N. W. ¼ of the S. E. ¼, and the W. ½ of the N. E. ¼ of section 12, and the S. W. ¼ of the S. E. ¼ of section 1;" but in his proceedings to obtain a patent therefor, and in

[1] A mistake in the description of land intended to be conveyed, resulting from an error as to its identity, is a mistake of fact against which equity will relieve, McCasland v. Insurance Co., (Ind.) 9 N. E. Rep. 119; Baker v. Pyeatt, Id. 112; Conrad v. Schwamb, (Wis.) 10 N. W. Rep. 395; James v. Cutler, Id. 147; and such relief will be granted in favor of the administrator of the grantee. Citizens' Nat. Bank v. Dayton, (Ill.) 4 N. E. Rep. 492.

issuing the patent, the tract was described by mistake as the "W. ½ of the N. E. ¼ of section 13, and the W. ½ of the S. E. ¼ of section 12."

The defendant Williams sold the land to the defendant Coffee, who sold to defendant Gloster, intending to convey the land actually settled on by Williams, but followed the description found in the patent from the United States.

In January, 1882, Williams being in possession of all the land under an agreement with Gloster, by which he had the right to purchase all of it from Gloster, but the time in which he was to make such purchase being about to expire, he requested plaintiff to buy the land, and thereafter give him (Williams) an extension of time, upon such terms as Williams and the plaintiff might agree, in which to purchase and pay for it. The plaintiff purchased all of the land from Gloster, who on January 20, 1882, executed and delivered to plaintiff a warranty deed, by which he intended to convey to plaintiff the land which Williams had settled upon and improved, and which was intended to be conveyed to him by the government; but Gloster followed the description as made in the deed to him, as conveyed to Williams by the United States.

It appeared that in making the government survey the surveyors made a mistake in marking some of the stakes, which misled the defendant and others in describing the land in their applications, and the error thus made continued through all the writings. This mistake was discovered in 1882, and, the attention of the land department of the government being called to it, was corrected before this suit was commenced, as to patents, by plaintiff's deeding the property conveyed to him by Gloster to the United States, and receiving a patent in the name of Williams for the land settled on by Williams. Plaintiff bought the land from Gloster for $1,309. He then gave to defendant, Williams, a contract of sale whereby he agreed to convey the land to defendant at any time within five years, upon payment of the purchase price above stated, interest, taxes, and other advances, such interest to be paid annually. This agreement was made the sixteenth day of February, 1882, and it provided that, if defendant failed in any part of his agreement, he would deliver possession of premises to plaintiff. Defendant failed to comply with the agreement as to payment of interest, and before commencement of this action he surrendered the agreement, and notified plaintiff that he could not comply with it. After it was learned that a mistake had been made in the description of land, defendant claimed that he was on public land, and refused to surrender possession to plaintiff. Plaintiff had judgment. Defendant, Williams, appeals.

E. V. Spencer, for appellant. *J. D. Goodwin*, for respondent.

FOOTE, C. This is an action brought for the purpose of reforming certain conveyances, and to recover certain lands which should have been properly described, but which by mistake were erroneously set out, therein. The plaintiff had judgment against all the parties defendant, but only one of them, Williams, appeals therefrom, and from an order denying him a new trial.

The points made by the appellant are that the findings are not supported by the evidence, and that the court erred in its rulings upon the admission and exclusion of evidence. To us the findings appear to be fully sustained by the evidence. We have examined with care the various rulings of the court as to the exclusion or admission of proffered evidence, and find that tribunal either to have been right in its action, or that its rulings did not and could not have had the least effect upon the decision in the cause. The effort of Williams to retain the land, and the money for which he had sold it, and his refusal to convey it by the description which it was originally intended to have, appears to have been inspired by a supposition he seems to have entertained that in some way unexplained by the record he could keep the plaintiff out of his just rights.

There is no merit in the appeal, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 415

ANSON *v.* TOWNSEND. (No. 12,062.)

(*Supreme Court of California.* September 20, 1887.)

1. FRAUDS, STATUTE OF—PAROL GIFT OF LAND.
A parol gift of real estate to one who had entered into possession of the premises before the gift was made, and who made no improvements thereon, and expended no money by reason of the gift, nor gave any other valuable consideration therefor, is void under the statute of frauds, and will not prevail against one holding the legal title.[1]

2. PARTIES—REAL PARTY IN INTEREST—TRUSTEE WITH LEGAL TITLE.
In an action to recover real estate, the fact that the plaintiff holds the legal title makes him, so far as the defendant is concerned, the real party in interest, and entitles him, under the Code, to maintain the action, and it is immaterial that such legal title is held in trust for a third person.

Commissioners' decision. Department 2.

Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Chipman & Garter and *J. F. Ellison*, for appellant. *Jas. T. Matlock* and *R. B. Snelling*, for respondent.

BELCHER, C. C. The principal questions involved in this case relate to the validity of an alleged parol gift of real property. The property in question consists of certain lots in the town of Red Bluff, which, in June, 1882, were owned by Abraham Townsend, and on which there was then a small dwelling-house. The defendant claims that Abraham Townsend made her a parol gift of the lots on the eighth of June, 1882, and that she thereby acquired a right to them which a court of equity will protect as against the legal title.

The facts upon which this claim is based may be briefly stated as follows: The defendant was the wife of Wilbur Townsend, and he was the son of Abraham Townsend. Wilbur had deserted defendant, leaving her with a young child, named Grace, and with no means to support herself and child except her own labor. Defendant was in the house, living there, when, on the eighth of June, 1882, and upon the premises, as she testifies, "he [Abraham Townsend] told me he gave me the property; it was mine if I would take good care of Gracie, and educate her and bring her up right. * * * He gave me the key to the front part of the house, and told me it was mine; the house was mine." Mollie Kennedy was a witness for defendant, and testified that she "heard a conversation between A. Townsend and the defendant, relative to the property in dispute. It was on June 8, 1882, I heard A. Townsend tell her that she could have the home, and it was hers; and for her always to take good care of Gracie, and that the home was hers. He gave her a key to the house. She said: 'Mr. Townsend, can I plant some vines out in front? I

[1] Previous possession will not take a parol conveyance out of the statute of frauds. Possession must be taken in pursuance of the sale. Birbeck v. Kelly, (Pa.) 9 Atl. Rep. 313; Green v. Groves, (Ind.) 10 N. E. Rep. 401. Equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise, makes valuable improvements on the land. Dowson v. McFaddin, (Neb.) 34 N. W. Rep. —. In general, as to the part performance that will take a contract out of the statute of frauds, see Martin v. Patterson, (S. C.) 2 S. E. Rep. 859, and note.

want to make a shade.' He said: 'Yes; you can do whatever you want to with the house; the house is yours; I give you this house; it is yours.' He said for her always to take good care of Gracie, and give her a good education, and Gracie came around, and kissed him, and says: 'Gran'pa, you aint going to throw me out in the street?' and he says: 'No; I never intended to.'" Thereafter the defendant continued to occupy the house until some time in the spring of 1883, when it was burned down. The lots were then vacant and unoccupied until the fall of 1884. Early in June, 1883, Abraham Townsend died. Administration was had upon his estate, and in September, 1884, the lots in question were distributed to Mrs. Etteville Townsend, the widow of deceased. After the distribution Mrs. Townsend erected a new house on the lots. In reference to this new house and her possession of it defendant testified: "Mrs. E. Townsend put it there, and after the death of A. Townsend, I did not object to her building on the place. I was living in town at the time it was built. I did not pay for any part of the house that is now on the property. I moved into it about a week after it was completed. The widow Townsend did not give me a key to it. I went in at the back door; it was unlocked. The front door was locked, and the key was on the inside of the door. It was dusk when I moved in. I did not get Mrs. Townsend's consent before I went in."

The foregoing is substantially all of the testimony on which defendant rests her case; and the question is, does it show such a gift of the lots as a court of equity will enforce? It is, of course, settled law that courts will compel the specific performance of parol contracts for the sale of real property when there has been a part performance of the contracts. And parol gifts will be enforced under like circumstances and conditions as parol sales. *Freeman* v. *Freeman*, 51 Barb. 306, and 43 N. Y. 34; *Manly* v. *Howlett*, 55 Cal. 94; *Bakersfield Ass'n*, v. *Chester*, Id. 102. But it is not always easy to determine what acts will constitute a sufficient part performance to remove a case from the operation of the statute of frauds. The general rule is that nothing will be considered a part performance which does not put the purchaser or donee in a situation which is a fraud upon him unless the agreement is fully performed. Fry, Spec. Perf. § 388; *Edwards* v. *Estell*, 48 Cal. 196. And before any acts otherwise sufficient can be treated as a sufficient part performance, it must appear that they were done in pursuance or fulfillment of the parol agreement, or in just reliance thereon. They must be done with a view to the agreement, and be referable exclusively thereto. Story, Eq. Jur. §§ 762–764; *Miller* v. *Ball*, 64 N. Y. 286; *Jervis* v. *Smith*, 1 Hoff. Ch. 470. Moreover, equity will not enforce the specific performance of a contract where the party asking its enforcement cannot be compelled to perform it specifically on his part. "The contract must be just and equal in its provisions, and the subject-matter must be such that equity can take jurisdiction of it, and compel performance by both of the parties. The remedy must be mutual as well as the obligation, and where the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other." *Cooper* v. *Pena*, 21 Cal. 403.

Now, looking at the case made by the defendant, how can it be said that a refusal to enforce the alleged gift will operate as a fraud upon her? She entered into the possession of the property, not under or in pursuance of the gift, but in advance of its being made. She made no improvements upon the property, but simply occupied the house till it was burned down. She stood by while Mrs. Townsend, the distributee of the lots, erected a new house thereon, making, so far as appears, no claim to them, and, when the house was completed, surreptitiously took possession of it. She paid nothing, and did nothing, except to support her little girl, which she was legally bound to do in any event. The grandfather of the child was not legally bound to support and educate her, and his promise to do so, if made, could not have been

enforced. *Mills* v. *Wyman*, 3 Pick. 207. In our opinion, the gift, if made as claimed to have been, was within the statute of frauds and void.

The point was made at the trial that the plaintiff was not the real party in interest, but was suing for and in the interest of Mrs. Etteville Townsend, who had conveyed the property to him by deed. Upon this point the court, of its own motion, instructed the jury as follows: "Under the Code of Civil Procedure every action must be brought in the name of the real party in interest, and it is the province of the jury to say from the evidence who that party is; whether it is Mrs. Abraham Townsend or the plaintiff. Should the jury find from the evidence that the plaintiff in this action is not the real party in interest, but that the real party in interest is Mrs. Abraham Townsend, then their verdict should be for the defendant." The instruction was clearly erroneous for two reasons: *First*, we find nothing in the evidence to justify such an instruction; and, *second*, as the plaintiff had the legal title, it did not concern the defendant whether he held it in trust for Mrs. Townsend or not. So far as concerned the defendant, he was the real party in interest, and might sue in his own name. *Walker* v. *McCusker*, 12 Pac. Rep. 724.

The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for new trial.

73 Cal. 425

STOCKTON v. KNOCK, Adm'r, etc. (No. 11,867.)

(*Supreme Court of California.* September 22, 1887.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—WAIVER—EVIDENCE OF, UNDER GENERAL ISSUE.
 Plaintiff, by stipulation in an action for a divorce, waived all claim to community property; and the decree, granting her a divorce, directed such property to be set apart to the husband. In ejectment brought against the husband's administrator for a homestead which was community property, *held*, that such decree and stipulation, and the will of decedent, were admissible in evidence under the general issue.
2. SAME—EXAMINING PLEADINGS TO EXPLAIN DECREE.
 In a petition for divorce, plaintiff described a certain homestead, alleging it to be community property; and the decree, granting her a divorce, awarded in general terms all community property to the husband. *Held*, in an action of ejectment brought by her against the husband's administrator to recover as homestead a portion of such community property, that the petition in the divorce suit might be considered in determining what property was awarded to the husband by the decree, and that the homestead was included in such award.
3. SAME—DIVORCE GRANTED WIFE FOR CRUELTY—COURT MAY AWARD COMMUNITY PROPERTY TO HUSBAND.
 Where the wife, in an action for divorce, by stipulation waives all claim to community property, the court has power, under Civil Code Cal. § 146, subd. 3, in a decree granting her a divorce for extreme cruelty, to award all such community property, including homestead, to the husband.

Commissioners' decision. Department 1.

Appeal from superior court, Lassen county; W. T. MARSTELLER, Judge.

E. V. Spencer and *J. E. Raker*, for appellant. *Goodwin & Davis*, for respondent.

FOOTE, C. The plaintiff brought an action of ejectment against the defendant, the administrator of her divorced husband's estate. The land sued for was a homestead, duly declared such by the husband, from community property, during the life-time of both the parties and the continuance of their

marriage. The trial court gave judgment for the defendant; and from that, and an order refusing to grant her a new trial, the plaintiff has appealed.

In her complaint she claims the right to enter, take possession, and hold the land in dispute, and that the defendant wrongfully withholds the possession thereof from her, which allegations he by his answer denies. It would therefore appear as if, under the general issue thus pleaded, the defendant had a right to introduce in evidence the judgment roll showing the divorce proceedings had between the parties in another action, which tended to show as a matter of fact that the plaintiff did not have the right, as she claimed, to enter upon the land in dispute at the time of the commencement of her action. *Semple* v. *Cook*, 50 Cal. 26. There was nothing in the answer which confessed the plaintiff's right of entry, and pleaded the judgment in the divorce proceedings by way of estoppel, as an avoidance of such right of entry. Therefore the case of *Young* v. *Wright*, 52 Cal. 407, cited to us by the appellant, is not in point. We hold, against the appellant's contention, that the judgment roll, the stipulation of counsel as to the disposition of the property mentioned in the petition for a divorce, and the will of said H. C. Stockton, deceased, were admissible in evidence.

It is next to be considered what effect, if any, the decree of divorce had upon the plaintiff's claim to a right of entry and possession as against the administrator of the estate of the deceased, H. C. Stockton, her divorced husband. The petition for a divorce contains this averment: "Plaintiff further says that defendant owns a tract of land of 320 acres, the homestead of plaintiff and defendant, situate on Susan river, about seven miles north-west of Susanville, in this county, known as 'Stockton Mill;' that he also owns horses, cattle, sheep, and hogs, the number of which is unknown to plaintiff, and other personal property; that all said property is common property, and was acquired since the marriage of plaintiff and defendant, and was not acquired by gift, devise, or descent." The part of the decree of divorce pertinent to the matter in hand is as follows: "And it further satisfactorily appearing to the court that the community property is of little value, and that the defendant is considerably in debt, and he having undertaken the care and education of the said four boys, the children of plaintiff and defendant, and the plaintiff having voluntarily relinquished all claim to the property, it is further ordered and adjudged that the whole of the community property be set apart to the defendant." The stipulation filed in the cause reads thus: "It is hereby stipulated and agreed that if the court should be of opinion that the plaintiff is entitled to a divorce, then the plaintiff waives all claim to the property, or any of it; and the parties mutually agree that if the court be of the opinion that the interests of the children will be protected, that the plaintiff shall have the custody of the three girls, and the defendant of the four boys, and consent to a decree so awarding the custody, if the court is of the opinion that the plaintiff is entitled to a decree at all." By his will the decedent, H. C. Stockton, left all his property, real and personal, to his four boys, and directed further "that a certain saw-mill known as the 'Stockton Saw-Mill,' situated near the town of Susanville, in Lassen county, state of California, and now owned by me, and also the ranch connected therewith, shall be kept until the youngest boy shall become of lawful age," then the property to be divided, etc.

From this documentary evidence it is plain that the court granting the divorce intended to and did assign the homestead and community property of the parties to the husband. The complaint identifies a certain "Stockton Mill" as a tract of 320 acres of land, the homestead of the parties, and declares that it and all the personal property described therein is community property; thus definitely including in the community property, as a part of it, the homestead known as "Stockton Mill." The decree, following the complaint, assigns all the community property, as set out in that pleading, to the husband, and, as the greater includes the less, the Stockton mill homestead, as

described in the complaint in the action, passed to H. C. Stockton by the decree rendered therein; for the decree can be made certain as to the description of the property it meant to assign to the husband, by reference to the complaint, which contained sufficient description of it. *Certum est quod certum reddi potest.*

The land described in the declaration of homestead is that sued for in the present action, and it is plain to us, from all the facts and circumstances disclosed in the record here, that the only homestead the parties ever had while they lived as husband and wife, was the one involved in this controversy, and decreed to H. C. Stockton, by the court trying the action of divorce, together with other property belonging to the community. But the plaintiff contends that the court which granted the divorce did not have the power to make the decree which it rendered in the premises, from the fact, as she alleges, that the husband was found guilty by that tribunal of "extreme cruelty" towards her, which was a bar to the assignment to him of a homestead taken from community property, as he was not an "innocent party." As a conclusive answer to that, it may be said that, as the plaintiff of her own motion stipulated that the court should assign the whole of the property set out in her complaint to her husband, and as the language of Civil Code, subd. 3, § 146, leaves it entirely discretionary with the court to assign or not the homestead, either absolutely or for a limited period, to the innocent party, *subject to the future disposition* of that tribunal, it would seem as if the trial court had full power and authority to make the decree which it did. The other points made do not require notice.

It is evident that the plaintiff could not, in an action of ejectment, recover from one in possession property to which she had no right of entry. The judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 430

NATIONAL BANK OF D. O. MILLS & CO. *v.* PORTER BROS. (No. 11,036.)

(*Supreme Court of California.* September 24, 1887.)

PRINCIPAL AND AGENT—FACTOR'S LIEN—ASSIGNEE OF BILL OF LADING.

Affirming *National Bank* v. *Porter*, 11 Pac. Rep. 693.

Commissioners' decision. In bank.

Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

Hart & White, for appellant. *Freeman & Bates*, for respondent.

BELCHER, C. C. When this case was before department 1 of this court, it was, in our opinion, rightly decided. 11 Pac. Rep. 693. The law applicable to the facts appearing in the record was correctly stated, and little more need now be added.

It is urged for the appellants that the facts as stated in the opinion are at variance with those stated in the complaint, and that by not looking at the complaint the court was led into error. The allegation in the complaint which is referred to is to the effect that Brewer & Co., being the owners of the carload of grapes in question, on the third day of October, 1883, shipped the same by railroad from Sacramento to Chicago, to be there sold by the defendants as commission merchants, and the proceeds to be accounted for to the owners of the fruit; that Brewer & Co. then and there received from the rail-

road company a bill of lading, and on the same day assigned the grapes to Cook & Son, by writing on the bill of lading an assignment, which is set out, and by delivering such bill of lading to Cook & Son. It is claimed that under this averment there can be no question that Brewer & Co. owned the grapes when they were shipped, and that if there was an agreement between the parties, either express or to be implied from their acts and course of dealing, that the consignees should have a lien upon the grapes for any general balance due them, then their lien attached the moment the grapes were delivered to the railroad company to be shipped, and that lien could not afterwards be divested by any act of the consignors. In support of this position the principal cases relied upon are *Valle* v. *Cerre's Adm'r*, 36 Mo. 588, and *Bailey* v. *Railroad Co.*, 49 N. Y. 75, 76.

In the first-named case it is said: "Whether or not the given consignment is to be considered as made to cover a general balance of account, will depend upon the special arrangements, agreements, and understanding of the parties; but where such an agreement exists, and the consignment is made in pursuance of it, and there is nothing else in the case which is inconsistent with the hypothesis, the case would be governed by the same principle, and a delivery to the carrier will be considered as a constructive delivery to the consignee. Russ. Fact. 203; *Clark* v. *Mauran*, 3 Paige, 373; *Bryans* v. *Nix*, 4 Mees. & W. 791; *Desha* v. *Pope*, 6 Ala. 690; 3 Pars. Cont. 261, and note *w*. In such case the shipment and delivery of the goods to the carrier, under the bill of lading, amounts to a specific appropriation of the property, with an intention that it shall be a security or a payment to the consignee for the advances he has made."

In the New York case, the court said: "It must appear that the delivery was made with intent to transfer the property. Until this is done the parol agreement is executory, the title remains in the consignor, and he has the power to transfer the property to whomsoever he pleases. * * * If A. has property upon which he has received an advance from B., upon an agreement that he will ship it to B. to pay the advance, or to pay any indebtedness, he may or he may not comply with his contract. He may ship it to C., or he may ship it to B., upon conditions. As owner he can dispose of it as he pleases. But if he actually ships it to B. in pursuance of his contract, the title vests in B. upon the shipment. The highest evidence that he has done so is the consignment and unconditional delivery to B. of the bill of lading. If the consignor procures an advance upon the bill of lading from a third person, or delivers or indorses the bill of lading to a third person for a consideration, it furnishes equally satisfactory evidence that the property was not delivered to the consignee, for the simple reason that it was delivered to some one else. * * * As against the consignor, the delivery of the property to the carrier, with intent to comply with his contract, vests the title in the consignee. It is largely a question in intention."

We fail to see how it can be said that these cases support the contention of appellants, and none which go further in that direction have been called to our attention. Here it does not appear that the car-load of grapes in question was shipped by Brewer & Co. in pursuance of their alleged agreement with defendants, nor that the delivery was made with the intent to transfer the property to them. On the contrary, it is clearly shown by uncontradicted evidence that it was understood in advance that the shipment was to be made for and on account of Cook & Son, to whom the bill of lading was assigned, and delivered immediately upon its issuance. The shipment and assignment of the bill of lading were parts of one transaction, and were wholly inconsistent with the hypothesis upon which the appellants base their claim.

As the case was presented, we see no error in the rulings of the court below, and the judgment and order should therefore be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 437

MILLER *v.* THOMAS and others. (No. 9,933.)

(*Supreme Court of California.* September 24, 1887.)

APPEAL—MODIFICATION OF JUDGMENT—RIGHTS OF PARTIES NOT SERVED WITH NOTICE.

Upon appeal from an interlocutory judgment, where it appears from the record that the portions appealed from could not be modified without disturbing the whole judgment, and prejudicially affecting the rights of parties not served with notice of the appeal, the appeal should be dismissed. MCKINSTRY, J., dissenting.

For opinion on former appeal, see 12 Pac. Rep. 432.

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Partition by Henry Miller, Thomas Rea, and Johanna Fitzgerald against Massey Thomas and some 1,200 other defendants. The land in question is the Rancho Las Animas, Santa Clara county, California. The *rancho* was a Spanish grant to one Mariaud Castro, who died in 1828, leaving a wife and eight children surviving him. Maria Lugardo Castro de Doak, one of his daughters, became the owner, by inheritance, of an undivided one-sixteenth of the *rancho*. The respective interests of the parties to this appeal are confined to this tract.

Page & Elks, *A. W. Crandall*, and *F. P. Bull*, for appellants. *Houghton & Reynolds*, for respondent.

BY THE COURT. A motion was made to dismiss the appeal herein, which was denied. In deciding the motion this court said: "So far as appears to us from the transcript, the judgment might be modified, if necessary or proper, without affecting the right of any party not served" with notice of appeal. "If, however, it should appear on the final hearing that the necessary parties are not before the court on this appeal, the appeal will be held ineffectual." 12 Pac. Rep. 432. The cause has since been argued, and, upon full examination of the record in the light of the argument, we are of opinion that this court has no jurisdiction to entertain the appeal, for the reason that there can be no just or appropriate modification of the portions of the interlocutory judgment appealed from, without disturbing the whole judgment, and prejudicially affecting the rights of parties not served with notice of this appeal. Appeal dismissed.

THORNTON, J., did not participate in the decision.

MCKINSTRY, J., dissents.

MILLER *v.* REA. (No. 9,847.)

(*Supreme Court of California.* September 24, 1887.)

In bank.

BY THE COURT. On the authority of *Miller* v. *Thomas*, *supra*, filed this day, appeal dismissed.

73 Cal. 423

In re Estate of CONNOLLY, Deceased. (No. 11,033.)

(*Supreme Court of California.* September 21, 1887.)

EXECUTORS AND ADMINISTRATORS—LIABILITY FOR WASTE.

The bondsmen of an administrator charged with wasting the assets cannot defend on the ground that the succeeding administrator was negligent in first seeking to recover the assets in the hands of third parties to whom they had been wrongfully transferred.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

John F. Burris and *P. G. Murphy*, for appellants. *M. L. G. O'Brien* and *W. C. Burnett*, for respondents.

SEARLS, C. J. This is an appeal from an order and judgment of the superior court in probate in favor of Patrick Callahan, administrator of the estate of John Connolly, deceased, and against Daniel Connolly, former administrator of the same estate, settling the account of such former administrator at $671.50, and ordering the same paid over to his successor. It appears from the report of the referee appointed to take and state the account of the former administrator that the latter received money and property of the estate of the value of $1,133; that he paid out certain moneys on account of the estate, leaving a balance of $671.50 in his hands due the estate, and that his services were of no value to the estate. The report was approved by the court, and the order entered thereupon, from which this appeal is taken.

Turning to the testimony, and it appears that Daniel Connolly, the former administrator, treated the assets of the estate as though they were his own property; probably proceeding upon the theory that he was the sole heir at law of the deceased. Of the moneys belonging to the estate, he confided $450 to one Reynolds, with a view of its being used in business for their joint account. Of this sum $200 was lost to the estate; the residue having been collected by the successor of Connolly.

The exceptions to the report of the referee are taken, not by Connolly, the administrator, but by Michael H. Gaffney, and S. A. Hussey, his bondsmen. Conceding that they can be heard in this connection, and the most that they claim in favor of their position is that their principal squandered the estate most palpably, and that the security afterwards obtained from Reynolds, by which a portion of it might have been recovered, was lost by the negligence of the attorney of the estate. This is to put the case much stronger than the facts will warrant; but assuming such to be the fact, and we still think the action of the court below correct. The successor of Connolly was under no obligation to look beyond him and his bondsmen for the assets of the estate. His doing so was a voluntary act, without any privity with or authority from Connolly; and if, in seeking to recover from Reynolds a mere debt which the latter owed to Connolly, he was guilty of negligence, it does not lie with Connolly or his bondsmen to find fault. Again, the evidence tends to show that the negligence and wrong, if any, by which the failure to collect the money due from Reynolds occurred, was occasioned by the conduct of Swartz, who was the agent of the bondsmen, and that of Koen, who acted under him.

The judgment appealed from is affirmed.

We concur: MCKINSTRY, J.; TEMPLE, J.

73 Cal. 93

RANKIN *v.* C. P. R. Co. and another. (No. 12,074.)

(*Supreme Court of California.* July 7, 1887.)

APPEAL—BY PARTY NOT AGGRIEVED — SUCCESSFUL DEFENDANT NOT AFFECTED BY NEW TRIAL TO CO-DEFENDANT.

In an action brought by the plaintiff against two defendants, judgment was rendered in favor of one, and against the other. The latter moved for a new trial, and the court ordered that the judgment be "set aside, and that a new trial be granted the moving party." From this order the other defendant appealed. *Held* that, as the order did not affect the judgment in favor of the other defendant, an appeal therefrom was unauthorized, and should be dismissed, because not taken by the "party aggrieved." Code Civil Proc. Cal. § 938.

In bank.

BY THE COURT. The appeal of the S. P. C. R. Co. from the order of the court below granting a new trial is unauthorized, and must be dismissed, because not taken by "a party aggrieved." Section 938, Code Civil Proc. The order in express terms grants a new trial only to the moving party, *i. e.*, the C. P. R. Co. For the purpose of determining the scope and effect of an order granting a new trial, we look at the moving papers, as well as the language of the order. In this case, appellant had judgment in its favor against plaintiff, and plaintiff recovered judgment against appellant's co-defendant, the C. P. R. Co. The latter moved for a new trial, which motion was granted in an order of which the following is a copy: "It is hereby ordered that the verdict and judgment heretofore rendered and entered herein be, and the same are hereby, vacated and set aside, and that a new trial be granted the moving party herein, upon its payment to plaintiff of his costs of the former trial." This order of the court, granting a new trial, did not, and could not, affect the judgment in favor of the S. P. C. R. Co.

Appeal dismissed.

73 Cal. 96

RANKIN *v.* C. P. R. Co. and another. (No. 12,191.)

(*Supreme Court of California.* July 7, 1887.)

VERDICT—AGAINST ONE OF TWO DEFENDANTS—SILENT AS TO THE OTHER.

In an action brought against two defendants, C. and S., for injuries resulting from their joint negligence, C. and S. answering separately, the jury rendered a verdict against C., but was silent as to S., and the clerk entered judgment against the plaintiff for the costs of S. *Held*, that this was not a verdict upon the issue raised by the answer of S., and that the judgment should therefore be reversed.

In bank.

PATERSON, J. Plaintiff commenced this action against the C. P. R. Co. and the S. P. C. R. Co. to recover for injuries charged in the complaint to have resulted from the joint negligence of both defendants. Each defendant answered separately, denying the negligence imputed to it, and each charging the other with negligence at the junction of their tracks where the accident occurred. The verdict rendered was in favor of the plaintiff against the C. P. R. Co. for $50,000, but was silent as to the S. P. C. R. Co. Upon this verdict the clerk entered up judgment in favor of plaintiff against the defendant the C. P. R. Co. for the sum of $50,000 and costs, and against plaintiff in favor of the defendant the S. P. C. R. Co. for costs of the latter. Unless we are prepared to overrule the case of *Benjamin* v. *Stewart,* 61 Cal. 605, we think the decision therein conclusive upon the question raised here. As we understand that case, it was held that such a verdict was not a decision upon the issue of fact raised by the answer of the defendant not named in the verdict.

The verdict of the jury, like the finding of the court, must pass upon all the issues, and be free from ambiguity and uncertainty. And where there

is a party plaintiff or defendant in whose favor, or against whom, judgment may be entered, regardless of the rights of those with whom he is joined, the verdict should expressly declare in favor of or against such party. The intent of the jury should not be left to inference or presumption. *Jenkins* v. *Parkhill*, 25 Ind. 473; *Settle* v. *Alison*, 8 Ga. 208. Of course, where the plaintiff takes a judgment against some of the defendants, his action amounts to a dismissal of the case against the other defendants sued as joint tort-feasors, and the judgment debtors cannot complain, there being no contribution; but in this case it is the plaintiff who complains that a judgment has been entered in favor of one of the defendants, against his wishes, and without a finding of the jury to support it. The case went to the jury with instructions which show that plaintiff was demanding an adjudication of all the issues as to both parties, and there is nothing subsequent to show consent to anything less on the part of plaintiff, or from which such consent or a waiver may be fairly presumed.

The verdict in this case is not simply informal or defective in matters that the plaintiff was bound to have corrected at the trial or waive the defect. It is no verdict at all upon the issue raised by the answer of the defendant S. P. C. R. Co., and the failure of plaintiff to call for a correction of the verdict does not raise a presumption that the issue had been abandoned by him on the trial.

Judgment reversed.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.; TEMPLE, J.; THORNTON, J.

73 Cal. 464

HONIG *v.* PACIFIC BANK. (No. 11,758.)

(*Supreme Court of California.* September 27, 1887.)

1. BANKS AND BANKING—CERTIFICATE OF DEPOSIT—UNAUTHORIZED PAYMENT TO AGENT.
 Peyser, a collector in the employ of Honig, deposited in a bank, without the latter's knowledge, certain sums of money, and, in designating to whose order the same was to be payable, wrote in the bank register, "N. Honig, by S. A. Peyser." Thereupon the bank issued and delivered to Peyser certificates of deposit payable to the order of "N. Honig," which were afterwards paid by the bank upon the indorsement by Peyser of "N. HONIG, by S. A. PEYSER." Subsequently, Honig, learning of the transaction, ratified the act of Peyser in depositing the money, and sued the bank upon the certificates so paid. *Held*, there was no contract, express or implied, that the certificates were payable only when indorsed according to the signature in the register; and that Honig was entitled to recover. MCFARLAND and PATERSON, JJ., dissenting.
2. SAME—DEPOSIT BY AGENT—FICTITIOUS PRINCIPAL.
 A bank assuming that a depositor, who designates himself as agent, represents a fictitious principal, does so at its peril.
3. SAME—DELIVERY TO AGENT—ACTION ON, BY PAYEE—UNAUTHORIZED PAYMENT TO AGENT.
 The fact that a certificate of deposit was in the possession of defendant bank (from which it was issued) at the time of commencing the action, and was never actually delivered to the payee named, is no defense to an action thereon by such payee, when it appears that there had been a constructive delivery to the payee through his agent, and that the possession of the defendant had been obtained by paying the certificate on the agent's unauthorized indorsement of the payee's name.
4. SAME—RATIFICATION OF DEPOSIT BY AGENT—PAYMENT TO AGENT NOT BINDING ON PRINCIPAL.
 Upon a ratification of the unauthorized acts of an agent in depositing in a bank certain sums of money, a recovery may be had by the principal of the full amount deposited, as evidenced by certificates of deposit issued by the bank, and wrongfully paid to the agent, without showing the amount actually received by the bank, and although the money drawn by the agent on the first certificate may have been used to purchase the second. MCFARLAND and PATERSON, JJ., dissenting.

In bank. Appeal from superior court, San Francisco; J. F. SULLIVAN, Judge.

Chas. J. Swift, for appellant. *Crittenden Thornton* and *F. H. Merzbach*, for respondent.

TEMPLE, J. This action is brought upon six certificates of deposit, made, executed, and delivered to the plaintiff, by the defendant. They are all in the same words, except as to date and amount. The following is a copy of the first issued:

"$250. No. 3,289.

"PACIFIC BANK, N. W. cor. Sansome and Pine Streets—Series B.

"SAN FRANCISCO, January 19, 1885.

"N. Honig has deposited in this bank two hundred and fifty dollars in gold coin, payable to self or order on the return of this certificate, properly indorsed. M. W. UPTON, Teller.

"S. G. MURPHY, Cashier."

The deposits were in fact made by one S. A. Peyser, who was the clerk of the plaintiff, and the certificates were delivered to him. When he made the deposits Peyser demanded certificates, and wrote in the register of certificates of deposit, under the head of "To Whose Order," "N. Honig, by S. A. Peyser," and the money was paid to him on each and all of the certificates. Honig had for many years been a well-known business man in San Francisco, but he had never had dealings with the defendant other than to collect money on checks on the bank; and it does not appear, otherwise than by the register and the issuance of the certificates, that the officers of the bank ever knew of his existence.

Peyser was in the employ of Honig, and was intrusted with the collection of moneys, but Honig did not authorize him to make these or any deposits with the bank; did not, in fact, know of the deposits, or that any certificates had been issued, until long after the certificates had been paid to Peyser, as before stated. Of course, Peyser had no authority from Honig to indorse the certificates, or to obtain the money upon them. Some time after their payment, Honig discovered the fact, and brought this suit upon the certificates, although they had been so paid, and had in fact been surrendered by Peyser to the bank, and were still in possession of the bank.

As to the register of signatures, the cashier testified as follows: "The register book of certificates of deposits is a signature book, or book of identification, which is placed before a person making a deposit in this way, and in which he writes his name then and there; and opposite to that man's name is the amount that the certificate is issued for and the number; and, on the return of that certificate to the bank, the paying teller is required to examine and compare the signature of the indorsement with the signature of the party depositing the money; and if that signature is not genuine, and has not the appearance of being genuine, and written by the party who deposits the money, payment is refused upon it."

It is contended that a certificate of deposit is a form of deposit by one with whom the bank has not a regular account; that the depositor, on leaving his money, leaves also his signature, thereby designating upon what indorsement the money may be withdrawn; that the contract really is to pay upon the surrender of the certificate indorsed by the same person, and in the same way, that the register is made in the certificate of deposit book. But the trouble with this contention is that the certificate is a negotiable instrument. On their face, the certificates sued on are payable to N. Honig or order. The register is a private book, kept by the bank for its own convenience and protection. It forms no part of the negotiable instrument issued by the bank. If an indorsement is required, the character of it is indicated on the face of the paper itself, which is expressly made payable to Honig or order.

The exigencies of the defendant's case would require us to hold that: (1) Had Honig presented in person the instrument which is expressly made pay-

able to him or order, the bank could have properly refused payment, and that upon such refusal no action would lie on the part of Honig against the bank. (2) That, had Honig assigned the certificate for a valuable consideration, the assignee could not have obtained the money, although by law it is negotiable, and is expressly made payable to Honig's order. (3) That Peyser could have indorsed Honig's name, and demanded the money, although the defendant knew he was no longer in the employ of Honig, and that Honig expressly protested against his authority to indorse his name, or to receive the money for him. That is, that Peyser was able without Honig's knowledge or consent to constitute himself Honig's agent, and that the agency was irrevocable. And (4) in case of Honig's death, his administrator could not get the money, but Peyser could still obtain it; and, in case of his death, his administrator, too, could have drawn the money.

If I send my messenger boy to make a deposit for me, and he discloses his principal, and the certificate is issued payable in terms to me, the contention is that I cannot collect the money until I cause my own name to be indorsed on the certificate by the boy, who at the time may be in Hong-Kong. This cannot be so. If the bank keeps a certificate book for its protection, its officers must see to it that they get the right signature in the book. It cannot, by taking the wrong signature, prevent the true owner from getting his money on demand.

There is no contract, express or implied, that the certificate was payable only when indorsed according to the signature in the register. The certificate of deposit register is evidently a mere private book, whose contents cannot concern the holder of a negotiable certificate; but, if it were otherwise, it is difficult to discover how it could help the defendant. For, after all, this book only shows the number of the certificate, the amount for which it was drawn, and to whose order it was made payable, which in this case was Honig. The cashier is presumed to know that no act of his could authorize Peyser to act as Honig's agent; and that, if Peyser had then been the agent of Honig, it was competent for Honig to withdraw the agency at any time.

It is said that a person may deposit in a fictitious name, or may give any name he chooses at the bank; so he may represent himself as the agent of a fictitious principal, and in such case he can draw the money in the name in which the deposit was made. Let this be admitted. It does not cover this case. Here, the principal was not fictitious. The bank cannot assume that a named principal is a fictitious person, or, if it does so, it will be at its peril. *Morgan* v. *Bank*, 1 Duer, 434. The fact that the certificates were in the possession of the defendant is immaterial. They had been executed and duly delivered to the plaintiff through his agent. The defendant came into possession of them wrongfully, and without having paid them to plaintiff or his order.

It is said that plaintiff cannot recover the full amount of all the certificates, for he has not shown that defendant received more than $300 altogether. This is upon the theory that Peyser may have drawn the money on the first certificate and redeposited it, or some of it, to purchase the second certificate, and so on. This would perhaps have been a tenable position if Honig had sued for money had and received, ignoring the certificate on the ground that the deposit was not authorized by him. But there can be no doubt of the proposition that plaintiff was at liberty to ratify the unauthorized act of his agent, and sue on the certificates, and that he could do this without authorizing Peyser to indorse his name upon the certificates. They were entirely distinct transactions. The action, then, was brought upon several negotiable instruments, each of them reciting the exact amount of money received from Honig, and promising to pay the same to Honig or his order. None of them have been paid to plaintiff or his order, or to his agent. When plaintiff proved the execution and delivery of the instruments, and that they had

not been paid, he made out his case. All that appears in answer to this is that, under the peculiar circumstances of this case, it is possible that only $300 of Honig's money was received by the bank. We cannot disturb the finding of fact of the trial court on the ground that upon the evidence it is possible that the defendant did not receive so much of the plaintiff's money. The burden of proof was clearly shifted to defendant.

The defendant having possession of the certificates, the plaintiff was not required to produce and surrender them; but, if that were necessary, it was done when the defendant was compelled to produce them and submit them to the court. Having come into the possession of them unlawfully, defendant held them for the plaintiff.

The judgment and order should be affirmed, and it is so ordered.

We concur: SEARLS, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

MCFARLAND, J. I dissent. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. The complaint contains six counts. The first avers that on January 19, 1885, defendant "made and executed unto the plaintiff its certain paper writing whereby it promised to pay unto plaintiff, or his order, the sum of two hundred and fifty [$250] dollars," and that afterwards plaintiff demanded payment of the same, and defendant has not paid the same, nor any part thereof. There is no averment of the specific character of the "paper writing," or that it was ever delivered to plaintiff, or that he ever had possession of it, or that he was ever the owner or holder of it, or that he ever presented it at the bank of defendant for payment. The other five counts are similar to the first, except that in each count a "paper writing" of a different date and for a different amount is averred. The largest amount named in either count is $300; and the latest date, the second day of March, 1885. The aggregate amount of all the paper writings was $1,250, for which sum, with interest, judgment was rendered.

At the trial, plaintiff, to prove the averments of his complaint, procured from the custody of defendant six paper writings, each marked "Paid" on its face, and introduced them in evidence, against the objections and exceptions of defendant. They proved to be paper writings in the form of certificates of deposit, in which plaintiff was named as depositor. The one first in date —and the others were the same, *mutatis mutandis*—was as follows: "N. Honig has deposited in this bank $250 in gold coin, payable to self or order on return of this certificate, *properly indorsed.*" It was properly signed by the officers of the bank, and was indorsed, "N. HONIG, by S. A. PEYSER." Across its face it was marked with a blue stamp: "Paid 23 Paying Teller."

The undisputed facts of the transaction are these: On the said nineteenth of January—the date of first certificate—one S. A. Peyser went into the bank of defendant and deposited $250, and took for it a certificate of deposit. It is the custom of the bank, when a man wants a certificate of deposit, to request him to write his name in a signature book, or book of identification. Opposite his signature is written the number of the certificate issued him, with date, amount, etc., so that, when it is presented for payment, the paying teller, by comparing the signature by which it is indorsed with the signature previously written in the book, may see that they are the same, and that, therefore, the certificate is "properly indorsed." In accordance with this requirement, Peyser wrote in the signature book "N. Honig, by S. A. Peyser," under the heading, "To Whose Order," and the certificate was issued and delivered to him with "N. Honig" named as depositor. In a few days Peyser returned with the certificate indorsed just as written in the signature book,—"N. HONIG, by S. A. PEYSER,"—was paid the money, and delivered up the certificate to the bank for cancellation. Shortly afterwards he made

another deposit, and received another certificate, in the same way, which, in a few days, was paid to him in like manner; and so on, until the six certificates had been thus issued and paid, except that one of them was payable to "N. Honig, per S. A. Peyser," and another was also indorsed by a firm called "Davis & Co.," and seems to have passed through the clearing-house. Each time, Peyser wrote in the signature book, "N. Honig, by S. A. Peyser," and the certificate was thus indorsed before payment. Each certificate was paid before its successor was issued, so that the greatest amount which Peyser ever had at the bank at any one time was $300.

While these transactions were taking place, the plaintiff, Honig, knew nothing whatever about them. He had never authorized Peyser to deposit any of *his* money at that bank, and did not know that Peyser had made any deposits there, of any character. Honig had never been a customer of the bank, had no account there of any kind, and had never himself received from it any certificate of deposit; and he was entirely unknown to the bank. But, after the transactions were concluded, and all the certificates had been paid and taken up by the bank, the said Peyser died; and, a few months after his death, plaintiff, having then learned of these transactions, demanded of the defendant that it should pay all of said certificates over again to him; and, the demand being refused, this action was commenced. He made no proof at the trial that any of the money deposited by Peyser belonged to him, (plaintiff,) but he relied entirely on the mere fact that his name was in the certificates as depositor.

Upon these facts I do not think that plaintiff was entitled to judgment; and therefore I do not deem it necessary to discuss at length appellant's two points, that the complaint was not sufficient, and that the certificates were not admissible in evidence. I do not see how the principles of law applicable to the peculiar qualities of negotiable paper can be invoked in this case. Those principles apply, ordinarily, when the rights of sureties, indorsees, guarantors, and third persons generally, intervene. If the certificates invoked in this case had not contained the words "or order," or any equivalent words, the claim of plaintiff would not have been of any less legal value. If it be shown that a negotiable instrument, made by A. to B., was without consideration, B. cannot maintain an action upon it against A. Between the original parties there is not often any difference whether a bailment or debt be evidenced by a simple receipt or a negotiable promise, except that, in the latter case, a consideration is presumed. If the money deposited by Peyser with defendant was not the money of plaintiff, upon what principle can he recover in this action? If he had obtained possession of the certificates before payment, and then had demanded payment, or had indorsed them to third parties, different questions might have arisen. The only parties to the contract were the bank and Peyser; part of that contract was that the certificates should have the indorsement which had been written in the book of identification; they were returned with that indorsement; the money was paid, and the instruments were taken up and canceled; and thus the contract was executed and ended before there was any assertion of the claim—real or pretended—of plaintiff.

The only position having any strength which plaintiff could take, is that the certificates, being in form negotiable, import a consideration; that is, make a *prima facie* case of ownership of the money by plaintiff. Plaintiff, however, in his testimony, entirely repudiates the agency of Peyser in every part of the transaction. He says that he knew nothing about the certificates until after Peyser's death. But, if Peyser was not plaintiff's agent in receiving the certificates, then the insertion of plaintiff's name therein goes for naught, and he can base no right thereon. On the other hand, if, notwithstanding his testimony, he seeks now to adopt and ratify the agency of Peyser, he must adopt the whole of that agency, or none. Story, Ag. § 250. But suppose it be assumed that the money belonged to plaintiff, and was in the

possession of Peyser, as his agent, how would the case stand then? It has been held in some cases that an original bailor may maintain detinue against a second bailee; but never, we apprehend, where the second bailee has safely redelivered the thing bailed, according to his contract, to the first bailee, before notice and demand by the original bailor. Story, Bailm. §§ 105–107. If B., having the custody of money of A., intrusts it to C., for temporary safekeeping, and C. returns it to B. before any notice or demand by A., then A. has no action, either *ex contractu* or *ex delicto*, against C., because C. has neither broken a contract, nor done a wrong.

However, I think that no case can be found where an action has been successfully maintained directly upon a negotiable instrument, not lost or destroyed before cancellation, when the plaintiff had never been in possession of the instrument, and had never known of its existence until after its existence had ended. Here, the appellant was in possession of the instruments sued on at the time the action was commenced, claiming to own them as canceled obligations. And it has been directly held in *Crandall* v. *Schroeppel*, 1 Hun, 557, that a party claiming to own a promissory note in the possession of another, who also claims to own it, cannot maintain action on it, and that the title to the note cannot be settled in such an action. Of course, this case differs widely from the common case where a man opens a general account with a bank, and a *contract relation* between the parties exists from the start. There the original party alone has the right to draw against the account, no matter by whom he may send deposits. It no doubt would have been more regular and safer if appellant had required Peyser to take the certificates in his own name, and dangerous complications might have arisen; but, under the facts here, in my opinion, there is no phase of justice, and no rule of law, which compels appellant to repay these dead and canceled instruments.

PATERSON, J. I dissent. The bank and Peyser had the right to enter into an agreement that the former should pay the money deposited by the latter to the order of "N. Honig, by S. A. Peyser," and this agreement was binding, unless the rights of innocent parties intervened. The instrument never was delivered to Honig. The fact that it is negotiable in form is immaterial. If plaintiff's right to recover depends upon the agency of Peyser, it is sufficient to say that the plaintiff must ratify or repudiate all of his acts. He cannot ratify the deposit, and repudiate the indorsement. There is nothing to show that plaintiff owned the money deposited by Peyser. At most, the plaintiff ought not to recover more than $300.

73 Cal. 475

PENDERGRASS, Adm'r, etc., *v.* CROSS, Judge, etc. (No. 12,243.)

(*Supreme Court of California.* September 27, 1887.)

NEW TRIAL.—MOTION FOR AMENDED STATEMENT—PRESENTING WITHIN REASONABLE TIME.

Code Civil Proc. Cal. § 659, prescribing the time within which an amended statement, in motion for a new trial, must be presented for settlement, does not apply when the amendments are adopted by the moving party, and in such case the statement so amended may be presented within a reasonable time, (Id. subd. 3;) and, the trial judge having decided that the time of presentment was reasonable, it is his duty to settle and certify the statement.

In bank. Petition for writ of mandate to superior court, Tulare county; W. W. CROSS, Judge.

Sidney V. Smith, for petitioner.

BY THE COURT. A judgment for defendant was entered in an action wherein the petitioner herein was plaintiff, and one Burris was defendant. The plaintiff in that action gave notice of intention to move for a new trial, and

served on defendant's attorney a draft statement of the case. Within statutory time the defendant served amendments to the statement, which were adopted by the plaintiff. We say the amendments were adopted, because the plaintiff did not indicate his non-adoption of them by serving notice that the statement and amendments would be presented to the judge for settlement, as prescribed in Code Civil Proc. § 659. The plaintiff, having adopted the amendments, delivered the statement as amended to the clerk, for the judge, to be settled, (the judge being absent from the county,) after the expiration of the time within which the statement and amendments must (upon notice) have been presented to the judge for settlement, or delivered to the clerk for him, had the amendments not been adopted by the plaintiff. The petitioner now prays that the judge be ordered by mandate to settle and certify the statement; the judge having refused to settle it.

Code Civil Proc. subd 3, § 659, does not limit the time within which a statement as amended—when the amendments are adopted by the moving party—shall be presented to the judge, or delivered to the clerk for settlement. It may be done in a reasonable time. The superior judge, as appears from his answer herein, decided that the time was reasonable, provided the law permits a statement as amended, where the amendments are adopted, to be presented for settlement, or to be delivered to the clerk, for the judge, after the time within which the statement and amendments must be presented to the judge, or delivered to the clerk, in cases where the amendments are not agreed to; but that the moving party had neglected "to pursue the proper steps to have said statement settled within the time required by law." The judge having so held that the statement was delivered to the clerk within a reasonable time, it was his duty to settle and certify the statement.

Let the writ issue.

McKINSTRY, J., expressing no opinion.

73 Cal. 459

BOWDEN *v.* PIERCE. (No. 11,004.)

(*Supreme Court of California.* September 27, 1887.)

1. EXECUTORS AND ADMINISTRATORS—EXECUTOR DE SON TORT—CALIFORNIA PROBATE PRACTICE.

 There is no such officer as executor *de son tort* recognized under the California probate practice.

2. SAME—EXECUTOR DE SON TORT—REFUSAL TO ACT.

 The fact that one who was named in a will as executor applied for letters, which the court granted, does not make him a trustee of the estate, when he refused or neglected to qualify; and contracts made by him with the executrix, if fair and just, are not void, although they redounded to his benefit.

In bank. For the opinion rendered in department 1, see 14 Pac. Rep. 302.

BY THE COURT. For the reasons given in the opinion rendered in department 1, order affirmed.

THORNTON, J., expressed no opinion.

BOWDEN *v.* PIERCE. (No. 9,588.)

(*Supreme Court of California.* September 27, 1887.)

In bank.

BY THE COURT. This is an appeal from the judgment, and, no error appearing in the judgment roll, the judgment is affirmed.

THORNTON, J., expressed no opinion.

73 Cal. 482

AMADOR QUEEN MIN. CO. *v.* DEWITT. (No. 12,030.)

(*Supreme Court of California.* September 28, 1887.)

EMINENT DOMAIN—CONDEMNATION OF MINING PROPERTY BY PRIVATE CORPORATION.

Plaintiff, a private corporation, owned two mining claims, and between them was located a mining claim owned by defendant, through which he had constructed a tunnel for his private use. This tunnel the plaintiff sought to condemn, for the purpose of enabling it to work its mines. *Held* that, plaintiff being a private corporation, the action could not be maintained under Code Civil Proc. Cal. § 1238, sub. 5,—which authorizes the condemnation of "roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse-matter from mines,"—so as to appropriate the property of the defendant to the private use of the plaintiff.[1]

Commissioners' decision. Department 1.

Appeal from superior court, Amador county; C. B. ARMSTRONG, Judge.

Stewart & Herrin and *John A. Eaton*, for appellant. *Geil & Morehouse*, for respondent.

BELCHER, C. C. This is an action to condemn a right of way through a tunnel under defendant's mining claim. The facts of the case as they appear in the complaint may be briefly stated as follows:

[1] That the state has no right to take private property for any but a public use, and as to what are such public uses as will justify the exercise of the right of eminent domain, see Johnston's Appeal, (Pa.) 7 Atl. Rep. 167; Heick v. Voight, (Ind.) 11 N. E. Rep. 306, and note; Sholl v. Coal Co., (Ill.) 10 N. E. Rep. 199; In re Railroad Co., (N. Y.) 8 N. E. Rep. 548, and note.

The plaintiff owns two mining claims in Amador county, one situated in a ravine known as "Hunt's Gulch," and the other in a ravine known as "Murphy's Gulch." Between these two claims is a high ridge of land, which is also a mining claim, and is owned by defendant. On its claim in Hunt's gulch plaintiff has a quartz-mill, and in its claim in Murphy's gulch is a large amount of valuable gold-bearing ore. There is a tunnel, constructed by plaintiff and defendant, which extends from a point near plaintiff's quartz-mill, through and under defendant's claim to Murphy's gulch. Plaintiff is working its mine in Murphy's gulch, and is transporting the ore taken therefrom through the tunnel to its mill, and without a right of way through the tunnel for the purpose of so transporting the ore, it cannot continue to work or develop its said mine. The defendant, in May, 1882, obtained a patent from the United States for his mining claim, which contained, among other things, the following condition of sale: "That in the absence of necessary legislation by congress, the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development." This condition of sale was inserted in the patent in pursuance of the provisions of section 2338, Rev. St. U. S., which reads as follows: "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and these conditions shall be fully expressed in the patent."

The prayer is that "the damages which defendant will sustain by reason of a right of way granted to plaintiff through said tunnel, for the purpose of working plaintiff's said mine in Murphy's gulch, be assessed, and that on the payment of the damages so assessed by this honorable court to the defendant, a right of way for working and developing plaintiff's said mine in Murphy's gulch, through said tunnel, may be condemned by this honorable court," etc.

The defendant filed a general demurrer to the complaint, which was sustained, and thereupon, the plaintiff declining to amend, judgment was entered in favor of defendant.

It is admitted that there was and is no legislation by congress providing rules for working mines, and none by the state except section 1238, Code Civil Proc. That section, in subdivision 5, authorizes the condemnation of "roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse-matter from mines."

It is contended, on behalf of appellant, that, under the above quoted section of the Revised Statutes, a right of way through the defendant's mine was reserved by the United States, and that this right of way may be taken and used by any other miner, whenever it becomes necessary to use it in working his mine, upon such terms and conditions as the state legislature may have prescribed. It is further contended that the provisions of section 1238, Code Civil Proc., constitute sufficient legislation by the state to meet the requirements of the case, and to justify the plaintiff in demanding the relief asked for. But was there any such reservation? We are unable to see how the language used can be construed to have such a meaning, and evidently the department of the interior did not so understand it when it issued the patent to the defendant. However this may be, we are satisfied that, under the provisions of the Code of Civil Procedure referred to, the plaintiff cannot have a right of way through defendant's mine condemned for its use in working its own mine. The mine of defendant is his private property, and it is clear that the plaintiff asks for the condemnation in order that it may appropriate a way through that property for its private use. This cannot be done. It was held in *Channel Co.* v. *Railroad Co.*, 51 Cal. 269, that mining, like the plaintiff's, is a private industry, and that private property cannot be condemned for such

a use. We think that case decisive of this, and the judgment should therefore be affirmed.

I concur: HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 438

Ex parte YOUNG AH GOW, on *Habeas Corpus*. (No. 20,296.)

(*Supreme Court of California.* September 26, 1887.)

LARCENY — SECOND OFFENSE — COURT MAY IMPOSE PUNISHMENT FOR, UPON VERDICT OF "GUILTY OF PETIT LARCENY."

Under Pen. Code Cal. § 667, providing a more severe punishment on conviction for a second offense of petit larceny, the court may, on a verdict of "guilty of petit larceny," impose a sentence for petit larceny, second offense; the previous conviction being charged in the information, and confessed by the defendant. MCKINSTRY, J., dissenting.

In bank. Petition for a writ of *habeas corpus* to superior court, San Francisco; T. K. WILSON, Judge.

E. B. Stonehill, Dist. Atty., (*D. W. Knox*, of counsel,) for the People. *Henry I. Kowalsky* and *Lyman I. Mowry*, for petitioner.

THORNTON, J. The return shows that the petitioner for the writ was imprisoned on a commitment issued out of the superior court of the city and county of San Francisco, of which the following is a copy:

"COMMITMENT.

"In the Superior Court, City and County of San Francisco, State of California, Department Five.

"TUESDAY, March 29, 1887 Present: Hon. JOHN HUNT, Judge.

"*The People of the State of California* vs. *Young Ah Gow.*

"Convicted of Petit Larceny—Second Offense.

"The district attorney, with the defendant and his counsel, Mr. L. J. Mowry, came into court. The defendant was duly informed by the court of the information duly presented and filed on the seventeenth day of February, 1887, by the district attorney of the city and county of San Francisco, charging said defendant with the crime of petit larceny, second offense; of his arraignment and plea of 'not guilty, as charged in said information;' of his trial and the verdict of the jury, on the sixteenth day of March, 1887, 'Guilty as charged.' And defendant's motion for a new trial herein having been denied by the court, defendant by his counsel excepting thereto, the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied he had none. And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment: That whereas, the said Young Ah Gow having been duly convicted in this court of the crime of petit larceny, second offense, it is therefore ordered, adjudged, and decreed that the said Young Ah Gow be punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of five (5) years. The defendant was then remanded to the custody of the sheriff of the said city and county, to be by him delivered into the custody of the proper officers of said state prison at San Quentin.

"OFFICE OF THE COUNTY CLERK OF THE CITY AND COUNTY OF SAN FRANCISCO.

"I, William J. Ruddick, county clerk of the city and county of San Francisco, and *ex officio* clerk of said superior court thereof, do hereby certify

the foregoing to be a true and correct copy of the judgment entered on the minutes of said court in and for the city and county of San Francisco, state of California, in the above-entitled cause, as appears of record in my office.

"Attest my hand and the seal of the said superior court this twenty-ninth day of March, A. D. 1887

"WM. J. RUDDICK, Clerk.

[Seal.] "By BEVL. MCNULTY, Deputy-Clerk."

From the record in the cause of *People* v. *Young Ah Gow* (the petitioner) it appears that the defendant was charged by information with the crime of petty larceny, and previous convictions for crimes committed before the petty larceny charged in the information, as follows: Five several convictions of petty larceny, one of burglary, and another of burglary in the second degree. On his arraignment the information was read to him, and he pleaded not guilty of the offense charged in the information, and voluntarily confessed every prior conviction set forth therein.

The plea exhibits a rare aggregation of crime, and a clear confession. We subjoin it: "I am not guilty of the offense charged in the information; and I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of petit larceny in the police judge's court of the city and county of San Francisco, state of California, on or about the fifth day of October, 1880, as set forth in the information. I confess that I was, before the alleged commission of said offense, convicted of the crime of burglary in the municipal criminal court of the city and county of San Francisco, state of California, on or about the thirtieth day of December, 1873, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of petit larceny in the police judge's court of the city and county of San Francisco, state of California, on or about the sixth day of August, 1877, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of petit larceny in the police judge's court of the city and county of San Francisco, state of California, on or about the third day of January, 1879, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of petit larceny in the police judge's court of the city and county of San Francisco, state of California, on or about the fifth day of October, 1880, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of petit larceny in the superior court, department No. eleven, of the city and county of San Francisco, state of California, on or about the thirteenth day of November, 1880, as set forth in the information. I confess and admit that I was, before the alleged commission of said offense, convicted of the crime of burglary, second degree, in the superior court of the county of Sacramento, state of California, on or about the twentieth day of November, 1881, as set forth in the information."

The cause was tried before a jury. The defendant introduced no testimony. The plea of not guilty was alone submitted to the jury, who, after hearing the testimony, without leaving their seats, rendered the following verdict: "We, the jury, find the defendant guilty of petit larceny." Thereupon the court proceeded to render its judgment, adjudging the defendant guilty of *petit larceny, second offense*, and to imprisonment in the state prison for the term of five years. (The return above quoted is a copy of the judgment.)

We are asked on this showing to discharge the petitioner from custody, on the ground of excess of jurisdiction by the court in the sentence pronounced. That the court had jurisdiction of the petit larceny, and of the prior convictions, is not denied. But the point is deliberately made here that the conviction was only for petty larceny, and that the court had no authority to sen-

tence petitioner to an imprisonment in the state prison upon such conviction. But the judgment in the record shows plainly that the sentence was for petit larceny, second offense. In other words, the sentence was for the petit larceny charged in the information, and a previous conviction of the same offense. Pen. Code, § 1207; *In re Ring*, 28 Cal. 247; *Ex parte Murray*, 43 Cal. 457. And under such circumstances the court can pronounce such a sentence as the one here imposed. See Pen. Code, § 667, first clause of the section, and subdivision 3. The court is by these clauses clearly invested with authority to impose such sentence. The judgment follows the verdict and confession of defendant, and is in all respects regular. There were other matters, referred to on the argument, which relate merely to the exercise of jurisdiction, and do not go to the jurisdiction of the court. They merely relate to the procedure on the trial, and are not *per se jurisdictional*. If they showed error committed in the trial court, they could only be reviewed on regular proceedings in an appeal court. We will add here, however, that we find no error in the record. The trial was according to the rule, and no right of the defendant was trenched upon. The court followed on the trial the rulings of this court in regard to arraignment, plea, submission to jury, and verdict, in *People* v. *Lewis*, 64 Cal. 401, 1 Pac. Rep. 490, and *People* v. *Brooks*, 65 Cal. 296, 4 Pac. Rep. 7, and contravened nothing said in *People* v. *King*, 64 Cal. 338.

On the argument, some remarks were made on the decisions of this court in the cases just above cited. They were spoken of as inharmonious and contradictory. A careful examinination of the opinions in the causes will show that this is not so. We will consider the cases in their order.

People v. *King* was first decided, the opinion having been filed on the twenty-sixth of November, 1883. King was convicted of petit larceny on an information charging him with the commission of grand larceny, and also with having suffered a previous conviction for felony The error on which the cause was reversed was as to the sentence pronounced on the verdict. The point is discussed in the opinion, and the points herein noticed were made. On his arraignment King was asked by the court whether he had suffered the previous conviction charged in the information. He pleaded not guilty to the specific offense charged, and admitted the previous conviction. This court said the arraignment was had on a section of the Penal Code (1025) which had been repealed, and that the question asked by the court as to the prior conviction was illegal. Further on in the opinion the court said: "No person accused of a public offense can be required by an unauthorized question asked him at his arraignment to criminate himself;" citing Pen. Code, § 688. The question being illegal, King "was not bound to answer it, and his answer could not be read against him, as equivalent to the verdict of guilty, upon which, on conviction, with a verdict of petit larceny, he could be adjudged guilty and punished." The opinion proceeds on the idea that King had been arraigned in a mode unauthorized by law; that the plea of *not guilty* should be considered as extending to the whole information, as denying all its allegations, both as to the specific offense charged, and the prior conviction, and therefore he had a right to have the jury pass on them; that the jury did pass on them, and found a verdict of guilty of petit larceny. This was regarded by the court as a finding that the previous conviction was not true. We therefore held that the punishment on the verdict could only be for petit larceny, under Pen. Code, § 490, and that confinement in the state prison was not the punishment allowed by law.

The only point really decided was that the sentence was illegal. The observations in the opinion were made in discussing this point, and were made to enforce the conclusion that the sentence to the state prison was not authorized by the law. The starting point in the reasoning was the illegality of the arraignment, which, it is stated, was had under a repealed statute, (section

1025 of the Penal Code.) The illegal part of the plea was there rejected, and it was held to be a plea of not guilty to the *whole information*. In this view the jury must pass on all the issues. It was held that it did so, in finding the verdict; affirming guilt only as to petit larceny. The verdict was construed as negativing the existence of the previous conviction, holding it not to be true. On this construction of the verdict it was held the judgment or sentence could only pronounce the punishment appropriate to petit larceny, which was not imprisonment in the state prison.

People v. *Lewis* was heard and decided in the month following that in which the judgment was rendered in *People* v. *King*, viz., on December 29, 1883. In *Lewis' Case* the indictment was for grand larceny and previous conviction of a like offense. On his arraignment Lewis pleaded not guilty to the offense charged in the indictment. The court below held this plea as extending to all the averments of the indictment,—to the larceny charged, as well as the previous conviction. Lewis, on the trial, offered to plead guilty to the previous conviction. This the court refused to allow. Construing the plea as above stated, that the previous conviction was denied, the court directed the jury as to the form of the verdict, in accordance with section 1158 of the Penal Code, and the jury found the following verdict: "We, the jury, find the defendant guilty of grand larceny, and we find the charge of previous conviction true." The above was sustained by this court, and the action of the trial court approved and affirmed. In *Lewis' Case* the trial court did what this court said in *King's Case* would have been correct. The defendant was allowed to plead, according to the usual and lawful mode, to the whole indictment. This he did in his plea of *not guilty*. No question was asked on the arraignment as to the previous conviction. The arraignment was had under the section of the Code relating to arraignments in criminal actions generally. Sections 988, 1017. He was not arraigned under the repealed section, (1025,) as King was. We think it clear that if King had been arraigned as Lewis was, and the verdict in his case found as in *Lewis' Case*, the court would, on the views expressed in the opinion in *King's Case*, have held that the judgment in *King's Case* was without error. In fine, the elements in *Lewis' Case* were what the court, speaking by McKEE, J., said were lacking in *King's Case*. *Lewis' Case* had the requisite elements, and was affirmed. *King's Case* lacked them, and was disapproved.

People v. *Brooks* was decided May 29, 1884. Brooks was charged on an information with the offense of an assault with intent to commit robbery, and a previous conviction of grand larceny. The defendant was arraigned under section 988 of the Penal Code, as Lewis was, and as this court said should have been done in *King's Case*. This court said, in *Brooks' Case*, in regard to this arraignment, that the special mode of arraignment prescribed by section 1025 no longer existing, as that section had been repealed, the trial court had to resort to section 988, which prescribed the mode of arraignment in all cases. And it will be here observed, this was the only mode then left for arraignment. If the arraignment was not had under section 988, there was no mode of arraignment provided by statute. Of necessity, the court below was compelled to resort to section 988 as its only guide for arraigning a person charged with a criminal offense. If this mode did not exist, there was no other, unless the court could resort to the common-law mode. On Brooks' arraignment he pleaded not guilty of the offense charged, and "confesses and admits that he was before the alleged commission of the offense convicted of the crime of grand larceny, as set forth in the information." In this case (Brooks') the only question asked was, "Guilty or not guilty?" The question held to be illegal was not put to him. It was further held in *Brooks' Case* that the voluntary confession was legal. Such voluntary confession is allowed by law. A party may confess his guilt as well in court as out of court. The verdict was held to be proper, and that it was not necessary after the voluntary con-

fession that the jury should find as to the previous conviction. This is in accordance with section 1158 of the Penal Code, which we here insert:

"Sec. 1158. Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: 'We find the charge of previous conviction true,' or, 'We find the charge of previous conviction not true;' as they find that the defendant has or has not suffered such conviction."

And this court further held, in the *Case of Brooks*, that the court might well render judgment on the verdict and the confession under section 1158. The court further held that the confession of the previous conviction is the *answer* of section 1158. That *answer* meant that, or it meant nothing. We see no other meaning that can be attributed to the word "answer." We must either give it that meaning or elide it from the statute, which we are not allowed to do. We further held that the first subdivision of section 1093 of the Penal Code allows such confession, and quoted this portion of section 1093 to which reference was made. It was further said that, when confession is made under section 1093, that portion of the information is not read to the jury on the trial, and in fact does not go to the jury, (section 1158,) and the jury, therefore, are not allowed to pass on it. We insert here the repealed sections, and that portion of section 1093 above referred to:

"Sec. 969. In charging in an indictment the fact of a previous conviction of a felony, or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of petty larceny, it is sufficient to state 'that the defendant, before the commission of the offense charged in this indictment, was, in [giving the title of the court in which the conviction was had] convicted of a felony, [or attempt, etc., or of petty larceny.]' If more than one previous conviction be charged in the indictment, the date of the judgment upon each conviction shall be stated, and not more than two previous convictions shall be charged in any one indictment."

"Sec. 1025. When a defendant, who is charged in the indictment with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer shall be entered by the clerk in the minutes of the court, and shall, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answer that he has not, his answer shall be entered by the clerk in the minutes of the court; and the question whether or not he has suffered such previous conviction shall be tried by the jury which tries the issues upon the plea of 'not guilty,' or, in case of a plea of 'guilty,' by a jury impaneled for that purpose. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads 'not guilty,' and answers that he has suffered the previous conviction, the charge of the previous conviction shall not be read to the jury, nor alluded to on the trial."

"Sec. 1093. The jury having been impaneled and sworn, the trial must proceed in the following order, unless otherwise directed by the court: (1) If the indictment or information be for felony, the clerk must read it, and state the plea of the defendant to the jury; and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk, in reading it, shall omit therefrom all that relates to such previous convictions. In all other cases this formality may be dispensed with."

Now, considering the opinions in the cases together, where is the inharmony or contradiction in the judgments rendered? In construing the opinion in *People* v. *King*, attention must be given to its peculiar features, and the

language used therein in regard to them. In *Cohens* v. *Virginia*, 6 Wheat. 399, MARSHALL, C. J., speaking, for the court, of some *dicta* of that court in *Marbury* v. *Madison*, 1 Cranch, 137, observed as follows: "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." In *Richardson* v. *Mellish*, 2 Bing. 248, BEST, chief justice of the common pleas, used this language with reference to an opinion cited on the argument: "There are expressions used by the chief justice in that case which seem to bear on the present; but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. The manner in which he is arguing is not the thing; it is the principle he is deciding. If ever I could have imagined it could have been extended to such a case as this, I would have protested against, though I could not have prevented, the decision. I would, in my place, have protested against it, for I should have seen the injustice and confusion to which such a doctrine would have been liable to be extended. I am quite satisfied that not one of the learned judges who decided that case ever conceived that its authority could be pressed to the extent to which it has been pressed in this case."

We take it to be a sound rule that the expressions of a judge in an opinion must be taken with reference to the case on which he decides; and if expressions there used go beyond the case, they may be respected, but "ought not to control the judgment in a subsequent case when the very point is presented for decision." The case (King's) before the court was one in which it was first held that the arraignment was had in a mode which was illegal. It was illegal in that a question was asked which was not allowed, since section 1025, which allowed it, had been repealed. The court regarded the plea of not guilty as alone before the court on which the trial was to be had; and the answer was, for the reasons above given, rejected as not in the plea. It was in reference to this state of the case that the court said that "the jury must, by their verdict, find the charge of a previous conviction true or not true." Upon the construction of the plea put upon it by the court, that it was only "not guilty," all the allegations of the information were put in issue, and all must be passed on by the jury. It was in this view that the court said that both charges must be proved, and both must be found upon by the jury. That the defendant must plead to both charges, all the three cases referred to above hold. This was done in all the cases,—in the first case by "not guilty;" and the other cases by "not guilty," and not guilty and a confession of the previous convictions.

In commenting on section 1158, the court did say, in *King's Case*, that the exception in section 1158, in relation to the rule requiring an issue of fact to be tried as prescribed in that section, being swept away by the repeal of the section of the Code which required an answer to be made, (the reference here was to section 1025,) the defendant stood for trial on his plea of "not guilty." But it had been clearly held in the preceding part of the opinion that the plea of "*not guilty*" was the only plea before the court. There was no necessity for saying that this was in consequence of the law requiring the answer having been swept away by the repeal of section 1025, which allowed it to be made. This part of the opinion was entirely *obiter*,—outside of the case. The court must have overlooked section 1093, which refers to such answer by the words "and the defendant has confessed the same," in connection with sec-

tion 1158, where the answer of defendant in regard to the previous conviction is referred to, neither of which sections quoted above in full (1093 or 1158) had been repealed, and still held their place for the guidance of courts in such cases as those of King, Lewis, and Brooks. The observations of this court in *King's Case* in regard to section 1158 were made in a cause where the facts were different from the one before us; they relate to a point not necessary to be decided in *King's Case*, and, though they should be respected, "ought not to control the judgment in a subsequent suit where the very point is presented for decision." This very point was presented for decision in *Brooks' Case*.

We will observe here, in relation to the sections above referred to, that 969 was modified in 1874 (see amendments to Codes 1873–74, p. 438) so as to read as it did when repealed April 9, 1880. Section 1025, not in the original Code, was inserted in 1874. See amendments above cited, p. 439. The form of section 1158 in the Code as first adopted was changed in 1874. By the act of April 9, 1880, sections 969 and 1025 were repealed. See amendments to Codes for 1880, part relating to Pen. Code, p. 15, § 30, and Id. p. 19, § 56. In 1874, § 1093 was amended. See amendments of 1874, *supra*, p. 444. By the act of 1880, (April 9th,) sections 1158 and 1093 were again amended so as to read as they did when the cases above discussed were decided. See amendments of 1880 to Pen. Code, § 64, p. 21, and section 62, p. 24. So it will be perceived that on the same day, and by the same act, sections 969 and 1025 were repealed, and 1093 and 1158 were amended. In so framing the Code, the legislature doubtless came to the conclusion that 1093 and 1158, as they were then framed, furnished a complete system. The above history of the legislation shows that, in the construction put on these sections in *Brooks' Case*, this court acted in accordance with the legislative intent.

We cannot perceive any lack of jurisdiction in the court in pronouncing the sentence in the case of the petitioner here, and he is therefore remanded to the custody of the proper officer, to be dealt with according to law. Ordered accordingly.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

MCKINSTRY, J., dissenting.

73 Cal. 452

HUTCHINSON *v.* AINSWORTH and another. (No. 9,603.)

(*Supreme Court of California.* September 27, 1887.)

1. MORTGAGE—FORECLOSURE—DEFECTIVE CERTIFICATE—REFORMATION—LIMITATION OF ACTION.

 A mortgage was executed September 3, 1878, and foreclosure was commenced March 25, 1880. On August 19, 1880, plaintiff asked leave to amend her complaint so as to obtain a reformation of the certificate of acknowledgment of the mortgage. The court denied plaintiff's request, but its judgment was reversed March 28, 1883, and, subsequently, such amended complaint was filed. *Held*, that whether the right to a reformation is or is not barred in three years from the date of the mistake, the amended complaint should be treated as having been filed at the date of the application, and therefore the statute of limitations would not prevent such reformation.

2. SAME—DEFECTIVE CERTIFICATE—RECORDING—SUBSEQUENT PURCHASER WITH NOTICE.

 A mortgage properly executed and acknowledged, although the certificate of acknowledgment is defective, is valid against a subsequent purchaser having knowledge of it as recorded, though not of its proper acknowledgment, where he parted with no value, and incurred no liability, except a contingent liability which never became fixed.

3. SAME—REFORMATION—MISTAKE—CONFLICT OF EVIDENCE NOT FATAL TO RELIEF.

 While, in actions for reformation of written instruments, the mistake must be established in a clear and convincing manner to the entire satisfaction of the court, relief will not be denied simply because there is a conflict in the evidence upon the question of a mistake.

4. SAME—DECREE.
In an action to reform a defective certificate of acknowledgment of a mortgage, the notary who took the acknowledgment testified explicitly to the observance of all the requisites to a valid acknowledgment, and to the mistake in attaching the defective certificate. *Held* sufficient to sustain a decree of reformation.[1]

5. SAME—NOTARY NOT NECESSARY PARTY DEFENDANT.
In a suit for reformation of a certificate of acknowledgment, the notary who took the acknowledgment is not a necessary party defendant.

6. SAME—PLEADING—FORECLOSURE AND REFORMATION SINGLE CAUSE OF ACTION.
A complaint which, in addition to the necessary averments and demand for relief in mortgage foreclosure, contains also the proper allegations and demand for reformation of the certificate of acknowledgment of the mortgage sought to be foreclosed, states but one cause of action.

In bank. Appeal from superior court, Alameda county; A. M. CRANE, Judge.

W. B. Tyler, for appellants. *William Reade* and *W. C. Belcher*, for respondent.

SEARLS, C. J. This cause was here on a former appeal, the decision on which is reported in 63 Cal. 286. In 1878, the defendants, Anna Ainsworth and A. G. Ainsworth, made their promissory note to Margaret M. Hutchinson for $3,500, payable on the third day of September, 1879, with interest at 10 per cent. per annum. The note was given for money loaned to said defendant by plaintiff, who is a married woman, and was her separate property. To secure the payment of the promissory note, Anna Hutchinson executed the mortgage to foreclose which this action is brought. The property mortgaged was the separate property of Anna Ainsworth, who is a married woman. The acknowledgment made by said Anna Ainsworth is found to have been properly taken; but the notary, in certifying thereto, failed to specify that he made her acquainted with the contents of the instrument, separate from, and without the hearing of, her husband. A copy of the certificate is set out in the report of the case on the former appeal. In that appeal this court reversed the judgment and order of the court below, upon the ground of error in refusing plaintiff's application to amend her complaint so as to show that the acknowledgment was actually taken in compliance with the statute, with a view to a judgment correcting the certificate, as provided by section 1202 of the Civil Code.

The action was brought March 25, 1880. Upon the return of the cause to the court below, and on the eleventh day of May, 1883, the complaint was amended, averring the acknowledgment to have been properly taken, and asking that the certificate be reformed and corrected. To this amended complaint defendant demurred, upon the grounds, among others: (1) That there is a non-joinder of parties defendant, in that Will. H. Burrill, the notary who took the acknowledgment, should have been made a defendant; (2) that two causes of action are joined in the complaint without being separately stated; (3) that the cause of action is barred by Code Civil Proc. subd. 4, § 338. The demurrer was overruled, and this action is assigned as error.

The demurrer was properly overruled. The notary was not a necessary party defendant to the reformation of his certificate. The reformation, if made at all, could only be so made by the judgment of the court. *Wedel* v. *Herman*, 59 Cal. 515.

The objection of the demurrer is not that two causes of action are improperly united, but that they are contained in the complaint, and are not sepa-

[1] As to the mistakes against which equity will relieve, and the proof necessary to obtain a reformation of a written instrument, see Benson v. Markoe, (Minn.) 33 N. W. Rep. 38; Guilmartin v. Urquhart, (Ala.) 1 South. Rep. 897, and note; Griffith v. County of Sebastian, (Ark.) 3 S. W. Rep. 886, and note; Bailey v. Insurance Co., 13 Fed. Rep. 250, 256.

rately stated. Waiving the question whether or not a proper uniting of two causes of action in the same complaint, without stating them separately, is a cause for demurrer, we are of opinion the complaint states but one cause of action. "An action is an ordinary proceeding in a court of justice by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code Civil Proc. § 22. The facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong, make up *the cause of action.* If these facts, taken together, give a unity of right, they constitute but one cause of action.

In equity the relief or the enforcement of a single right may be varied, and the facts essential to such relief may be set out without objection, as auxiliary to the right to be enforced. In the case at bar the object of the action is to collect a single debt, and to enforce a single lien, to redress a single wrong. To accomplish this object dual relief is sought, but this circumstance, so frequent in equity, does not constitute two causes of action. Pomeroy, at section 459 of his work on Remedies, in discussing this question, uses the following language: "Actions brought to reform instruments in writing, such as policies of insurance and other contracts, mortgages, deeds of conveyance, and the like, and to enforce the same as reformed by judgments for the recovery of the money due on the contracts, or for the foreclosure of the mortgages, or for the recovery of possession of the land conveyed by the deed, fall within the same general principle. One cause of action only is stated in such cases, however various may be the reliefs demanded and granted." *Meyer* v. *Van Collem,* 7 Abb. Pr. 222; *McClurg* v. *Phillips,* 49 Mo. 315.

Is the cause of action barred by the statute of limitations? To repeat: The note and mortgage were executed September 3, 1878, and fell due September 3, 1879. Suit brought March 25, 1880. Leave to amend the complaint was asked and refused by the court at the first trial on the nineteenth day of August, 1880. Judgment reversed, March 28, 1883. Amended complaint filed May 11, 1883. It will be observed that three years had not elapsed from September 3, 1878, the date of the mistake in the certificate, when plaintiff asked and was denied the privilege of amending her complaint so as to have such mistake corrected. Under such circumstances, the plaintiff having a legal right to file her amended pleading, and having been prevented from so doing by the act of defendants, and through the error of the court below, it should, by application of the doctrine of relation, be deemed and treated as having been filed as of the date of the application and refusal. If A. has a right to answer a complaint filed against him, which right is denied by the *nisi prius* court, after an appeal and reversal of the order denying such right, he cannot be met with the answer that his time to answer has expired under the statute. This doctrine is quite different from that which prevents a party from taking advantage of a disability, unless it existed in his favor at the time that the statute began to run. A disability to sue may be a misfortune, but, as it cannot be attributed to the acts of others, it must be borne by the party upon whom it rests, except so far as relieved against by statute.

Plaintiffs were under no disability. They asked to exercise a right which was refused by the court, and, as they might well do, they procured a correction of the error by appeal, whereupon they were entitled to stand in the position they would have occupied had the right been granted them in the first instance. Any other rule would render a successful appeal fruitless in a variety of cases. This reasoning proceeds upon the theory that the application to reform the certificate was a cause of action which would be barred within three years from the date of the mistake sought to be corrected, or, if not then known, within three years after its discovery; but it may well be doubted

whether the right to reform the certificate of acknowledgment was not a mere incident to the right to recover upon the note and mortgage, which would stand or fall with its principal.

Had we confined ourselves to the statements of the complaint, we might have disposed of the demurrer thereto more briefly, but, as the same question is presented upon a broader field by the findings, we have discussed it in its latter aspect, and are of opinion the demurrer was properly overruled, and that the findings against the plea of the statute of limitations are fully warranted.

We are asked to review the evidence upon the question of a mistake by the notary in certifying to the acknowledgment, and to set aside the finding of the court upon the ground that it is not supported by the evidence; and in this connection are referred to a number of cases in which it is held that to authorize the correction of mistakes by reforming written instruments, the alleged mistake must be clearly made out by proofs entirely satisfactory, and that nothing short of a clear and convincing state of facts showing the mistake will warrant the court to interfere with and reform the instrument. As was said in *Lestrade* v. *Barth*, 19 Cal. 660: "The evidence, it is true, must be clear and convincing, making out the mistake to the entire satisfaction of the court, and not loose, equivocal, or contradictory, leaving the mistake open to doubt." The conclusion from the sum of all the authorities on the subject is not that relief must necessarily be denied, because there is a conflict of testimony, for that would result in a denial of justice in some of the plainest cases calling for such relief; but that upon all the proofs, taking the facts as they appear to the court, after eliminating testimony unworthy of credence, or based upon mistake or uncertainty, as in other cases, the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court. Viewed in this light, we cannot say the court was unauthorized by the testimony in the conclusion it reached.

The testimony of the notary, Burrill, is clear and explicit to the facts that he went to the house of the mortgagor; that her husband retired from the room; that he then and there made her acquainted with the contents of the instrument, and that she acknowledged it, etc., all without the presence or hearing of her husband; and that upon returning to his office he inadvertently attached a printed certificate which would have been valid under the statute as it formerly existed, but which failed to certify that he made the mortgagor acquainted with the contents of the instrument, without the presence and hearing of her husband, as required by the present law. This was a mistake which might well have happened; and upon such testimony, if believed to be true, the court below was fully warranted in the conclusion it reached.

The conveyance, then, having been properly executed and acknowledged, (though not properly certified,) was valid as between the parties to it, and all the world, except subsequent *bona fide* purchasers, for a valuable consideration, without notice.

The court found that the defendant Tyler had notice of the mortgage as recorded, but no notice in fact that it had been properly acknowledged; that he gave no money or thing of value therefor, and incurred no liability on account thereof, except the contingent liability that, if the rents of the property which was covered by the mortgage did not amount to $500, he would pay his grantor that amount; and that the rents paid said sum, and he never became liable therefor. The testimony supports this finding, and, had the court found a fuller and more complete notice in Tyler, we do not see that such finding could have been disturbed by this court.

The judgment and order appealed from are affirmed.

We concur: SHARPSTEIN, J.; TEMPLE, J.; PATERSON, J.; MCKINSTRY, J.; MCFARLAND, J.; THORNTON, J.

73 Cal. 243

PEOPLE *v.* SUTTON. (No. 20,605.)

(*Supreme Court of California.* August 29, 1887.)

1. CRIMINAL PRACTICE—CROSS-EXAMINATION—SCOPE.
On cross-examination in a criminal trial, where answers of defendant to questions objected to added nothing material to what he had previously voluntarily stated without objection, and only tended to make more clear some of the statements previously made by him, there was no violation of Pen. Code Cal. § 1323, limiting cross-examination of a defendant in criminal actions to matters as to which he was examined in chief.[1]

2. SAME—MEDICAL EXPERT—OPINION AS TO MERITS OF TEXT-BOOK.
A medical expert, testifying in a criminal trial, was asked whether "Maudsley's Responsibility in Mental Diseases" was a standard work. The question was asked for the purpose of showing the familiarity of witness with authors upon that subject. *Held*, that the question was properly excluded, on the ground that the opinion of the witness as to the merits and standing of the work would not tend to prove such familiarity.

3. SAME—HYPOTHETICAL QUESTIONS—CROSS-EXAMINATION.
A medical expert, on cross-examination, may be asked hypothetical questions bearing upon the sanity of defendant, and based on a portion of the evidence, for the purpose of testing his competency as an expert.

4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.
"To entitle a party to a new trial on the ground of newly-discovered evidence, it must appear that the *evidence*, and not merely its materiality, be newly discovered; that the evidence is not cumulative merely; that it is such as to render a different result probable on a retrial of the cause; that the party could not with reasonable diligence have discovered and produced it at the trial; and that these facts be shown by the best evidence which the case admits."

5. SAME—DISCRETION OF COURT—PRESUMPTION.
Applications for new trial on the ground of newly-discovered evidence are addressed to the discretion of the court, and its action will not be disturbed except for an abuse of discretion; the presumption being that the discretion was properly exercised.

In bank. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Wells Whitmore and *M. C. Chapman*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. On the trial the defendant testified on his own behalf, and on his cross-examination stated. "I did not see Martin's [deceased's] cattle on my place but once after I got my gun, and it was too much trouble to get the gun and shoot them. I never thought of shooting them at all. I saw some of Martin's cattle on my said place two years ago, but I did not shoot any of them. The next time that I saw any of them was on September 15, 1886, [the date of the homicide.] There were two bands, 15 in one and 8 in another. When I first saw them I was about a quarter of a mile away, at work at my barn, and when I saw them I went into my house and got my gun to shoot the cattle, but I did not shoot them. I went up onto the hill and saw the band of cattle and Martin [deceased] standing on the top. The cattle were going east." The question that elicited this statement is omitted in the record, and it does not appear that any objection was interposed to it. But at the conclusion of the above statement the district attorney asked this question: "Then the cattle were going toward Martin's place?" The defendant's attorney objected, on the ground that it was not cross-examination. The objection was overruled, and the ruling excepted to. The question was

[1] Respecting the latitude permissible in a cross-examination of the defendant in a criminal prosecution, where he offers himself as witness, see Disque v. State, (N. J.) 8 Atl. Rep. 281, and note; Spies v. People, (Ill.) 12 N. E. Rep. 865, and note; State v. Saunders, (Or.) 12 Pac. Rep. 442; State v. Johnson, (Iowa,) 34 N. W. Rep. 177; State v. Robertson, (S. C.) 1 S. E. Rep. 443; Tickell v. Railroad Co., (Mo.) 2 S. W. Rep. 407; State v. Brooks, (Mo.) 5 S. W. Rep. 257.

not answered, and the district attorney said: "That was towards the coal mines?" To which the defendant answered: "Yes, sir." The district attorney then said: "The coal mine is not on your premises, is it?" Defendant answered: "No, sir." The district attorney then asked: "Was anybody driving them [the cattle] that way?" Defendant's counsel objected, on the ground that it was not cross-examination. Objection overruled, and ruling excepted to. *Answer*. "No, sir. There was no one behind the cattle. Martin [deceased] was staying up on the hill to drive the cattle off, I suppose." On his examination in chief the defendant stated that he had been much annoyed by cattle trespassing on his premises; but he did not narrate the facts which he narrated on his cross-examination, without objection, and, so far as the record shows, without being interrogated in relation thereto. If he had testified to the same facts on his examination in chief, the right to ask him the questions objected to on cross-examination would be perfectly clear. And we think the questions objected to, and the answers to them, only tended to make more clear some of the statements previously made by the defendant without objection on his cross-examination.

We fail to see that the answers to the questions objected to add anything material to what the defendant had previously voluntarily stated. So viewing it, we think the rulings of the court correct, under the provision of the Code which limits the cross-examination in such a case to the matters about which the defendant was examined in chief. Pen. Code, § 1323. The cross-examination in this case was quite as clearly within the rule as was that held to be so by this court in *People* v. *Russell*, 46 Cal. 121.

The next alleged error relied on by the appellant was the ruling of the court sustaining an objection interposed by the district attorney to a question asked Dr. Buck by appellant's counsel. Dr. Buck, called by the defendant, testified that he was familiar with "Maudsley's Responsibility in Mental Diseases." Defendant's counsel then asked him if he knew whether it was a standard work. The district attorney objected, and the court sustained the objection, to which defendant excepted. It is now insisted that the court erred, because an affirmative answer of the witness would tend to show his great familiarity with authors upon the subject upon which he was called to give expert testimony. But he had testified that he was familiar with the treatise in question, and we think his opinion of it would not tend to prove his great familiarity with authors upon that subject. His competency to testify as an expert does not appear to have been questioned. *People* v. *Donovan*, 43 Cal. 162, cited by defendant's counsel, has no bearing on this question.

On cross-examination by the district attorney, Dr. Buck was asked: "Would you say that in a case where a man had had a grievance against another man of long standing, and who, seeing that grievance being repeated, should go and get a rifle, walk from a quarter of a mile to a half mile to where the man committing the grievance was, and who should shoot that man,—would you say that that was a case of transitory mania or homicidal mania?" The defendant objected, on the ground "that it was not cross-examination, and evidently an hypothetical question, based upon a portion of the evidence introduced in this case, and not correctly stated, and omitting a large portion of the evidence in the case." The objection was overruled. The defendant excepted, and the witness answered: "As stated by the district attorney, there is nothing in the statement that would indicate any insanity whatever." The witness was then asked this question: "Would you say that a man who is very prompt and careful in the paying of his debts,—would you consider that a matter of insanity, indicating the insane temperament?" Defendant's counsel objected, on substantially the same ground on which he objected to the preceding question. The objection was overruled, and the ruling excepted to. The witness answered: "I should think that was no indication of insanity in any one. I should hope not, I am sure."

We think the rulings of the court upon the objections of the defendant were not erroneous. The witness was being cross-examined, and we think it was proper to ask him such questions as these, for the purpose of testing his competency as an expert. If he had testified that the hypothetical facts embraced in either question indicated insanity, we think the jury would have doubted his sanity. We think the defendant's counsel could not have relied upon those facts as tending to prove insanity. It seems to be well settled that experts of all classes may be asked as to an hypothetical case, and if the facts on which the hypothesis is based fall, the answer falls also.

One of the grounds upon which defendant based his motion for a new trial was newly-discovered evidence, which he could not with reasonable diligence have discovered and produced at the trial. At the hearing of the motion the defendant produced the affidavits of the witnesses by whom he expected such evidence to be given. To entitle a party to a new trial, on the ground of newly-discovered evidence, it must appear—"*First*, that the evidence, and not merely its materiality, be newly discovered; *second*, that the evidence is not cumulative merely; *third*, that it is such as to render a different result probable on a retrial of the cause; *fourth*, that the party could not with reasonable diligence have discovered and produced it at the trial; and, *fifth*, that these facts be shown by the best evidence which the case admits." 1 Hayne, New Trial & App. § 83. "Applications on this ground are addressed to the discretion of the court below, and the action of the court will not be disturbed, except for an abuse of discretion; the presumption being that the discretion was properly exercised." Id. § 87.

The affidavits produced in this case do not make it clear to our comprehension that the court below, in denying the motion for a new trial, abused its discretion. It is by no means clear that the defendant could not with reasonable diligence have discovered and produced the evidence claimed to be newly discovered at the trial, nor are we prepared to say that it is such as to render a different result probable on a retrial. Of that the court below was in a much better position to judge than we are. And this court has laid down the rule that applications on this ground are to be regarded with distrust and disfavor. *Baker* v. *Joseph*, 16 Cal. 180; O'*Brien* v. *Brady*, 23 Cal. 243; *Jones* v. *Singleton*, 45 Cal. 94; *Bartlett* v. *Hogden*, 3 Cal. 58; *Hobler* v. *Cole*, 49 Cal. 250; *Arnold* v. *Skaggs*, 35 Cal. 684. It not appearing to us that there was any abuse of discretion by the court below, we cannot disturb the order on that ground.

The statement in defendant's brief that "the court, in its instructions to the jury, assumed that the killing was admitted as proved," is not borne out by the record, as far as we can discover. All the instructions which defendant's counsel requested to be given were given.

Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; MCKINSTRY, J.; TEMPLE, J.; THORNTON, J.

73 Cal. 520

MORGAN and another *v.* TILLOTSON and another. (No. 11,916.)

(*Supreme Court of California.* September 29, 1887.)

1. EJECTMENT—PLEADING—DENIAL OF PLAINTIFF'S TITLE.
 In an action of ejectment, it is sufficient to deny the ownership and title to possession of plaintiff. Averments as to the ownership of plaintiff's grantors are immaterial, and need not be denied.

2. MINING CLAIMS—PLACER MINES—ANNUAL EXPENDITURE—RELOCATION.
 A failure to comply with the provisions of Rev. St. U. S. § 2324, which requires an annual expenditure of $100 by the locator of a placer mining claim, renders the claim subject to relocation.

Department 2. Appeal from superior court, Placer county; B. F. MYRES, Judge.

C. A. & F. P. Tuttle, for appellants. *Hall & Craig*, for respondents.

THORNTON, J. Action of ejectment to recover mining ground constituting a placer claim. The question of title was put in issue by the answers. The material averment of plaintiffs' ownership and title to the possession was denied. The averment in the complaint in relation to the ownership of plaintiffs' grantors and predecessors in interest was entirely immaterial, and need not have been denied. *Coryell* v. *Cain*, 16 Cal. 567.

The question whether the provision of the Revised Statutes of the United States (section 2324) which requires an annual expenditure of a certain amount for labor and materials on each mining claim until the patent is issued, a failure to comply with which provision renders the claim subject to relocation, we regard as settled in the affirmative by the case of *Russell* v. *Brosseau*, 65 Cal. 605, 4 Pac. Rep. 643, in this court; and *Jackson* v. *Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301, in the supreme court of the United States. These cases show clearly that judgment should have been rendered for defendants on the evidence, the whole of which was comprised in an agreed statement of facts. Under such circumstances, we consider it unnecessary and unjust to put the defendants to the toil and expense of a new trial.

The judgment and order are therefore reversed, and the cause remanded to the court below, with directions to enter judgment for defendants for the land in controversy. Ordered accordingly.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

73 Cal. 526

BARNHART v. FULKERTH and another. (No. 11,849.)

(*Supreme Court of California.* September 30, 1887.)

1. PLEDGE—LEVY ON PROPERTY PLEDGED—PLEDGEE CANNOT SET UP TITLE ADVERSE TO PLEDGEOR.
 A pledgee, in an action against a sheriff who has levied on the pledge as the the property of the pledgeor, cannot set up a title, adverse to the pledgeor, acquired subsequent to the levy of the execution.
2. SAME—TENDER TO PLEDGEE—WAIVER OF CONDITIONS.
 A pledgee who admits the sufficiency, so far as the amount is concerned, of a tender of what is due him from the pledgeor, made by a sheriff in execution, thereby waives his right to object to a condition annexed that he surrender the note secured by, or the warehouse receipt for, the pledge.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

W. E. Turner, for appellant. *J. H. Budd*, for respondent.

THORNTON, J. This action was brought to recover possession of 4,255 bags of wheat, or their value, in case a delivery cannot be had, and for $2,000 damages, etc. The material allegations of the complaint were denied by the answer, and defendant Fulkerth justified under a levy on the wheat sued for, made by him as sheriff of the county of Stanislaus, of a writ of attachment issued in the action brought in the district court for the county just named by *H. O. Matthews et al.* against *J. T. Davis*, and further under a levy on the same property of a writ of execution issued upon a judgment recovered in the above-entitled action.

At the trial it appears that on or about the seventh day of November, 1878, the plaintiff lent Davis the sum of $2,500, and received the wheat in question in pledge as security for its repayment to him. These facts are established by uncontroverted evidence. At the time of this loan the wheat was stored in a

warehouse at Turlock. It had been stored at Turlock before plaintiff made the loan to Davis, having been placed there by Davis in the September preceding. For this wheat a receipt was given by the warehouseman, defendant Perley, of which the following is a copy:

"TURLOCK, CAL., September 16, 1878.

"Received in good order and well-conditioned, from E. C. Vancel, five thousand and fifty-five (5,055) bags wheat, weighing six hundred and fifty-four thousand three hundred and eighty-nine pounds, (654,389 lbs.,) which I hereby agree to deliver in like order and condition, (the danger from fire excepted,) upon return of this receipt and payment of storage at the rate of 50 cents per ton for the first month, commencing August 26, 1878, and 25 cents per ton per month thereafter. Total storage not to exceed one dollar ($1) per ton for the season ending June 1, 1879.

"Stored in the grain warehouse at Turlock, known as 'Chas. Dallas' Warehouse.' GEORGE PERLEY."

This receipt was delivered to the plaintiff by Davis on the seventh of November, 1878, with the following indorsements on it:

"To dispose of for me to the best advantage, I assign the within to John T. Davis. E. C. VANCEL."

"NOVEMBER 5, 1878. Received on the within receipt 800 bags wheat; estimated weight, one hundred and four thousand pounds.

"J. T. DAVIS."

"I assign the within receipt to H. Barnhart to secure to him the payment of $2,500. J. T. DAVIS."

The last indorsement of Davis was made at the time of the loan of $2,500. This pledge was a bailment by Davis to the plaintiff. Davis and the plaintiff sustained to each other the relation of pledgeor and pledgee. Plaintiff's transaction was with Davis only. He lent Davis the money, and took his note for it. When the money lent should be paid back by Davis, the plaintiff was bound to return him the wheat pledged.

It is contended on the part of plaintiff that this wheat was the property of one Vancel. Can the plaintiff be allowed to show this? It does not appear that any transactions took place between Vancel and plaintiff until after this action was commenced. Barnhart testified that he lent money to Vancel on this wheat and other property in April, 1879. This action was brought on the seventeenth of February, 1879. Barnhart must recover on his title as it was when the action was commenced. If Barnhart cannot call in aid the title of Vancel when the suit was commenced, it will not avail him to recover in this action. He may show that the money—$2,500—that he paid over to Davis in November, 1878, and for which Davis executed to him his note, was merely a loan to Vancel through Davis, as agent of the latter, and that Vancel, and not Davis, was the pledgeor; that the transaction was one, not with Davis, but with Vancel through Davis as the agent of the former. If the loan was to Davis as principal, and the pledge was made by Davis on his individual account, and the wheat belonged to Vancel, and Barnhart had, before this action was brought, turned over the wheat to Vancel as owner, and received it back from him as his (Vancel's) custodian, he might have relied on Vancel's title. *Palmtag* v. *Doutrick*, 59 Cal. 154. Nor does it appear that Barnhart ever lent any money to Vancel until after he had brought suit. He and Davis both testify that the money was lent by the plaintiff to Davis, and that Davis pledged the wheat to him. The plaintiff received the wheat from Davis on a loan made to him, and to him only. It does not appear that Vancel's name was ever mentioned in the transaction at all. Vancel does not appear in the case until after the wheat had been attached by the plaintiffs in the suit of *Matthews et al.* v. *Davis*, and a tender, admitted by Barnhart to have been sufficient, of the amount due him by Davis, had been made to him, and refused. The interposition of Vancel as owner, by Barnhart,

seems to have been an afterthought resorted to to ward off and defeat the defense herein set up.

We are of opinion that Barnhart showed no right in this case to rely on the title of Vancel to defeat the defense relied on. His right to invoke such title did not arise until after he had begun his suit; and, inasmuch as he could only recover on the title which he had when his action was instituted, a right or title afterwards acquired could not be here available to him. Barnhart testified that he told Hewel (the agent of the sheriff to make the tender) that so far as the amount was concerned, and the sufficiency of the tender, he admitted it. Having made this admission, Barnhart should not be permitted afterwards to allege that the tender was not good by reason of the fact that Hewel said to him, when the tender was made, that he wanted Davis' note from him and the warehouse receipt. If the above should be construed as annexing conditions to the tender, Barnhart waived all right to object to them by admitting the sufficiency of the tender. Civil Code, § 1501.

We do not think that there should be a reversal because the court refused to permit a question to be put to the witness, Davis, on his cross-examination by counsel for defendants, whether, since the seventh or eighth of November 1878, he had paid the loan of $2,500, or any part of it. We are not clear that it was allowable on cross-examination, and that the court erred in ruling it out for that reason. We are the less disposed to reverse, on account of this ruling, for the reason that the defendants might have made Davis their own witness as to the matter inquired about.

Having held that Barnhart was estopped, by reason of his relation to Davis, to avail himself of the title of Vancel, there is but slight necessity to pass on another point of estoppel urged by defendants, based on the statements made by Barnhart, prior to the levy of the attachment, to the attaching creditor (Matthews) and the sheriff, that the wheat was the property of Davis. We do not think this estoppel made out, for the reason that it does not appear that the levy was made in sole reliance upon the statements made by Barnhart.

We see no error in the court's refusing to sign the findings presented by counsel for defendants, for the reasons given in *Miller* v. *Steen*, 30 Cal. 402, and *Porter* v. *Woodward*, 57 Cal. 538.

It follows from the foregoing that the judgment and order denying a new trial must be reversed, and the cause remanded, that a new trial may be had. So ordered.

We concur: McFARLAND, J.; SHARPSTEIN, J.

73 Cal. 518

WALDEN *v.* PURVIS. (No. 11,957.)

(*Supreme Court of California.* September 29, 1887.)

EVIDENCE—ADMISSIONS OF DONOR—FRAUD IN GIFT.

In an action against a sheriff, for wrongfully taking cattle donated to plaintiff by his father, a statement alleged to have been made by the father after he had parted with the possession of the cattle is inadmissible, either to prove the fraudulent character of the gift, or for any other purpose.

Commissioners' decision. Department 2.

Appeal from superior court, Stanislaus county; WM. O. MINOR, Judge.

Wright & Hazen, for appellant. *Schell & Bond*, for respondent.

HAYNE, C. Action against the sheriff for taking 111 head of cattle, alleged to have been the property of the plaintiff, under attachment against plaintiff's father. The plaintiff claimed 80 of the cattle under a sale from his father. Whatever errors may have been committed by the court in admitting or re-

jecting evidence in relation to these 80 cattle cannot be considered, because the court held the sale of those cattle to have been fraudulent and void, and so far as they are concerned the judgment was in favor of the appellant.

The balance of the cattle, viz., 31 head, were claimed by the plaintiff before the sale above mentioned. His account of these cattle is as follows: "I know the cattle in controversy. Part of them I bought from my father, and some were my original cattle; thirty or forty, or possibly fifty, head,—what I called my original stock; some of them I got from my father. Farmers would leave some cattle for ranch fees, and he would give them to me, and I also got some by taking the calves of stray cows on the ranch, or a cow would get drowned, or mired in the mud, and the calf was mine. Have had cattle for a number of years; some of them for ten years. Could not say how many I have had for one, nor how many for two, years. Owned them since they were calves. They range from one to seven or eight years."

This being the general position of the parties, the "counsel for defendant then asked that the witness be allowed to state what Miner Walden [the father] said at that time while in possession of the cattle in controversy. The plaintiff objected to the testimony, and the court sustained the objection, and refused to allow the testimony; to which ruling the defendant then and there excepted." So far as "the cattle in controversy" included the 80 head, it makes no difference whether there was error or not; because, as above stated, the court held in appellant's favor that that sale was void. So far as it relates to the 31 head for which the plaintiff had judgment, the declaration sought to be proven was a declaration of the donor after he had parted with the property, and was inadmissible either to prove fraud or otherwise. *Cohn* v. *Mulford*, 15 Cal. 52; *Jones* v. *Morse*, 36 Cal. 207.

The other points made do not, in our opinion, materially affect the judgment for the 31 head. We therefore advise that the judgment, and order denying a new trial, be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE *ex rel.* SEDGWICK *v.* SHEAR. (No. 10,000.)

(*Supreme Court of California.* September 24, 1887.)

1. OFFICE AND OFFICERS—REMOVAL.
 Where the duration or time of holding an office is not prescribed by law or by the constitution, the appointing power may remove the incumbent of the office at its pleasure.
2. SAME.
 California act of March 31, 1876, providing for the appointment of a superintendent for the house of correction of San Francisco by the board of supervisors, and "that said superintendent shall only be removed for just and sufficient legal cause after a fair and impartial investigation of his case by said supervisors," does not restrain or limit the power of removal to the manner indicated in the act, and the board of supervisors have power to remove the superintendent at their pleasure; following *People* v. *Hill*, 7 Cal. 97; *Smith* v. *Brown*, 59 Cal. 672.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action to try the title to the office of superintendent for the house of correction of the city and county of San Francisco, brought by the people, upon the relation of respondent, against the appellant. Appellant, Samuel Shear, on January 29, 1883, was appointed, by the board of supervisors of the city and county of San Francisco, superintendent for the house of correction of said city and county, under "An act to utilize the prison labor, and govern

the house of correction of the city and county of San Francisco," approved March 31, 1876, which reads as follows: "They [the board of supervisors] shall appoint a competent superintendent for the house of correction of said city and county. * * * Said superintendent shall only be removed for just and sufficient legal cause, after a fair and impartial investigation of his case by said supervisors." Appellant duly qualified and entered upon his duties as such. On January 12, 1885, said board declared the office vacant on and after January 15, 1885, and then, immediately after, appointed said John Sedgwick such superintendent, to fill the vacancy caused by the removal of Shear. Sedgwick, on January 12, 1885, accepted said office and qualified according to law. Shear refused to surrender the office, under the claim that such superintendent can only be removed for just and sufficient legal cause, after a fair and impartial investigation of the case by said supervisors, as provided in section 4 of said act, and that the board, in declaring said office vacant, assigned no cause, and that there had been no such investigation as provided by that section, and Sedgwick, on January 15, 1885, instituted this action. It was admitted that prior to this action there had been no such investigation, and no cause assigned. After the institution of this action, the said board again, on January 26, 1887, declared the office vacant, assigning a cause after investigation, and again appointed Sedgwick, etc.; but Sedgwick, having already qualified under the former action of the board, did nothing under the latter action. The superior court rendered judgment in favor of Sedgwick, and Shear appealed.

Thos. J. Clunie, for appellant. *Davis Louderback*, for respondent.

BY THE COURT. On the authority of *Smith* v. *Brown*, 59 Cal. 672, and *People* v. *Hill*, 7 Cal. 97, the judgment and order appealed from are affirmed.

73 Cal. 541

GARTHE *v.* HART and others. (No. 11,701.)

(*Supreme Court of California.* October 6, 1887.)

1. MINES AND MINING—LOCATION.
 Where the first location of a mining claim is valid, and the parties have kept it so by doing what is required by the mining laws of California, a subsequent location, however regular in form, is of no effect.
2. SAME—LOCATION—INSTRUCTIONS.
 In an action of ejectment for a mining claim, where the evidence showed a location by defendant prior to that of plaintiff, and possession by plaintiff, the court instructed the jury that one mode of making a valid location of a mining claim was by taking possession of it, and clearly defining its boundaries; but failed to state the distinction between the right of such locator as against a mere intruder, and as against one who has complied with the mining laws. *Held*, that the instruction was misleading, and the error was not cured by a subsequent instruction that if the defendant's location was prior to that of plaintiff, and conformed to the mining law, the plaintiff acquired no right under the subsequent location.
3. SAME—BOUNDARIES—PAROL AGREEMENT.
 In an action of ejectment for a mining claim, where there is evidence tending to show an adjustment of boundaries between the parties by oral agreement, an instruction that if, under the oral agreement, improvements were made by one of the parties, this would work an estoppel, is erroneous, when there is no evidence that any such improvements had been made.
4. SAME—TRANSFER OF CLAIM—PAROL.
 Under Civil Code Cal. § 1091, a writing is required to transfer a mining claim, and an oral agreement cannot operate as a transfer.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Cross & Simonds, for appellants. *Alfred D. Mason*, for respondent.

HAYNE, C. Action of ejectment for a mining claim. Verdict and judgment for plaintiff. Defendants appeal.

1. The plaintiff gave evidence tending to show a location in 1881, and a subsequent location in 1884, the marking of the boundaries under these locations, and the recording of both claims. The statement does not show that $100 worth of work was done each year as required by the act of 1872; but this defect in the evidence is not referred to in the specifications. The defendants gave evidence tending to show a valid location in 1880, the recording of the claim as required by a local regulation, the marking of sufficient boundaries, and the performance of the requisite amount of work each year. There is no evidence in contradiction of this. And if it be assumed that the plaintiff's proceedings were regular in all respects, it is manifest that the defendants had the earlier and better right. Where the first location is valid, and the parties have kept it so by doing what is required by the mining laws, a subsequent location, however regular in form, is of no effect. *Belk* v. *Meagher*, 104 U. S. 284; *Rose* v. *Richmond Co.*, 17 Nev. 56, 57. The verdict is therefore unsupported by the evidence.

2. The plaintiff gave evidence of an attempted location in 1879, and of acts tending to show a possession within the rule laid down in several cases. See *English* v. *Johnson*, 17 Cal. 109; *Table Mountain Co.* v. *Stranahan*, 20 Cal. 209; *Hess* v. *Winder*, 30 Cal. 355. The court "struck out all evidence of this first location, for the reason that it appeared that the same had not been made in compliance with law." It does not clearly appear whether this order was in reference to the "location" merely, or whether it extended to the possession also. But we think the order was in reference to the location, because the non-compliance with the mining law would not be a reason for striking out evidence of the possession.

Without saying whether the acts done were sufficient to constitute a possession, we think the court erred in its charge to the jury with reference to it. The charge was as follows: "In order to make *a valid location* of mining claims, the locator may adopt one of two courses. He may determine to locate his claim in accordance with law and customs. In order to get a title—a possessory title—in this way, he must conform to the requirements of law. * * * As I said, there is still another way by which a miner in this state may acquire a right to the possession of a piece of mining ground. It is *by taking possession of it, and clearly defining the boundaries so that they may be readily traced, and holding such possession,—keeping such possession.*"

In the hurry of the trial the learned judge evidently overlooked the distinction between the right of a party in possession as against mere intruders, and his right as against one who has complied with the mining laws. Possession is good against mere intruders, (*Attwood* v. *Fricot*, 17 Cal. 43; *English* v. *Johnson*, Id. 115; *Hess* v. *Winder*, 30 Cal. 355; *Golden Fleece Co.* v. *Cable Co.*, 12 Nev. 321, 322;) but it is not good as against one who has complied with the mining laws, (*Du Prat* v. *James*, 65 Cal. 556, 557, 4 Pac. Rep. 562.) We do not see that the error was cured by other portions of the charge. What is claimed as curing the error is the following: "Another question presents itself in this case which I will speak of shortly. Plaintiffs' claim in this case, so far as they are concerned, depends upon a location made by Mr. Penders and son in the year 1881, and a subsequent location made by Wiseman and others in 1884. Of course, if the location of defendants, to which I have already referred, was prior to that of plaintiffs, and they have complied with the requirements of the law since the date of that location, and the location itself was sufficient, no rights could be acquired by plaintiff *under the subsequent location.*" This instruction points to the first ground of plaintiff's right of which the court had spoken. It tells the jury, in substance, that if the defendants' location was prior to that of the plaintiff, and conformed to the requirements of the mining law, the plaintiff acquired no right "under the subsequent location." But it does not say that the defendants' location would prevail over the plaintiff's prior *possession*, which the court had al-

ready told the jury was one way in which the plaintiff could acquire a right to the premises in controversy. At most, the charge was misleading; and we think the jury must have been misled by it.

3. There was evidence tending to show an adjustment of boundaries between the parties by oral agreement. With reference to this the court instructed the jury, at defendants' request, as follows: "The jury is instructed that no estate or interest in real property, (except a lease for not more than one year,) nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." This was undoubtedly correct. Before 1860 a verbal transfer was held to be good when accompanied with a change of possession. *Table Mountain Co.* v. *Stranahan*, 20 Cal. 208; *King* v. *Randlett*, 33 Cal. 321. In 1860 an act was passed with reference to gold mines, (Laws 1860, p. 175,) and afterwards extended to all mines, (Laws 1863, p. 98,) which was construed to do away with oral transfers. See *Patterson* v. *Mining Co.*, 30 Cal. 363; *Goller* v. *Fett*, Id. 484, 485; *Felger* v. *Coward*, 35 Cal. 652. Section 1091 of the Civil Code has been held to require a writing for the transfer of mining claims. *Melton* v. *Lambard*, 51 Cal. 259, 260.

The oral agreement, therefore, could not operate as a transfer. It seems to have been supposed, however, that what took place could have some effect by way of estoppel, and in this regard the court instructed the jury "that if they believe from the evidence in this case that the location of John W. Hart and others was the first location, which was good according to law; that afterwards said Hart, Englebright, and their lessees, and J. W. Penders and his grantees, had a dispute as to the boundary line of the claim of each, and that it was finally understood and agreed by all parties that the line claimed by Penders should be treated and considered as the true boundary line between the two mining claims, and that thereupon the grantees of said Penders went in good faith to work upon the land before in dispute, *and made improvements thereon* under such agreement and understanding,—then I charge you that, in determining the true boundary line between the parties, you may consider such conversation and agreements, if any there was, for the purpose of determining the true boundary line between the mining claims of each party."

This was improper; if for no other reason, because there was no evidence of any improvement made "under such agreement and understanding," or otherwise, and nothing which would give rise to an estoppel. We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

73 Cal. 548

PEOPLE *v.* MEYER. (No. 20,273.)

(*Supreme Court of California.* October 6, 1887.)

CRIMINAL PRACTICE—FORMER CONVICTION—READING INDICTMENT TO JURY.

On trial of an indictment charging the defendant with petit larceny, and four former convictions of the same offense, the defendant pleaded not guilty to the first charge, but confessed the former convictions, and pleaded guilty thereto. *Held*, that it was error to permit the reading before the jury of that part of the indictment relating to the former convictions, the same being expressly prohibited by Pen. Code Cal. § 1093; and that under Id. § 1158, it was error to instruct or to permit any evidence to go to the jury in regard to the second charge.

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Information for petit larceny.

John D'Arcy, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

THORNTON, J. The defendant is accused by information of petit larceny, and four previous convictions of petit larceny. On his arraignment he pleaded not guilty of the petit larceny charged in the information, and confessed and pleaded guilty to the prior convictions.

The bill of exceptions recites: "At said trial, the clerk of the court, after having read the first part of the information which charged the crime of petit larceny, as herein stated, was proceeding to read the second part, which charged the prior conviction as above stated and set forth, when defendant's counsel interposed an objection, on the ground that the reading of anything relative to the prior conviction was prohibited by section 1093 of the Penal Code. The court overruled said objection, and defendant's counsel duly excepted. The clerk then read to the jury that part of the information which charged the defendant with having suffered the prior conviction aforesaid, and as herein set forth. The prosecution was proceeding to present to the jury evidence that defendant had suffered said prior conviction, when defendant's counsel objected, on the ground that such evidence was irrelevant, immaterial, and incompetent. The court overruled said objection, and defendant's counsel duly excepted. A witness then testified that defendant had suffered said prior conviction. The prosecution then offered in evidence the record of defendant's said prior conviction, when defendant's counsel objected, on the ground that said evidence was irrelevant, immaterial, and incompetent. The court overruled said objection, and defendant's counsel duly excepted. The record of defendant's said prior conviction was then read to the jury."

Each of the foregoing rulings was error. *People* v. *Carlton*, 57 Cal. 559; *People* v. *Brooks*, 65 Cal. 295, 4 Pac. Rep. 7; *Ex parte Young Ah Gow*, *ante*, 76, (filed September 26, 1887.) The defendant having confessed the previous conviction, the reading to the jury of that part of the information which related to the previous conviction is directly contrary to law. It is inhibited in section 1093 of the Penal Code. See, also, section 1158, Pen. Code. When the previous conviction is confessed, the jury has nothing to do with it. It is error then to offer any evidence to the jury in relation to it. Pen. Code, § 1158, and cases above cited.

The court also erred in telling the jury that they must find whether the defendant had suffered a previous conviction. This is contrary to the statute. Section 1158, *supra*. This is only to be done by the jury when the previous conviction is denied. Sections 1093, 1158.

That the defendant was prejudiced by the above rulings of the court we can entertain no doubt.

For these errors the judgment and order are reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

73 Cal. 531

PEOPLE *v.* WILLIAMS. (No. 20,326.)

(*Supreme Court of California.* September 30, 1887.)

CRIMINAL PRACTICE—INSTRUCTIONS—MURDER IN FIRST DEGREE.

Upon the trial of an indictment for murder, where the trial judge instructs the jury that if, from the evidence, they believe certain facts and circumstances under which the state claimed the homicide to have been committed, and that defendant, "without further cause or provocation," then killed the deceased, he was guilty of murder in the first degree; and such instruction is erroneous because it omits the essential elements of intent and premeditation,—it is prejudicial error, which is not cured by the fact that a full and correct definition of the offense had previously been given. SEARLS, C. J., and MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Napa county; R. CROUCH, Judge.

Indictment for murder in the first degree.

F. E. Johnston, *A. J. Hull*, and *H. C. Gesford*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted of murder in the first degree, and now appeals from the judgment, and from an order denying his motion for a new trial.

The only point raised on the appeal which I deem it necessary to consider arises on instruction 20, given at the request of the prosecution. It is as follows:

"If the jury believe, from the evidence, that, on the day of the homicide, Clark came to the town of Monticello, and that Williams, seeing or meeting him on the street, spoke to Clark, and said he wanted to see him, and requested Clark to go to the shade on the north side of Fowler's saloon, and if, when they had reached the shade, Williams informed Clark of what he had heard that Clark had said about Williams mistreating his wife, or poisoning his wife, and asked Clark to retract it or take it back, or words to that effect, and that Clark refused to retract or take back what he had said, and that then Williams, without further cause or provocation, shot and killed Clark, then Williams committed murder of the first degree, and you should so find."

This instruction seem to omit the element of premeditation and deliberation in defining murder in the first degree. Before giving this instruction, the court had fully and in various forms defined murder in the first degree, and murder in the second degree.

The first contention on the part of the people is that under such circumstances the instruction, though erroneous, could not have misled the jury to the injury of the appellant. But it is plain that this position cannot be maintained. If a trial judge, in his charge to the jury, recites certain alleged facts which there is some evidence tending to prove, and then tells the jury that, if such facts are proven beyond a reasonable doubt, they must find the defendant guilty of murder in the first degree; and such charge is erroneous because the alleged facts do not, as matter of law, constitute murder in the first degree,—it is prejudicial error, which is not cured by the fact that a full and correct definition of the offense had previously been given. Under this instruction, the jury, having found that the recited facts existed, were bound to find the defendant guilty of murder in the first degree, and they had no further use for a definition of the offense. They were expressly told that all the elements of the crime were there, and they must find the defendant guilty.

Conceding that the instruction is thus erroneous, I cannot understand how it can be said not to have prejudiced the rights of the defendant, except upon the theory that we assume his guilt, and also that his defense is a wrongful attempt to evade the demands of justice. But, whatever we may think of the evidence, he is entitled to his "due process," and to a fair trial according to the rules of law. Until found guilty upon such a trial, he stands clothed with

the presumption of innocence. With this most important element omitted, the defendant has not had his day in court,—has not been tried and convicted by a jury of the crime with which he was charged, and of which he has been adjudged guilty.

It is also suggested, although we find no such claim in the brief filed for the plaintiff, that the instruction does, in fact, contain the elements of deliberation and premeditation. The plain answer to this is the language of the instruction itself. But the instruction plainly omits an essential element of murder in the first degree, to-wit, premeditation and deliberation; and, even if we could adopt the theory of the prosecution, that the facts recited plainly imply deliberation, the instruction is still erroneous. It invades the province of the jury, and finds for them a conclusion from the evidence, which must always be left for the jury.

In *People* v. *Doyell*, 48 Cal. 85, this court attempted to define the degrees of murder, and stated the elements constituting each. It is there said: "To constitute a crime, there must be a joint operation of act and intention. But the common law measures an act which is *malum in se* substantially by the result produced; holding the doer of the act guilty of the thing done in the same measure as if it were specifically intended." But this guilty intent which the law thus implies from the fact that an unlawful act has been committed, would not, in a case of homicide, raise the offense to the grade of murder in the first degree. It would be, at the most, but murder in the second degree. To raise the offense to murder in the first degree, there must be added the element of deliberation,—not implied, but made manifest by the evidence; but, since no appreciable space of time need elapse between the intent and the act, it is only necessary that the evidence should show, and the jury should find, that, before the act of killing, the specific intent to take life was formed. In each case the intent to take life existed as matter of law. In the one case, however, it need not be proven, and may not, in fact, exist; it is implied from the fact of an unlawful killing. In the other, the evidence must show that there was a deliberate intent to take life. Of course, it is not necessary to show this by express or direct proof of an intent; but the evidence in some way must make it manifest, and the jury must be able to find it from the testimony. To illustrate: Nothing else appearing except that a homicide has been committed by the defendant, the law implies malice; and, as the burden of showing justification or excuse is on the defendant, it would be murder, but not murder in the first degree, because the specific intent to take life is not proven. This last is a most essential fact, and is always an inference from the facts proven, and cannot be taken from the jury, however clear, or even inevitable, the conclusion may be. *People* v. *Walden*, 51 Cal. 588; *People* v. *Carrillo*, 54 Cal. 63.

Suppose, in this case, the instruction had been: "If you believe from the evidence, beyond a reasonable doubt, that defendant had announced that he would take the life of deceased as soon as opportunity occurred, and thereupon, meeting Clark, asked him to go with him into the shade, and then, without any provocation or hostile demonstration on the part of deceased, shot and killed him, it is murder in the first degree." The conclusion that there was the specific intent to take life would be very obvious, and the jury would not be justified on such facts in finding any other verdict than murder in the first degree. And yet the instruction would be plainly erroneous. It would take from the jury the very question of guilt, so far as this grade of the offense is concerned. The verdict would be the finding of the court, and not of the jury. The case, as to the grade of the offense, was taken from the jury, and there was no jury trial. On such theory the court might in every case recite all the other facts, omitting intentions and motives, which are essential to constitute the offense, and tell the jury, if the dry facts are so, they must find the defendant guilty. It would be but one step further to enter judg-

ment without trial, when the guilt is obvious, and then say there was no injury, because the verdict could have been but one way. This degree of refinement—if it be such, and it is only that of the statute—is not necessary in this case, where the recited facts do not necessarily involve deliberation. I have gone into the matter thus fully to show how dangerous such instructions must always be.

It is not necessary to allude to the other instructions which are objected to. Some of them, if standing by themselves, would undoubtedly need qualification; but, on the whole, we think they are not inconsistent, and fairly and correctly place the law before the jury. Many of them are taken from the charge approved in *People* v. *Iams*, 57 Cal. 118. Although the whole charge is there approved, but a small part of it was really involved in the exceptions taken in that case, and as to the rest it was *obiter*. As a whole, the charge was undoubtedly an able *resume* of the law upon the subject, but, like the instructions just alluded to in this case, some portions, if isolated, would require qualification.

The judgment and order should be reversed, and the case remanded for a new trial; and it is so ordered.

We concur: McKINSTRY, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

McFARLAND, J. I dissent. Instruction No. 20—the only one about which there can be any serious question—tells the jury that if, from the evidence, they believe certain facts and circumstances, (enumerating them,) under which the prosecution claimed the homicide to have been committed, and that appellant, "without further cause or provocation," then killed the deceased, he was guilty of murder in the first degree. This kind of instruction is not commendable, and is, at best, hazardous. The particular objection in the present instance is that the elements of deliberation and premeditation were not expressly stated in the instruction. But the court, in other parts of its charge, had fully and in various forms of language instructed the jury about the difference between murder in the first degree and murder in the second degree; and that to constitute the former the killing must be willful, deliberate, and premeditated. For instance, the court, among other instructions, gave the following: "It therefore becomes necessary for me to define what is necessary to constitute murder in the first degree, with reference to the willful, deliberate, and premeditated killing. * * * The killing must have been willful, which implies simply a purpose or willingness to do the killing. *Fourth*, it must have been the result of deliberation; that is, it must have been done after the slayer had considered and weighed the matter in his mind. And, *fifth*, it must have been premeditated; that is, preconcerted and *planned*, and *meditated beforehand*. And each one of these elements must be proved by the prosecution beyond a reasonable doubt. The law does not imply deliberation and premeditation. That must be proved by the prosecution affirmatively, and beyond a reasonable doubt. And if you find that any of these elements is wanting in this case, or if you have a reasonable doubt as to the existence of any of these elements from the evidence, I charge you that you cannot find a verdict of murder in the first degree." This language states the law most liberally in favor of appellant.

The facts grouped and enumerated in said instruction 20 were all facts about which there was evidence, and which the jury might well find to be true. There was evidence that appellant had previously threatened to kill the deceased, for the very reasons which the prosecution claimed he did kill him. Keeping in view, therefore, the evidence and the previous instructions, and assuming that the jury found all the facts enumerated in said instruction 20 to be true, and that, "without further cause or provocation," appellant killed

the deceased, I do not see how the jury could have been misled, or could have come to any other conclusion than that the appellant was guilty of murder in the first degree. The proposition presented to the jury, under these circumstances, necessarily includes the elements of deliberation and premeditation, although those or equivalent words were not *expressly* used in the particular instruction complained of. In *People* v. *Moice*, 15 Cal. 331, an instruction similar in principle was affirmed.

I think that the judgment and order should be affirmed.

I concur: SEARLS, C. J.

73 Cal. 522

CHUNG KEE and another *v.* DAVIDSON and others. (No. 11,605.)

(*Supreme Court of California.* September 30, 1887.)

CONTRACTS—BENEFICIAL INTEREST OF THIRD PARTY.

Defendants and A. and W. entered into an agreement concerning certain mines, under which the latter were to retain possession and management of the mines, and to turn over to defendants the entire result of each "clean up" of the mines, which was to be applied by defendants to the "defraying of the expenses of running and working said mines," and to the payment of indebtedness of A. and W. to defendants. In working the mines under this agreement, A. and W. became indebted to the assignors of plaintiffs for labor in such working. *Held*, that the agreement between A. and W. and defendants was not of such a character as to sustain an action by plaintiffs against defendants, under Civil Code Cal. § 1559, providing that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."[1]

Department 1. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Jos. H. Budd, for appellants. *J. A. Louttit*, for respondents.

BY THE COURT. The defendants W. Cook and A. Cook executed a deed which upon its face purported to be an absolute conveyance of certain property therein described, consisting, in part, of some mines, which deed was in fact a mortgage to secure certain indebtedness from the Cooks to the defendants L. Davidson and S. C. Peek. Afterwards, the latter persons executed and delivered to the former an agreement in writing, which stipulated that, if by a certain time the indebtedness secured by the mortgage deed should be paid, L. Davidson and S. C. Peek would reconvey the property set out therein to the Cooks. The agreement contained, among other things, a provision that the Cooks should retain the possession and management of the mines mentioned in the mortgage deed, and that they were to turn over to L. Davidson and S. C. Peek the entire result of each "clean-up" of the "flumes and under-currents of the mines," the result of which "clean-ups"—that is, the precious metals extracted therefrom—was to be applied by those to whom "turned over" "to the defraying of the expenses of running and working said mines," and "the payment of all promissory notes, obligations, and accounts of indebtedness, of whatsoever nature, due said parties of the first part;" that is, L. Davidson and S. C. Peek, "and the firm of Davidson & Peek." L. Davidson was not a member of the firm of Davidson & Peek; that firm, it appears, was composed of M. Davidson and S. C. Peek. While the Cooks under that agreement were working the mines, they became indebted to certain Chinamen for labor done and laborers furnished in such working, and they gave to the Chinamen a written statement of such indebtedness. These claims the Chinamen to whom they were given, and in whose favor they originally stood, transferred properly to the present plaintiffs, who brought this action for the amount due on the assigned claims for work and labor done and fur-

[1] Concerning the enforcement of contracts by third parties, see Woodland v. Newhall's Adm'r, 31 Fed. Rep. 434; Wright v. Terry, (Fla.) 2 South. Rep. 6, and note.

nished in working and running the mines, alleging that, under the terms of the agreement or written contract formerly mentioned, they were entitled to receive those amounts from L. Davidson and S. C. Peek, and the Cooks, out of certain "gold-dust," the result of the "clean-up" of July, 1884, which was delivered to L. Davidson, in accordance with the terms of the stipulation, and which amounted in value to the sum of $5,564.40. From that sum it seems that Davidson paid the firm of Davidson & Peek for goods, wares, merchandise, etc., furnished to the Cooks, and to others upon their order, the sum of $2,794.28, and took therefrom for himself the sum of $1,152.97 on account of advances of money and goods made by him to the Cooks, and that he also supplied towards the payment of a note for $2,000, given by the Cooks for money advanced to them by him the previous year, the sum of $1,700. He also paid about a month afterwards, out of his own money, to a man named Guy, the sum of $425, the amount of a lien for work done by Guy for the Cooks, in the mines aforesaid, in the year 1883. The Cooks did not defend the action, and judgment by default was rendered against them for about $2,100. The action, as to the defendants L. Davidson and S. C. Peek, was tried before a jury, who brought in a verdict for the plaintiffs for $1,900, without interest, upon which a judgment was duly rendered, from which, and an order refusing to grant them a new trial, L. Davidson and S. C. Peek have appealed.

The court instructed the jury: "*Third.* When a person receives money or property which it is his duty to pay to third persons, as to those third persons he becomes an original debtor and promisor." "*Fifth.* It is not necessary for the plaintiffs to prove a direct promise from the defendants Davidson and Peek, or either of them, to entitle them to recover, provided the jury believe from the evidence that the gold-dust * * * was delivered to said Davidson in pursuance of said contract, and that the same was sufficient in amount to pay the claim and demand of the plaintiffs, or such proportion thereof as should remain after paying other running and working expenses." "*Ninth.* The moment the gold-dust was delivered, the plaintiffs' claim, or, at least, the claim of plaintiffs' assignors, became vested, and neither of said defendants, Davidson or Peek, or the Cooks, or either of them, or all, had any right or power to change or divest that right."

The deed and written agreement, when read together, show a mortgage, and the conditions upon which a redemption of the mortgaged property may be had. Respondents contend that the agreement is a contract, made for the benefit of plaintiffs' assignors, and as such can be enforced, although said assignors are not named as parties therein. Section 1559 of the Civil Code, upon which this contention is based, reads as follows: "A contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." The general rule applicable to cases of this kind is that, "when two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other." *Railroad Co.* v. *Curtiss*, 80 N. Y. 222. We cannot say that the contract before us was made expressly for the benefit of the plaintiffs' assignors. On the contrary, we think it was made expressly for the benefit of the parties named therein. The most that can be said is that it is a contract *incidentally* for the benefit of those who worked in the mine. The clean-up was to be paid by the Cooks to the defendants. The Cooks were largely indebted to these defendants when this agreement was made, and advances evidently were to be made by the defendants to the Cooks during the working of the mine for the running expenses thereof, and this, no doubt, was the consideration which caused the parties to place the covenant referred to in the contract. Such advancements were, in fact, made to the extent of sev-

eral hundred dollars. It is not necessary that the parties for whose benefit the contract has been made, should be named in the contract. It must appear, however, by the direct terms of the contract that it was made for the benefit of such parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit.

Judgment and order reversed, and cause remanded for a new trial.

73 Cal. 511

PEOPLE *v.* FLYNN. (No. 20,295.)

(*Supreme Court of California.* September 28, 1887.)

1. BURGLARY—POSSESSION OF STOLEN PROPERTY.
 The finding of recently stolen property in the possession of a defendant is not sufficient to support a conviction for burglary without other corroborating circumstances.[1]

2. CRIMINAL PRACTICE—INSTRUCTIONS—CREDIBILITY OF WITNESS.
 An instruction that the jury might reject, wholly or in part, the testimony of a witness who had "willfully testified falsely in regard to any one person or any one particular fact in the case," was objected to on the ground that it should only have told the jury to distrust or reject the testimony of a witness who had willfully sworn falsely "as to a material point in the case." *Held* that, under the rule "that a witness false in one part of his testimony is to be distrusted in others," (Code Civil Proc. Cal. § 2061, sub. 3,) the instruction was not erroneous.

3. SAME—INSTRUCTIONS—CHARGING AS TO FACT.
 The mere statement in an instruction that there is a conflict in the evidence in certain respects cannot be regarded as an expression of an opinion upon the weight of evidence, or a charge with respect to matters of fact, in violation of Const. Cal. art. 6, § 19, providing that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

4. SAME—INSTRUCTIONS—REASONABLE DOUBT.
 An instruction that the jury must be "satisfied" of defendant's guilt is not erroneous, because it omits the words "beyond a reasonable doubt," when the whole of the instructions, taken together, clearly inform the jury that they cannot convict the defendant unless they are satisfied of his guilt beyond a reasonable doubt.

5. SAME—SUFFICIENCY OF EVIDENCE.
 In a prosecution for burglary, although the fact that defendant was seen near the place where and about the time when the burglary was committed, is a material circumstance, a conviction based upon circumstantial evidence may be supported without it.

6. SAME—INSTRUCTIONS—REQUEST BY ACCUSED.
 Omissions by the court to instruct the jury "that no presumption of guilt follows from [defendant's] failure to testify in his own behalf," and to define the phrase "reasonable doubt," as used in some of the instructions, are not erroneous, where defendant's counsel did not request such instructions at the proper time.

7. SAME—SENTENCE—PRIOR CONVICTIONS.
 A defendant on trial for burglary pleaded guilty to the charge of "prior convictions" and the court did not instruct the jury as to such prior convictions, nor did it appear from the record that any reference was made to them during the trial. The jury found the defendant guilty of burglary in the first degree, but did not find in reference to the prior convictions, which before judgment were withdrawn on motion of the district attorney, and the court only sentenced the prisoner to imprisonment for 10 instead of 15 years. *Held* that it must be presumed that the clerk had obeyed the law (Pen. Code Cal. § 1093) and omitted to read the prior convictions to the jury, and that the court in view of their withdrawal had disregarded them in considering the sentence.

Commissioners' decision. In bank.

Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Indictment for burglary.

Geo. A. Knight, for appellant. *Geo. A. Johnson*, Atty. Gen., for the State.

[1] As to the weight to be assigned to the fact of the possession of stolen goods recently after the theft, see State v. Kirkpatrick, (Iowa,) 34 N. W. Rep. 301, and note.

BELCHER, C. C. The defendant was charged with the crime of burglary, committed on the third day of May, 1886, by breaking and entering the saloon of one Clement Dixon, in the city of San Francisco, with intent to commit larceny. He was tried and convicted of burglary of the first degree, and sentenced to suffer imprisonment for 10 years. He moved for a new trial, and has appealed from the order denying his motion, and from the judgment. The appellant makes 10 points for the reversal of the judgment, the first five of them relating to the evidence, which, it is claimed, did not justify the verdict.

It was clearly proved that a burglary was committed at the time and place named in the information, and it was not necessary, in order to establish the defendant's guilt, that any of the witnesses should have actually seen him break and enter the premises, or should have seen him in the vicinity of the premises about the time the burglary was committed. It rarely happens that an offense, like that here complained of, can be proved by witnesses who saw and recognized the defendant in the act, and resort must, therefore, ordinarily be had to circumstantial evidence. And the fact that one was seen near the place where a burglary was committed, and about the time of its commission, may or may not be a circumstance tending to show guilt; but it cannot be necessary in every case of burglary to prove that the defendant was so seen before a conviction can be had. Here there was some evidence tending to connect the defendant with the commission of the offense charged. A considerable sum of money was stolen, and one of the pieces of money taken was found in the possession of, and was claimed by, the defendant when he was arrested on the next day. The court properly instructed the jury as to the possession of recently stolen property, and as to the necessity of other corroborating circumstances being shown before one having such possession could be found guilty. It is unnecessary to detail the evidence at length. The question was, did the defendant commit the crime charged against him? That was a question of fact for the jury, and, as the jury found that he did commit it, we cannot say that the judgment should be set aside because the finding was not warranted.

It is next contended that sundry errors were committed by the court, to the manifest prejudice of the defendant. The defendant did not take the stand as a witness in his own behalf, and the court did not instruct the jury in reference to his failure to do so. It is claimed that "it was the duty of the court to charge the jury that no presumption of guilt followed from his failure to testify in his own behalf, and that they could not consider his failure to testify in arriving at a verdict." It does not appear from the bill of exceptions that any such instruction was asked. If counsel for defendant desired such an instruction to be given, they should have asked it at the proper time; and, as they failed to do that, they cannot now be heard to complain. *People* v. *Haun*, 44 Cal. 100; *People* v. *Ah Wee*, 48 Cal. 239; *People* v. *Marks*, 13 Pac. Rep. 149.

In a portion of its charge to the jury the court used the following language: "And if you are satisfied that the defendant is guilty of the offense charged, and that he committed it in the night-time, that is, between sunset of one day and sunrise of the next, you should find him guilty of burglary in the first degree." It is claimed that this instruction was erroneous because it omitted the words "beyond a reasonable doubt," and left the jury to be simply "satisfied" of the defendant's guilt, no matter whether they entertained a reasonable doubt of his guilt or not. Looking at the whole charge, it will be found that the words "beyond a reasonable doubt" are repeated some 15 times. For example, the court told the jury: "It devolves upon the prosecution to establish the guilt of the defendant to your satisfaction, beyond a reasonable doubt, before you are authorized to find a verdict against him." "All persons charged with a criminal offense are presumed to be innocent until the jury

are satisfied beyond a reasonable doubt of their guilt." "If you have a reasonable doubt as to the guilt or innocence of the defendant, you should give him the benefit of the doubt, and acquit him." "You must be satisfied in the case, beyond a reasonable doubt, from all the facts and circumstances of this defendant's guilt, before you will be authorized to bring in a verdict against him." "If you entertain a reasonable doubt of his guilt, however, you should give him the benefit of the doubt, and acquit him."

And the very next sentence after that complained of is as follows: "If you are satisfied beyond a reasonable doubt that he is guilty of burglary, but are not satisfied beyond a reasonable doubt that it was committed in the nighttime, you should give him the benefit of that doubt, and find him guilty of burglary in the second degree."

Taking, then, the whole charge, and reading, as we must, the different parts of it together, it appears that the jury were clearly told that they could not find the defendant guilty of burglary of the first degree, or at all, unless they were satisfied of his guilt beyond a reasonable doubt. We are unable, therefore, to see how the defendant could have been prejudiced by the part of the charge objected to.

The court also, in its charge, used these words: "If you are satisfied that any witness has willfully testified falsely in regard to any one person, or any one particular fact in the case, then you are authorized to distrust his or her testimony in all particulars; that is, you may reject it entirely if you choose to do so, or you may reject it in part and receive it in part, as you find it contradicted or sustained by other testimony, as you are satisfied of its truth or falsity." It is claimed that the instruction was erroneous, that it should only have told the jury that they were authorized to distrust or reject the testimony of a witness who had willfully sworn falsely "as to a material point" in the case. We think the instruction was properly given. The rule, as stated in the Code of Civil Procedure, is "that a witness false in one part of his testimony is to be distrusted in others." Section 2061, sub. 3. If a witness has wilfully testified falsely as to "any one person or any one particular fact in the case," his testimony, we think, comes clearly within the rule; and we see nothing in *People* v. *Sprague*, 53 Cal. 491, in conflict with this view. See *People* v. *Treadwell*, 69 Cal. 238, 10 Pac. Rep. 502.

The court further stated to the jury that "there is some conflict in the testimony in regard to where this money was obtained, when it was obtained, and where he was a part and portion of the night." This is complained of as being a charge with respect to matters of fact, in violation of section 19 of article 6, of the constitution. We do not think the objection well taken. Judges may state the testimony and declare the law, but must not express an opinion upon the weight of the evidence. We are unable to see how the mere statement that there is a conflict in the evidence in certain respects can be regarded as the expression of an opinion upon the weight of the evidence, or a charge with respect to matters of fact. In *People* v. *Casey*, 65 Cal. 261, 3 Pac. Rep. 874, cited by appellant, the court instructed the jury that "the testimony in the case shows that the defendants," etc. This was held to be erroneous, and the court said: "To state the testimony is one thing. To declare what it shows is another and very different thing. It is for the jury exclusively to determine what the testimony shows." That case is not in point here.

The court in its charge nowhere defined or stated what is meant by the words "reasonable doubt," and this failure is assigned as error. No specific instruction upon the subject was asked by the defendant. Possibly he and his counsel then thought that the phrase was so familiar that no definition was required. However this may have been, the fact, as we have seen, that they failed to ask for the instruction is a full answer to the point which they now make.

The last point to be considered relates to certain charges of prior convictions found in the information. Defendant was charged with burglary, and with prior convictions of robbery and burglary. When called upon to plead, he "acknowledged the prior convictions, and pleaded not guilty to the charge in the information." After the jury was impaneled, "the information charging the defendant with the crime of burglary was read, and his plea of not guilty duly stated." The court did not instruct the jury in relation to the charge of prior convictions, and, so far as appears, no reference was made to that charge by any one during the whole progress of the trial. The jury found the defendant guilty of burglary in the first degree, but did not find in reference to the prior convictions. Before judgment was pronounced the prior convictions were withdrawn, on motion of the district attorney. It is claimed that, as the information contained charges of prior convictions, these charges must have been read to the jury, and that they impeached the character of defendant, and without doubt prejudiced the jury against him, to his injury. We see nothing to indicate that the charges of prior convictions were read to the jury. Section 1,093 of the Penal Code provides: "If the indictment or information be for felony, the clerk must read it and state the plea of the defendant to the jury; and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous convictions." As the defendant, when arraigned, confessed the previous convictions, we must presume that the clerk obeyed the law and omitted the reading of all that related to those charges. The court might have sentenced the defendant to imprisonment for 15 years. The extreme penalty was not pronounced, but the sentence was for 10 years only. As the previous convictions were withdrawn, it must be presumed that the court paid no attention to them in pronouncing judgment, and that the sentence would have been the same if the previous convictions had not been charged in the information.

We conclude from an examination of the whole record that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 477

DOWER v. RICHARDS. (No. 12,076.)

(*Supreme Court of California.* September 28, 1887.)

1. MINES AND MINING—TUNNELING LAND—RIGHTS OF THIRD PARTIES.
 Defendant owned land in fee-simple to which he had acquired title under a grant by town-site patent issued by the United States in 1869. Plaintiff ran a tunnel under this lot, claiming a right to do so, in order to reach and work a gold-bearing quartz ledge situated within said lot, and known to exist at the date of the town-site patent under which said lot was held. Defendant, in order to restore the water to a well which had become drained by reason of the tunnel, sunk a shaft, and caved in the same, and plaintiff brought an action to recover for the alleged trespass. *Held*, the grant by town-site patent being prior to the passage of the act of 1872, (Rev. St. U. S. § 2320,) which gives to a quartz-mining claim a width not exceeding 300 feet on each side of the center of the croppings of the ledge, vested in the grantee, and those claiming under it, an absolute title to all the land it describes in fee-simple, excepting, under Rev. St. U. S. §§ 2386, 2392, only such portion as may contain a mine of gold, silver, cinnabar, or copper, or mining claim, or possession, which may be held under local authority or existing laws. And plaintiff in the absence of any contract with defendant, had no right to dig the tunnel.

2. TRIAL—INSTRUCTIONS—EVIDENCE TO SUPPORT.
 It is not erroneous to neglect to submit to the jury, as a material issue, the question whether the defendant's grantor had given the plaintiff, before the sale of the

lot to defendant, the right to run a tunnel under such lot, when such allegation in the pleadings and the evidence in the case fail to show any consideration to support such agreement.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; F. D. SOWARD, Judge.

H. L. Gear, for appellant. *Gaylord & Searls* and *Cross & Simonds*, for respondent.

FOOTE, C. Richards was the owner of a lot of ground which he claimed and held by a deed of conveyance from a Mrs. Bigelow, who had acquired it with other land under the town-site patent of the city of Nevada, issued in the year 1869, by virtue of the provisions of title 32, Rev. St. U. S. The plaintiff had run a tunnel under this lot, claiming that he had a right to do so, because, as he alleged, in such way only could he reach and work a "gold mine" situated within said lot, and known to exist at the date of the town-site patent under which said lot was held and claimed. As a consequence, a well belonging to the defendant, located on that lot, several hundred feet from the tunnel, had become drained of its water, and to restore the water to the well the defendant caved in the plaintiff's tunnel at a point where the latter claimed it had reached a spur of the quartz ledge or "gold mine." Because of the alleged trespass of the defendant in digging in his own lot in such a way as to cave in the tunnel of the plaintiff, and to recover the damages resulting therefrom, the latter instituted this action. The cause was tried by a jury, who returned a verdict for the defendant, and from the judgment rendered thereupon this appeal is prosecuted. A bill of exceptions presents the grounds relied on to reverse that judgment.

The main points made in support of the plaintiff's contention are: (1) That the court erred in its instruction to the jury numbered "one;" (2) that it refused to grant 12 instructions requested by the plaintiff.

The instruction first mentioned is as follows: "The jury is instructed that if they believe from the evidence that the place where Philip Richards caved in the tunnel was upon ground to which he had previously derived title under the town-site patent of the city of Nevada, and that such place was not upon any mining or tunnel possession held at the date of, or prior to the date of, such town-site patent, then the jury should find for the defendant, unless you find the acts of the defendant in filling up the tunnel were done through malice and oppression."

It is very plain that the United States, in granting the patent under which the defendant held and possessed his lot, reserved to itself the title to any "gold mine" which might be known to exist in any part of that lot, (section 2392, Rev. St. U. S. 1878, 2d Ed. p. 438;) and the plaintiff urges that, as a consequence, the government, or any one authorized by it to explore such gold mine, may tunnel under a lot granted by a town-site patent dated in the year 1869, and drain the water from a well situated on that lot, if it be necessary to the reasonable and proper construction of that tunnel, even if, while so doing, there be no gold mine existing in that part of such lot under or in which the tunnel runs. This is to say, she claims the right, for her own private purposes, to make use of and run a tunnel in the land of another, and drain his well of water, because in some part of said lot there is a gold mine which was known to exist prior to or at the time the patent was issued under which the defendant claims, and which can only be reached by such tunnel running through another part of that lot in which there is no mine. Is not this an effort on the part of the plaintiff to appropriate the private property of the defendant to the private use of plaintiff? Is it not an enterprise to be conducted solely for her personal profit.

At the time when the patent to the town-site was granted,—that is, in the year 1869,—congress had not passed the act of 1872, (Rev. St. § 2320,) giving

a width to quartz-mining claims of not exceeding 300 feet on each side of the center of the croppings of the ledge; so that there was then existing no law of the United States which prescribed the method by which a "gold mine" could be prospected and worked, and as the law then stood it reserved the title to such mine in the government, but went no further. The grant, then, by the town-site patent, carried an absolute fee-simple title to the grantee, and those claiming under it, of all land in which "no gold, silver, copper, or cinnabar mine" existed, or in which no valid mining claim or possession was had or held under local authority or rules or existing laws. Sections 2386, 2392, Rev. St. U. S.

It would therefore appear that the defendant had an absolute fee-simple title to all that part of his lot which had been tunneled prior to the draining of his well, and that the plaintiff had no right, in the absence of any contract with the defendant, to dig that tunnel, and that the defendant did no wrong, and committed no trespass, in caving it in. For it cannot be (in the absence of any law of the United States reserving rights to work gold mines in a specific way) that a mere reservation of the title to such a mine in a patent in any way limits the title which it passes to that portion of the land in which no mine exists; and the grantee takes under the town-site patent all the land it describes by an absolute title in fee-simple, excepting only such portion as may contain a mine of gold, silver, cinnabar, or copper, or mining claim or possession which may be held under local authority or existing laws. For example, an individual owns a town-site lot which is 300 feet square. There is in a corner of that lot a gold mine embedded in the ground in the shape of a quartz ledge. The gold mine only occupies a space say 10 feet square. In the absence of any legislation by congress before or at the time when this patent, including that lot, is issued, stating how that mine shall be worked, or of any valid state law to the same effect, authorized by congress, the owner of the lot under the patent holds all the ground, save that part in which the mine is located, by a fee-simple title; and, without some law in accordance with the constitution of the state and of the United States, no man can tunnel under the part of the lot held by this title in fee-simple, except by contract with the owner. This use attempted to be obtained by the plaintiff in tunneling the defendant's land was not a public use, and no valid state law authorizes it. *Consolidated Co.* v. *Railroad Co.*, 51 Cal. 269. As we have seen, no law of the United States gave it, as the patent issued in 1869, when no legislation had been had as to the manner of working gold mines. The right to 300 feet of ground on each side of a quartz ledge was not granted until the passage of the act of 1872, (Rev. St. § 2320.)

We are of opinion that instruction 1 was correctly given, in so far as it did not inform the jury, as the appellant claims it should have done, that the plaintiff had a right to run her tunnel under the defendant's land in a reasonable and proper manner, in order to reach and work the gold mine which lay in another part of said lot. But the appellant makes a further point on that instruction: she claims that it did not submit to the consideration of the jury a material issue, which was whether or not the defendant's vendor, Mrs. Bigelow, had given to the plaintiff (before her sale of the lot to defendant) the right to run the tunnel as she did. It nowhere appears, either as alleged in any pleading or in evidence, that any consideration whatever moved from the plaintiff to Mrs. Bigelow or the defendant which would support any such agreement; hence the allegation as made in the pleading, and its denial, did not raise any material issue upon which the jury should have been called to pass, and an instruction on the point was unnecessary.

The whole 12 instructions asked for by the plaintiff, and refused by the court, are expressed in such a way as that, taken altogether, the jury must necessarily have been impressed with the idea that the court intended to say to them that, if they believed there was "a gold mine" in any part of the de-

fendant's lot, the title thereto being reserved to the government, and not vested in the defendant, the plaintiff had a right to run her tunnel as she did. The defendant had no right to cave it in, and was therefore liable in damages. The instructions would have misled the jury, and were properly refused.

As we have before said, the defendant owned in fee-simple the whole of the lot to which he had a conveyance, except the part in which the alleged "gold mine" lay. There was no valid law of the state or United States existent which at the time of the issuance of the town-site patent prescribed any method of working a "gold mine" so situated. Therefore, the title to the gold mine and its *locus* remained in the United States government; but, that government not having legislated so as to impose any method of working said mine as a condition or restriction upon the fee-simple holding of the part of the lot where there was no gold mine, the owner of the lot held it absolutely, subject only to the right which might be given by a constitutional state law to condemn it for a public use.

We perceive no prejudicial error in the record, and the judgment should be affirmed.

I concur: BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 537

JANUARY *v.* SUPERIOR COURT. (No. 20,165.)

(*Supreme Court of California.* September 30, 1887.)

1. EXCEPTIONS, BILL OF—TIME OF SETTLING—NEW BILL.
 Defendant's attorneys, without notice to the opposite side, took a bill of exceptions already filed by them with the clerk, which the court had declared defective, separated the first 10 and last 15 pages therefrom, and between these two portions introduced a statement of the evidence in narrative form, and presented it for settlement. *Held*, that the bill, as thus presented, was a new bill, and, as defendant's time within which he could regularly file his bill had expired, it was not an abuse of discretion for the court to refuse to settle it.
2. SAME—DEFECTIVE BILL.
 A bill of exceptions, consisting simply of a transcript of the reporter's notes of the evidence and proceedings, is defective, and the court is justified in disallowing it.
3. PRACTICE IN CIVIL CASES—SERVICE OF PAPERS.
 Code Civil Proc. Cal. § 1011, providing for the service of papers upon attorneys, requires them to be left "in a conspicuous place in the office," in the absence of the attorney. *Held*, that a box designated by an attorney for the deposit of letters and papers in his absence is "a conspicuous place," within the meaning of the section.

In bank. Application for *mandamus* to superior court, Sacramento county; W. C. VAN FLEET, Judge.

A. Green Curtis, *John H. McKune*, and *Henry Edgerton*, for plaintiff. *Atty. Gen. Geo. A. Johnson*, for the People.

PATERSON, J. The first bill of exceptions was prepared in time and properly left with the clerk for the judge. The service of the notice, which was made by depositing a copy thereof through the door into the postal box which had been placed there for the reception of documents, was sufficient. It cannot be said that a box so clearly designated by an attorney as the proper place for the deposit of letters and papers during his absence from the office, is not a "conspicuous place" within the meaning of section 1011, Code Civil Proc.

The bill as originally presented was a transcript of the reporter's notes of the evidence and proceedings, and the court was justified in refusing to settle it. It is claimed, however, that he should have ordered a statement in narrative form. This he did not do, nor did he give any one authority to change

or amend the statement which had been presented. Counsel for defendant asked permission of the judge to revise the bill by reducing the evidence to a narrative form, but were informed by the respondent that he would take no action without notice to, or in the presence of, the district attorney. Thereupon defendant's attorneys, without notice to the district attorney or to respondent, took the bill, separated the first 10 and last 15 pages therefrom, and between these two portions introduced a statement of evidence in narrative form. This new bill as prepared was delivered to the clerk on the twelfth day of November, 1885, and notice given to the district attorney that it would be presented to the judge for settlement on the sixteenth day of November, 1885. On the last-named date, the district attorney appeared and objected to the settlement or allowance of the bill, on the grounds that the document presented for settlement was not the bill of exceptions left with the clerk on the eighteenth of August, 1885; that since the filing of the original bill of exceptions with the clerk, the same had been mutilated, portions torn out, and new matter put in; that the time for filing the bill of exceptions had long since expired, and no order extending the time had been made; that the original bill filed was improper in form and substance. The judge heard the evidence as to the facts alleged in these objections, found the same to be true, sustained the objections, and refused to settle the bill, saying: "Now, with reference to the bill as proposed and introduced on the twelfth day of November, this bill must doubtless be held to all intents and purposes to be a new bill. * * * The body of the bill was entirely changed, new matter inserted, and the bill in its revamped form again presented for settlement upon formal notice to the district attorney. It will have to be considered, therefore, from the standpoint of a newly proposed bill, presented at a date subsequent to the expiration of the time allowed for that purpose; defendant's time, as allowed by the court, within which he could regularly present his bill, having unquestionably expired August 20th. Defendant contends that the mere fact that his bill was presented after a lapse of the time allowed, is not of itself sufficient to deprive him of the right to have it settled; that the statute is directory merely; that it is a matter of discretion with the judge whether he will settle it or not, and that he should settle the bill notwithstanding the delay. * * * The discretion, however, which is to be exercised by the court or judge, is intended to be a sound judicial discretion, founded upon a just and legal ground of excuse as contradistinguished from mere arbitrary assertion of personal will power on the part of the individual. The evidence shows that the defendant in this case was afforded, in addition to the time allowed by the statute, a very generous period within which to prepare and serve his bill of exceptions; the time being repeatedly extended by the judge upon the application of his counsel. * * * At the eleventh hour he presents for the consideration of the court a proposed bill in a form which he must have been aware, in fact was bound to know, could not be entertained or allowed." The judge then went on to speak of the manner in which the new bill had been prepared, without excuse for the delay, and concluded that it would be an abuse of judicial discretion, in view of the decisions of the supreme court in *People* v. *Sprague*, 53 Cal. 422, and *People* v. *Getty*, 49 Cal. 581, to allow or settle the bill. The second bill having been prepared by mutilating the original bill without the consent of the court or the district attorney, we think the judge was right in treating it as he did, as essentially a new bill, filed without authority of law or permission of the court; and we cannot say that there was an abuse of discretion in refusing to settle the same.

Application denied; alternative writ dismissed.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.

We dissent: TEMPLE, J.; SHARPSTEIN, J.

73 Cal. 486

Ex parte HENSHAW, on *Habeas Corpus*. (No. 20,310.)

(*Supreme Court of California.* September 28, 1887.)

1. OFFICE AND OFFICER—POWER OF SUPERIOR COURT TO TRY USURPATION OF OFFICE.
Under Code Civil Proc. Cal. *c.* 5, the superior court has jurisdiction of the subject-matter of an action brought against the defendant for the usurpation of a public office, and incidentally has the power to determine the question of the existence or non-existence of such office.

2. SAME—JUDGMENT OF USURPATION—COLLATERAL ATTACK—NON-EXISTENCE OF OFFICE.
The judgment of the superior court, finding that the defendant has usurped and is unlawfully holding a public office, cannot be attacked collaterally; and such judgment cannot be annulled by the subsequent decree of that or of any other court adjudging the non-existence of the office.

3. CONTEMPT—FORM AND SUFFICIENCY OF JUDGMENT.
The petitioner for a writ of *habeas corpus* had been arrested and imprisoned for contempt of court in disobeying the orders of a judgment. It was ordered and decreed that, as a punishment for said contempt, he "be, and he is hereby, fined in the sum of $500; and that he pay said fine to the clerk of this court; and it is further ordered and adjudged that, in default of the payment of said fine, he be imprisoned in the county jail of the county of Alameda until the said fine is paid; such imprisonment not to exceed one day for each and every dollar of said fine that shall so remain unpaid." *Held*, that the judgment was a substantial compliance with Pen. Code Cal. § 1205, and was valid.

4. SAME.
When a contempt is not committed in the immediate view and presence of the court, it is not necessary that the judgment should set forth the facts constituting the contempt. Code Civil Proc. Cal. § 1211. MCFARLAND, TEMPLE, and THORNTON, JJ., dissenting.

5. SAME—COSTS.
A judgment for contempt in disobeying the orders of court, besides imposing upon the defendant the penalty of fine or imprisonment, decreed that the relator should have his costs in the proceeding, without specifying the amount of such costs. *Held*, that the whole judgment was not void, there being no judgment for imprisonment for non-payment of such costs.

In bank. Application for *habeas corpus*.

Moore & Reed, *James A. Johnson*, and *Charles Tuttle*, for petitioner. *Fox & Kellogg*, for respondent.

MCKINSTRY, J. The attorney general, upon the relation of one Daniels, commenced an action against the petitioner herein, in which action judgment was entered, by the superior court for Alameda, that the petitioner had usurped, and intruded into, and was unlawfully exercising, the office of police judge of the city of Oakland, and that the relator therein was entitled to the office. From that judgment the defendant therein appealed, but the appeal did not stay its execution. Code Civil Proc. § 949. Upon proceedings taken in the said superior court, the defendant in that action, petitioner here, was adjudged guilty of contempt in that he had disobeyed the judgment, and continued to occupy and exercise the office in disregard thereof.

1. It is contended by the petitioner that the judgment in the action for usurpation was absolutely void, and he was therefore not guilty of contempt in disregarding it; that when the action was commenced, and judgment therein entered, there was no such office as that of police judge of the city of Oakland, because the act of March, 1866, "to establish a police court," etc., "in the city of Oakland," was repealed by the act of 1885, to "provide for police courts," etc. St. 1865-66, p. 193; St. 1885, p. 213. The decisions cited by counsel for petitioner do not meet the question here presented: *First.* Persons imprisoned for contempt in having refused obedience to judgments in civil actions commanding them to do or refrain from a certain act, have been discharged on *habeas corpus* when a court of limited statutory jurisdiction has tried an action it had no power to try, and entered a judgment it had no

power to enter, and has then attempted to enforce compliance with its judgment by imprisoning a party refusing to obey it. *Second.* Where there are no public offenses except those made such by statute, persons held under judgments directing their imprisonment have been discharged on *habeas corpus*, when it appeared that the act charged against the prisoner, and which he had been adjudged to have done or committed, was not a crime, and could not be a crime, however fully it might be stated or described. *Third.* Where, although the act charged, and of which the prisoner had been found guilty, constituted a crime, yet the court had no power to impose the imprisonment as a consequence of his conviction.

In the last two of the classes mentioned, as in the first, the discharge is founded upon the proposition that the court had no jurisdiction to render the judgment. Why no jurisdiction? Because a court of criminal jurisdiction is limited to the trial of crimes or public offenses, and to the rendition, in each instance, of the judgment prescribed by law. In the second class, the jurisdiction is in part derived from, and is limited by, the statutes declaring certain acts to be public offenses. In the third class, the power to pronounce judgment is derived solely from the statutes attaching certain penalties to certain offenses.

The jurisdiction of the superior court to try the question of usurpation of an office, and, incidentally, the question of the existence of the office, is not derived from the act of 1866, (claimed to have been repealed by the act of 1885,) or from any act relating to a particular office, but from its constitutional grant of general jurisdiction in civil cases, the exercise of which, so far as respects actions of this character, is regulated by the chapter of the Code of Civil Procedure treating of "actions for the usurpation of an office or franchise." The act of 1866 provides for a police court, and the election of a judge thereof; the act of 1885 provides for a police court, and the designation of a justice of the peace to be judge of the police court. Under either act the judge of the police court is the police judge within the city of Oakland. The complaint alleged that the petitioner had usurped the office of police judge of the city of Oakland. The court had jurisdiction to decide that petitioner had usurped the office of police judge, if, in its opinion, the act of 1885 was in force, and the petitioner without authority was exercising the office of police judge under that act. It had jurisdiction to decide that the complaint was sufficient to justify such a judgment, and to disregard as surplusage erroneous allegations as to the statutory origin of the office. Moreover, the existence or non-existence of the office described in the complaint was an issue which the court had jurisdiction to try. Its finding upon that issue cannot be assailed collaterally, though it should be conceded the finding was erroneous; or though, in determining the issue, the court may erroneously have believed and assumed a statute was not repealed which was repealed. The trial of the issue could not have been stayed by prohibition, nor could the judgment be annulled by *certiorari*.

Suppose, in a proceeding like that, the judgment wherein is here claimed to be void, the superior judge should erroneously (in the opinion of another superior judge) hold that a statute creating an office had been repealed, when it had not been repealed, and base a judgment against the people on such erroneous ruling, would not the judgment, if unreversed, be a bar to a subsequent action on the same facts? In such case the judgment would turn on a question of law, and a court can no more set aside a statute, still in force, than it can re-enact a repealed statute. But, in deciding properly or erroneously that a statute purporting to create an office has been or has not been repealed, it neither abrogates nor does it create *the office*. It construes the law; and a mistake of law in that regard no more invalidates its judgment than does a mistake of law in any other particular. It decides the question of law because its grant of jurisdiction authorizes it to decide all questions of law

involved in the issues it has power to try. Except with respect to statutory limitations of the powers of the *court itself*, a court is authorized to treat statutes as but part of the law, and an erroneous interpretation of a statute, or an erroneous ruling as to the operative force of one of two statutes, apparently conflicting, no more affects the jurisdictional power to render a judgment than does an erroneous interpretation of the unwritten law.

Every judgment that an office has been usurped involves an adjudication that there is an office to be usurped. The court has power to adjudge the existence, unless its jurisdiction is limited by the *fact*. But here the court had power to determine the fact, since its jurisdiction is not limited by the existence or non-existence of the fact. On the contrary, it has power to try and determine its existence or non-existence. None the less so because the fact depends upon the law. "An action may be brought by the attorney general, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state," etc. Code Civil Proc. § 803. "In every such action, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require." Code Civil Proc. § 805.

Even if it should be conceded that the jurisdiction of the superior court in this class of actions is derived solely from the Code of Civil Procedure, it could not successfully be contended that, by section 803, the jurisdiction is limited by the fact that there is an office, established by law, which the alleged intruder has usurped; that any other court may determine, on *habeas corpus*, or in any collateral proceeding, that, under the law, there is no such office, and therefore that the judgment in the action for usurpation is void. It is claimed that, in the exercise of the *habeas corpus* jurisdiction, every other superior court in the state has power to decide that the office does or does not exist, but that the court to whom is confided the trial of the question of usurpation has no such power. Surely the legislature (violating no constitutional provision) could confer on the superior court the power to determine, in an action brought for usurpation of an office, whether, under the laws of the state, the office exists. The rest is merely matter of statutory construction. Has the legislature conferred on the superior court the power to determine the question? In our opinion, section 803 places the jurisdiction in the superior court. Even if the act of 1866 was repealed by the act of 1885, and if (by reason of specific averments in the complaint) the superior court had no power to decide that the petitioner had usurped the office of police judge, as created and defined by the act last mentioned, petitioner is not entitled to his discharge. Certainly the superior court did *not* decide that the petitioner was rightfully in office under the act of 1885.

The superior court adjudged that the petitioner had unlawfully usurped and was unlawfully holding the office of police judge of the city of Oakland. It is claimed by the petitioner that the findings and judgment are to be referred to the averments of the complaint, and are therefore a finding and judgment that he had intruded into the office described in the complaint, and was unlawfully exercising the functions attributed by the complaint to that office; that the references in the complaint to the statutes relating to the police judge of Oakland—his election, term of office, and duties—clearly indicate that the defendant (petitioner) was charged with usurping the powers of police judge of the city of Oakland, as prescribed in the *act of eighteen hundred and sixty-six;* and that the judgment was that he was exercising such powers. But, if all this should be conceded in favor of petitioner, the result would be the same. It might be admitted that if no such office (police judge of the city of Oakland) exists, *in law*, the portion of the judgment which declares the relator to be entitled to it is void; but that is a matter with which the peti-

tioner has no concern, except as to the matter of *costs*, of which something will be said hereafter. If the petitioner was exercising the functions of a judge, as the same are defined in the act creating the office of judge of the police court of the city of Oakland,—trying causes and rendering judgments,—and was called on by the state to show by what authority he was doing these things, he could not defend his conduct by proving no one else had power to exercise such functions. As between the people on the one hand, and the petitioner on the other, the important question was not so much whether the office existed, as whether he was unlawfully exercising public functions, such as were attached to the office when the office did exist. It may be true that an office must exist *de jure*, but it by no means follows that one who is exercising the public functions of an office, as the same were defined in a repealed statute, can deny the existence of the office, and base upon that denial a right to continue the exercise of powers unauthorized by law

In argument it is suggested that petitioner did not intrude into the office of police judge, but that he was lawfully exercising the functions of "city justice." But the court found that he had usurped the office described in the complaint. If the office of "city justice" is the same as that of police judge, the superior court adjudged petitioner had usurped that office; if the office of "city justice" is different from police judge, the court adjudged petitioner had usurped the police judgeship.

An office is of the nature of a franchise, in that it can only be derived from the sovereign. Section 803 of the Code of Civil Procedure provides for an action against one who unlawfully exercises any public office "or any franchise." A franchise is said to be a particular privilege conferred by grant from government, and invested in individuals. 3 Kent, Comm. 458. If an individual or corporation shall assume, without grant, to exercise powers which are prerogatives of the government, and such as can be exercised by a private person only when granted by the government, can it be doubted that he or it should be adjudged to be unlawfully exercising such powers under the chapter of the Code of Civil Procedure which relates to actions for the usurpation of franchises? In such case, would the intruder be permitted to say: "I have not usurped a franchise, because there can be no franchise without a grant?" The response would be: "You have usurped a power of the government. You cannot act as if you had the franchise, and say you are not exercising it." At least, the office of police judge of the city of Oakland *was*. One who unlawfully has assumed the powers of the former police judge is estopped from asserting, when he is pursued for the usurpation, that the office no longer exists. Our conclusion is that the judgment that the petitioner usurped the office described in the complaint is not void. Whether it be erroneous is a matter to be decided after the appeal therefrom shall have been heard.

2. The contempt judgment of the superior court under which the petitioner is imprisoned, after reciting the proceedings (including the affidavit of one Daniels) on which it is based, proceeds: "Now the court, being fully advised of the facts and of the law in the premises, finds as matters of fact that each and all of the facts, matters, charges, and things stated and specified in the affidavit of said Daniels hereinbefore set forth, and upon which the order to show cause herein was based, are true and correct as there stated and alleged; and as a conclusion of law therefrom the court finds that the same constitute a contempt of the authority of this court. Wherefore, it is ordered, adjudged, and decreed by this court that, by reason of the acts and conduct of the said F. W. Henshaw, specified and stated in the affidavit of the said S. F. Daniels, hereinbefore set forth, he, the said F. W. Henshaw, is guilty of contempt of the authority of this court; and it is further ordered and adjudged by this court that, as a punishment for said contempt, the said F. W. Henshaw be, and he is hereby, fined in the sum of $500, and that he pay said fine to the clerk of this court; and it is further ordered and adjudged that, in de-

fault of the payment of said fine, he be imprisoned in the county jail of the county of Alameda, until the said fine is paid; such imprisonment not to exceed one day for each and every dollar of said fine that shall so remain unpaid. It is further ordered and adjudged by this court that the said S. F. Daniels have and recover of and from the said F. W. Henshaw, defendant herein, his costs in the proceeding."

It is claimed by petitioner that this judgment, in so far as it provides for his imprisonment, is void; that the judgment, while purporting to impose the imprisonment as an alternative, yet directs that the petitioner be imprisoned until the fine be paid; or, if not to be so read, that it provides he be imprisoned for the full period of 500 days; that by the terms of the judgment the petitioner would not be entitled to his discharge although he should pay the whole or any portion of the fine prior to the expiration of the 500 days. The argument is based upon the language of section 1205 of the Penal Code, which reads as follows: "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine." Section 1446 of the Penal Code, to which reference has been made, relates only to judgments of justices' and police courts. In *Ex parte Crittenden*, 62 Cal. 534, it was held that, upon a judgment imposing a fine for a contempt, it is competent for the court to direct that the party stand committed until the fine be paid. Even, however, if it be conceded that section 1205 of the Penal Code is a limitation upon the power of courts to punish for contempts, we think the judgment conforms to that section. The judgment directs that the petitioner be imprisoned until the fine be paid; and to avoid the possible interpretation that the word "paid" is used in any sense different from "satisfied,"—the statutory term,—it provides that such imprisonment shall not exceed one day for each and every dollar of said fine that shall *so remain unpaid*. The judgment further provides that the imprisonment shall not occur at all, except in default of the payment of the fine. In legal contemplation the petitioner was present in court when the judgment was rendered. He certainly could not escape its consequences by reason of his absence, if he was absent. To say that he ought to have been given time to pay the fine, is but to say that the judgment ought to have been one not directed by section 1205 of the Penal Code. We find nothing in the statute which commands or requires the court to give a defendant any definite period of time to raise the money to pay the fine, before the expiration of which he is not to be imprisoned. The judgment specifies the extent of the imprisonment in specifying the maximum of time, and in providing that it shall not exceed one day for each dollar of the fine remaining unpaid. This view accords with the decision in *Ex parte Ellis*, 54 Cal. 204. The section of the Code does not in express terms authorize the discharge of the defendant who has suffered a portion of the term of imprisonment, in case he shall pay the balance of the fine not satisfied by imprisonment, at the rate of one day for each dollar of the fine. His right to be discharged, under such circumstances, is the result of judicial construction of the language of the section. A judgment in a criminal case which, after assessing the amount of a fine imposed, should also direct that the defendant be imprisoned until the fine be satisfied, and specify the extent of the imprisonment, by fixing a term not exceeding one day for each dollar of the fine, would be sufficient in form, and valid, because it would comply with section 1205 of the Penal Code. The judgment before us limits and specifies the imprisonment, by providing that it shall not exceed one day for each and every dollar of the fine remaining upaid. It is sufficient and valid because it declares what has been decided to be the legal effect of a judgment in literal accord with the statute.

The whole judgment is not void because it attempts to give costs to the relator, or because it does not specify the amount of such costs. It does not

provide for the imprisonment of petitioner in default of the payment of costs.

Petitioner also contends the judgment is void because it does not recite the facts which constitute the contempt of which the defendant (petitioner) is adjudged guilty. Section 1211 of the Code of Civil Procedure provides that when a contempt, not in the presence of the court, is committed, an affidavit shall be presented of the facts constituting the contempt. Upon the affidavit may be made an order to show cause. Code Civil Proc. § 1212. When the person upon whom the order is served appears, the court must proceed to investigate the "charge," (Code Civil Proc. § 1217,) and must determine whether the person proceeded against "is guilty of the contempt charged." Code Civil Proc. § 1218. Under the sections of the Code the finding of the superior court that the averments in the affidavit or charge of Daniels, on which the order to show cause was based, were true; that the commission of the acts affirmed in such affidavit constituted a contempt; and that, by reason of the commission by petitioner of the acts alleged in the affidavit, he was guilty of contempt,—was a determination that he was guilty of the contempt charged. Of course, such determination does not preclude us from inquiring if the acts charged, and found to have been done, really constitute a contempt. But the record clearly shows upon what facts, proved to its satisfaction, the court based the contempt judgment. In *People* v. *Turner*, 1 Cal. 152, relied on by petitioner's counsel, the judgment was simply that a person "be imprisoned forty-eight hours, and fined $500, for contempt of court." The supreme court held the order should be annulled on *certiorari*. This was before the enactment of any statute regulating proceedings for contempts. Moreover, the decision was clearly right, upon common-law principles, since, for aught that appeared, the judgment was a mere arbitrary abuse of power, not preceded by any investigation, and not showing an adjudication that any particular contempt had been committed.

In our opinion, the facts charged, and of which the petitioner was found guilty, constituted a contempt which the superior court had power to punish.

Let the petitioner be remanded to custody.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.

We dissent: MCFARLAND, J.; TEMPLE, J.

THORNTON, J., (*dissenting.*) The only inquiry to be made herein is whether the court had jurisdiction to imprison the petitioner for a contempt in the case before us. The petitioner is held to be in contempt for refusing to obey a judgment of the superior court of the county of Alameda, rendered and given in the case of *People ex rel. Daniels* against *The Petitioner*. Unless the judgment is void, the court had jurisdiction, and the imprisonment for contempt is valid. The inquiry, then, relates to the judgment rendered. This judgment was rendered in a case in which it was alleged that Daniels was entitled to an office,—that of police judge of the city of Oakland,—which had been usurped by Henshaw, the petitioner here. It is urged here that the office must exist to be usurped; that there can be no usurpation of an office which does not exist; and, if the office does not exist, there is no jurisdiction in the court to inquire into its usurpation, and render any judgment in favor of the plaintiff against defendant.

If the office did not exist in regard to which the suit was brought, we cannot conceive how there can be any jurisdiction in the court to enter judgment against any one usurping it. An office can only be created by the constitution, or some valid statute passed by the legislature. Then the existence or non-existence of an office is a question of law, not of fact. Its existence depends on law, either constitutional or statutory. If no law can be found show-

ing its creation, it cannot exist. To empower a court to render a valid judgment, it must have jurisdiction of the *res*, where it is a cause *in rem*, or of the subject-matter and parties, when it is a cause *inter partes*. If there is no jurisdiction of the parties, the judgment is void, though it may have jurisdiction of the subject-matter. If there is no jurisdiction of the subject-matter, the judgment is also a nullity, though the court may have had jurisdiction of the parties. If no *res* exists, there can be no jurisdiction in a cause *in rem*, and a judgment pronounced in such cause would be void. If a ship is proceeded against by libel in an admiralty court, in a case appropriate for such proceeding, there would be no jurisdiction if there was no ship. If there was no subject-matter in a cause *inter partes*, we cannot see any ground of jurisdiction. If an action of ejectment is brought in a court in this state, to recover a parcel of land situate in the state of Nevada, we cannot see that there could be any jurisdiction or any judgment pronounced for its recovery which would not be void. If the parties are myths, fictitious persons, a judgment pronounced in an action between them would be void for want of jurisdiction. The same would result if one of the parties was not a real person. If the court had jurisdiction to inquire, the judgment in that case would be void. A court can have no power to pronounce judgment for or against a non-existent person. Such was the point directly in judicature in *Sampeyreac* v. *U. S.*, 7 Pet. 233. In that case it was held that a decree in favor of a fictitious person (Sampeyreac) was a nullity. The case cited was this: Under an act of congress purporting to authorize it, a bill of review was filed in the superior court of the territory of Arkansas, to impeach a decree previously rendered in the same court in favor of the complainant in the cause of *Sampeyreac* v. *U. S.* The decree had been rendered in favor of Sampeyreac, and against the United States, for a tract of land. The decree on review was held void, for the reason that Sampeyreac was not a real person. The court said: "The original decree in this case was a mere nullity; it gave no right to any one." And this was so held for the reason that the complainant was a fictitious, and not a real, person.

If a court, to render a valid decree *inter partes*, must have jurisdiction both of the subject-matter and the parties, how can such jurisdiction exist if there is no subject-matter or no parties? Let it be admitted that a court has jurisdiction to inquire whether there is an existent subject-matter; as soon as it finds there is none such, its jurisdiction to enter a decree for its recovery against any person is at an end. It has no more power than it has when a suit is brought to recover a piece of land, and it gives judgment against the defendant for a horse or an office. That such a judgment would be void, we cannot see that there can be any doubt. If such jurisdiction exists, it can only be from a determination of the court that such subject-matter exists, and it is too well settled to be now debated that a court cannot, by holding that it has jurisdiction when it has none, invest itself with jurisdiction. The jurisdiction of a court must be shown by the record of the case on which it passes. The jurisdiction of the court is always open to inquiry in any court in which the record of the action is put in evidence. It is so open in the same court, or in any other court having jurisdiction of the case before it, and can always be called in question collaterally. A court, in rendering a judgment, always, either expressly or impliedly, affirms that it has jurisdiction. It may enter such judgment, and at any time on its own motion re-examine the cause, and vacate the judgment for lack of jurisdiction. When the record of a judgment is offered in evidence in another court, the jurisdiction is a matter of law, and if, upon an examination of the record, it appears that, upon the application of the law, the court rendering the judgment had no jurisdiction, it can declare such judgment to be void. It is in effect always void,—void *ab initio*. The judgment is a nullity. It never had life, and was always naught. It gave no right to any one, and none could be acquired under it.

In the action of *People, etc., ex rel. Daniels* v. *Henshaw* the complaint is in these words:

"(1) That on the first day of January, A. D. 1885, the city of Oakland was, thence hitherto has been, and now is, a municipal corporation, created, organized, and existing under the laws of the state of California. (2) That among other offices of said municipal corporation, created by statute, and provided by its charter or organic act for the government of said city, is the office of police judge, and the charter of said city provides and requires that there be a municipal election held in said city on the second Monday of March, A. D. 1886, for the election, among municipal officers, of a police judge, for the term of two years next succeeding such election. (3) That on the second Monday of March, A. D. 1886, to-wit, on the eighth day of March, A. D. 1886, a municipal and charter election was duly held in said city, for the election of, among other municipal officers, a police judge, for the term of two years next succeeding such election. (4) That at said election so held in said city one S. F. Daniels received the greatest number of votes cast for police judge of the city of Oakland by the qualified electors of said city, and thereafter, to-wit, on the twenty-ninth day of March, A. D. 1886, and within ten days after receiving a certificate of his election, he took the oath of office, and presented to the city council of said city a bond good and sufficient in form, and as required by law, with two good and sufficient sureties in the penal sum of $5,000, as and for his official bond as police judge of the city of Oakland, for the term of two years next succeeding his said election. (5) That on said second Monday of March, A. D. 1886, and for more than one year prior thereto, the said S. F. Daniels was, thence hitherto has been, and now is, a resident of the city of Oakland, Alameda county, state of California, and during all of said time he has been, and now is, an attorney and counselor at law, eligible and qualified to fill and hold the office and discharge the duties of police judge of said city. (6) That on the seventh day of April, A. D. 1886, the defendant, F. W. Henshaw, usurped and intruded into the office of police judge of said city, and ever since said day he has usurped and intruded into said office, and withheld the same from the said S. F. Daniels. Wherefore the plaintiff demands judgment: *First.* That the defendant is not entitled to the office of police judge of the city of Oakland, and that he be ousted therefrom. *Second.* That the said S. F. Daniels is entitled to said office of police judge of the city of Oakland, and that he be let and put into possession of said office, and that he have his costs herein, and such other and further relief in the premises as shall seem proper."

The answer of Henshaw is as follows:

"The above-named defendant, for answer in his behalf to the pretended cause of action set forth in the complaint of plaintiff above named, herein filed: *First.* Admits that the allegations contained in paragraph 1 of said complaint are true. *Second.* Denies that among other offices of said municipal corporation created by statute, and provided for by its charter or organic act, for the government of said city, or at all, is the office of police judge. Denies that the charter of said city provides and requires, or provides or requires, that there be a municipal election held in said city on the second day of March, A. D. 1886, or at any time, or at all, for the election, among other municipal officers, of a police judge for the term of two years next succeeding such election, or for any term at all. *Third.* Denies that on the second Monday of March, A. D. 1886, or at any time, or at all, a municipal and charter election, or municipal or charter election, was duly or otherwise held in said city for the election of, among other municipal officers, a police judge for the term of two years next succeeding such election, or for any term, or at all. *Fourth.* Defendant has no knowledge, information, or belief sufficient to enable defendant to answer the allegations contained in paragraph 4 of said complaint, and therefore denies that at said election so held in said city one S. F. Daniels

received the greatest number of votes, or any number of votes, for police judge of the city of Oakland by the qualified electors of said city, and that thereafter, to-wit, on the twenty-ninth day of March, A. D. 1886, or at any time, or at all, or within ten days after receiving a certificate of his election, he took the oath of office, and presented to the city council of said city a bond, good and sufficient in form, and as required by law, with two good and sufficient sureties in the penal sum of $5,000, as and for his official bond as police judge of the city of Oakland for the term of two years next succeeding his said election, or for any term, or at all. *Fifth.* Answering paragraph 5 of said complaint, defendant admits that the allegations contained therein are true, assuming that the word 'qualified' therein used is intended to convey its ordinary and usual meaning. *Sixth.* Denies that on the seventh day of April, A. D. 1886, or ever, or at all, this defendant usurped and intruded, or usurped or intruded, into the office of police judge of said city, and ever since said day, or ever, or at all, he has usurped and intruded, or usurped or intruded, into said office, and withholds the same, or withholds the same, from said S. F. Daniels. Wherefore, having fully answered, defendant prays judgment that plaintiff be denied the judgment demanded in his said complaint, and that he take nothing by this action, and that defendant have judgment against plaintiff for defendant's costs herein."

The controversy in the action was as to the office of police judge of the city of Oakland. Is there any such office? If there is, the statutes will show it. There is no such office mentioned in the constitution. We must then find it in some statute. It may be conceded that there was under the act of March 10, 1866, an office of police judge for the city of Oakland. See St. 1865-66, p. 193, §§ 1, 2. In fact, there was such an office created by the second section of the act. The first section created a police court for the city named. The police judge was to be elected at the charter election of said city, held on the first Monday in March, 1867, who was to hold office for two years, and until his successor shall be elected and qualified. In the following sections of the act the jurisdiction of the police court as established may be found, and other provisions made in regard to the court. Let it be conceded that other statutes existed by which the office mentioned existed.

On the eighteenth of March, 1885, a statute was passed entitled "An act to provide for police courts in cities having 30,000, and under 100,000, inhabitants, and to provide for officers thereof." The first section of the act is in these words: "The judicial power of every city having 30,000, and under 100,000, inhabitants shall be vested in a police court, to be held therein by the city justices, or one of them, to be designated by the mayor; but either of said justices may hold such court without such designation, and it is hereby made the duty of said city justices, in addition to the duties now required of them by law, to hold said police court." The act consists of 15 sections. It proceeds by the second and third sections to define and settle the jurisdiction of the police court established by the first section; by the fourth, to declare who shall discharge the duties of said court in case of the disability of the justice appointed to hold the court under the first section. By the fifth section the power of the justice of the court is declared and conferred. The sixth section provides for a clerk of the court to be appointed by the city council, and defines his duties, and provides for his salary. Section 7 provides for the disposition of the fines and other moneys collected on behalf of the city in the court, and for a report to the city council each month of all bills for fees and costs due the court. Section 8 provides for rooms for the court and dockets. The ninth section provides that the court shall be always open except on non-judicial days, and then for such purposes as by law are permitted or required of the other courts of the state. Appeals are provided for by section 10; section 11, a place of imprisonment, and a place of labor; section 12, for a seal of the court, to be furnished by the city; section 13, for a

report to the city council by the city justices, on the first Monday of each month, of all the cases, civil and criminal, in which the city has an interest, or which are required to be entered in the city civil docket, or the city criminal docket, etc. The next section (14) provides that certified transcripts made by the clerk shall be evidence, etc., and that all warrants and other process issued out of said court, and all acts done by said court, and certified under its seal, shall have the same force and validity in any part of the state as though issued or done by any court of record of this state. Section 15 provides that this act shall go into effect upon the expiration of the term of office of the present police judges of said cities, or when a vacancy occurs therein.

That this act of 1885 repeals former acts in relation to a police judge in the city of Oakland, we think there cannot be any doubt. The former acts cannot stand with the act of 1885. There is such a repugnance that they cannot stand together. The former act or acts provided for a police judge, to be elected by the electors of the city at a certain election. This act of 1885 provides that the judicial power shall be vested in a police court, to be held in the city by the city justices, or one of them, to be designated by the mayor. The city justices are elected under section 103 of the Code of Civil Procedure, (which section was held constitutional in *Bishop* v. *City of Oakland*, 58 Cal. 572,) and it is made the duty of the mayor, by the act of 1885, to designate one of such justices to hold the police court. The office of police judge to be elected, as before pointed out, ceases, under the act of 1885, upon the expiration of the term of the incumbent in office at the time the act of 1885 was passed, or when a vacancy may occur in such office. These provisions show that the former acts creating the office of police judge are repealed by the act of 1885. The repeal is shown by its being clearly a revision of the former acts on the subject of police courts in the class of cities referred to. See *Christy* v. *Sacramento*, 39 Cal. 8; *Ex parte Smith*, 40 Cal. 419; *Estate of Wixom*, 35 Cal. 320; *People* v. *Burt*, 43 Cal. 560.

That the act of 1885 is constitutional, is clear. The power over this subject is amply conferred by sections 1 and 13 of article 6 of the constitution. It would seem that, under section 1 of article 6, such a court as that established by the act of 1885 may be created by a special law for each city. If a general law is required to create such a law, the act of 1885 is a general law. It is general because it applies to a class of cities. *Thomason* v. *Ashworth*, 14 Pac. Rep. 615. It makes no difference in this regard that Oakland is the only city belonging to the class having 30,000, and less than 100,000, inhabitants. There is certainly another (Los Angeles) since the act of 1885 was passed, and there will soon be others. It may be remarked here that the police courts constitute a part of the courts of the state, and the police judge part of the judiciary, and section 6 of article 11 of the constitution has no reference to them. *McGrew* v. *Mayor of San Jose*, 55 Cal. 611; *People* v. *Ransom*, 58 Cal. 560; *Bishop* v. *City of Oakland*, 58 Cal. 572; *Jenks* v. *City of Oakland*, 58 Cal. 578; *Coggins* v. *Sacramento*, 59 Cal. 599; Const. art. 6, § 1.

The act of 1885, then, repeals all other acts in relation to the office of police judge of the city of Oakland, does away with such office, and is a valid and constitutional act. In this view, it follows that the judgment of the court below, in adjudging that Daniels is entitled to the office of police judge, is clearly erroneous.

Is it also void? For a judgment can also be void as well as erroneous. *Ex parte Lange*, 18 Wall. 163. If merely erroneous, it is not void. But if void it is also erroneous, and will be reversed on appeal. In accordance with the views expressed in a foregoing part of this opinion, the judgment is void, for the reason that it adjudges a person entitled to an office which does not exist. A court can no more render a valid judgment for the recovery of an office which does not exist, than it can for a non-existent parcel of land or a non-existent horse.

Can a person be imprisoned for refusing to obey a void judgment? We cannot perceive how this can be. A void judgment is a nullity; it can confer no rights on any one, nor deprive any one of a right. An imprisonment under a void judgment is an arbitrary one, beyond the power of any court or judge. It is in no sense within their jurisdiction. To render a judgment of imprisonment is an assumption of power authorized neither by the constitution or law, nor justice. The officer who attempts to execute such a judgment is a trespasser, and may be lawfully resisted by any one against whom the process in his hands runs. It cannot be lawful unless the arbitrary edict of a court or judge can make that lawful which is contrary to all law. The above views are, in our opinion, sustained by the decided cases.

In *Batchelder* v. *Moore*, 42 Cal. 415, there was no jurisdiction of the subject-matter. Calderwood was not a party to the action of *Batchelder* v. *Moore*, in which judgment had been rendered, and was not dispossessed under it. There was then no jurisdiction of the subject-matter. In *Ex parte Kearny*, 55 Cal. 212, there was no offense charged against Kearney, hence there was no subject-matter of which the court had or could take jurisdiction. The court held in this case, as correctly stated in the head-notes, as follows: "Where it affirmatively appears from the record of the proceedings of an *inferior court* that a person was tried and sentenced to be punished for an act which is not a crime, the judgment is absolutely void, and a person in custody under such a judgment will be discharged on *habeas corpus*. To constitute an offense under subdivision 3, section 38, of order No. 697, as amended by order No. 1196 of the city and county of San Francisco, which provides that 'no person shall address to another, or utter in the presence of another, any words * * * having a tendency to create a breach of the peace,' the words must be uttered in the presence of the person whom they tend to provoke to such breach of the peace." The same is true of *Ex parte Corryell*, 22 Cal. 179. Corryell had been charged with that which was no crime, and therefore he was discharged. *Ex parte Frank*, 52 Cal. 606, goes on the same ground. The ordinance under which he was convicted was void, therefore the judgment under it was void. *Ex parte Siebold*, 100 U. S. 371, is also an authority. In that case it was alleged that the act under which the imprisonment was adjudged was unconstitutional. The supreme court of the United States held that the act was constitutional, and remanded the applicant. The court held that if the act was unconstitutional the applicant was entitled to his discharge. See opinion of court on pages 376, 377, of 100 U. S. Two of the justices (FIELD and CLIFFORD) dissented, holding the law unconstitutional, and were, on that ground, in favor of discharging the applicant. See 100 U. S. 364. The same rulings were made in *Ex parte Virginia*, 100 U. S. 339, and in *Ex parte Clarke*, Id. 399, as in *Siebold's Case*. In *Ex parte Siebold* the court cited *Rex* v. *Suddis*, 1 East, 306; Bac. Abr. "Habeas Corpus," B 10; and *Bushel's Case*, T. Jones, 13, Vaughan, 135, 6 How. St. Tr. 999.

Bushel's Case, which was cited approvingly by the court in *Siebold's Case*, is thus stated in its opinion: "There, twelve jurymen had been convicted in the oyer and terminer for rendering a verdict (against the charge of the court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the court of common pleas for a *habeas corpus;* and though the court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet, having granted it, they discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose." Thus holding that the court of oyer and terminer had no jurisdiction of the subject-matter. No offense had been committed by the jurors, therefore there was no subject-matter. *Ex parte Jackson*, 96 U. S. 727, accords. In *Zeehandelaur's Case*, 12 Pac. Rep. 259, this court held that a superior court had no jurisdiction to adjudge in contempt and imprison a wit

ness for refusing to answer a question which was immaterial to any issue in the case, and discharged the petitioner. In all these cases the court had jurisdiction of the parties. In cases where the court had jurisdiction of the subject-matter, the applicant for the writ was remanded, and where it had no such jurisdiction the applicant was discharged. See, also, *Hummel's Case*, 9 Watts, 416; *Com.* v. *Newton*, 1 Grant, Cas. 453; *People* v. *Kelly*, 24 N. Y. 74; *In re Fernandez*, 10 C. B. (N. S.) 32; *Burnham* v. *Morrissey*, 14 Gray, 226.

It can make no difference in this case, conceding that the court below held the act of 1885 unconstitutional, or that the former acts had not been repealed by the act of 1885, so far as relates to the office of police judge. The foregoing are questions of law, which go to the jurisdiction of the court. If the act of 1885 is constitutional, and lawfully repealed the former acts, the court below had no jurisdiction to render the judgment herein mentioned, adjudging Daniels entitled to the office as against Henshaw, and ousting Henshaw therefrom. The judgment being void, the commitment for contempt in refusing to obey it is also void, as being beyond the power of the court to render it. In fact, the case should have been dismissed on an inspection of the complaint. It sets forth no title to an existing office; in fact, shows want of title. The affidavit of Daniels was entirely insufficient to confer any power on the court to punish for contempt.

The conclusion above reached applies as well to judgment in a civil as in a criminal action. There can be no punishment by a court under a void judgment in either case.

The applicant for the writ (Henshaw) should, in my opinion, be discharged from custody.

73 Cal. 545

In re Estate of HERTEMAN, Deceased. (No. 9,388.)

(*Supreme Court of California.* October 6, 1887.)

1. EXECUTORS AND ADMINISTRATORS—FINAL ACCOUNTING—PROOF OF DISBURSEMENTS.
On final accounting, an administrator produced an ordinary receipt for $1,500, and testified that $1,085 was for money borrowed on account of the estate, and $415 was for the share of the estate in the amount of the expenses above the receipts of a hotel in which the estate was interested; that he did not take a separate voucher for the $415, as it was not thought necessary, and it was desirable to suppress the fact of a deficit in the business in order to sell the hotel; that the manager of the hotel, to whom the $1,500 was paid, and who signed the receipt, and kept the accounts, had taken the accounts to France, and died there. In a verified account filed after the alleged payment, the administrator stated that the estate had been put to no expense on account of the hotel. *Held*, that there was no sufficient evidence of the payment of the item of $415.

2. SAME—MISTAKE IN ACCOUNT.
On final accounting, an administrator claimed to have made a mistake in an account filed five years before, by which the estate was credited with $720, the amount received from the rent of a hotel, instead of $120. He testified that the account was made by his attorneys from *memoranda* furnished by him, and that the error was made in mistaking the figure "1" for "7," and that he signed and verified the account as prepared without going over the details. By the account claimed to be erroneous, and the previous account, it appeared that the rent of the hotel averaged about $150 per month, which for the period covered by the alleged erroneous item would amount to about $720. *Held*, that there was no sufficient proof of the alleged mistake.

3. SAME—LIABILITY OF ADMINISTRATOR FOR FAILING TO PAY TAXES AND INSTALLMENTS.
The value of real property lost to the estate by reason of the failure of the administrator to pay taxes, and to pay installments of purchase money and interest on school lands held under a certificate of purchase, he having under his control sufficient money belonging to the estate to pay such taxes, installments, and interest, is properly chargeable to him in his final account.

4. SAME—INTEREST ON MONEY MINGLED WITH PRIVATE FUNDS.
An administrator is chargeable with interest on money of the estate drawn by him, and mingled with his own funds, and omitted from his account.

5. Same—Appeal—Refusal of Court to Settle Statement—Mandamus.

The refusal of the trial court to settle a statement, or act upon a motion for a new trial, cannot be reviewed on appeal. If it was the duty of the court to settle the statement, and act upon the motion, *mandamus* would be the proper remedy.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Final accounting of an administrator. A two-thirds interest in a hotel belonged to the estate; the other third belonging to one Fouroche, who managed it under a partnership agreement made with decedent. The administrator testified that to pay the expenses of two children of decedent, of whom he was guardian, and other expenses, for which there was available no money belonging to the estate, he had borrowed money at different times from Fouroche, amounting in the aggregate to about $1,085; that he and Fouroche on July 7, 1876, had a settlement of the hotel business, and for the borrowed money, when it was found that Fouroche had paid $415 more than his share of the expenses of the hotel above what he had taken in, and that he paid Fouroche $1,500; that he did not take a separate voucher for the $415, as he did not think it necessary, and it was desirable to suppress the fact of a deficit in the business in order to sell the hotel; that Fouroche kept the accounts, which the administrator verified; and that Fouroche took the books to France, where he had since died. A receipt signed by Fouroche was produced, simply acknowledging the receipt of $1,500. It was admitted that there was $1,500 available to the estate on application to the probate court. A verified account filed November 8, 1877, was produced, in which the administrator stated that the estate had been put to no expense on account of the hotel.

Certain real property was lost to the estate by reason of the failure of the administrator to pay the taxes thereon, and to pay installments of purchase money and interest on school lands held under a certificate of purchase from the state. The administrator claimed that there was no money belonging to the estate out of which he could pay such taxes, installments, and interest, and that the land was of no value. From his inventory and appraisal, it appeared that the appraised value of the real property was $501.88, and that at the time of the sale for taxes, and at the time the installments of purchase money and interest became due, there was sufficient money belonging to the estate and under the control of the administrator to pay all such taxes, installments of purchase money, and interest.

The administrator alleged that in his account of November 8, 1877, he had made a clerical error of $600 in favor of the estate. He testified that he was no book-keeper, and knew very little about keeping accounts; that he took *memoranda* of his accounts to his attorneys, who prepared the account, and that he signed and verified it without going over the details; that the error was made in the amount received from rent of a hotel, by mistaking his figure "1" for "7," thus crediting the estate $720, instead of $120; that he never at one time got $720, but did get $120, for which he meant to give credit; that the memorandum was not preserved, and he did not discover the mistake until he made up his final account. The final account was filed October 9, 1882. To disprove this allegation, an account filed April 15, 1876, was offered in evidence, by which it appeared that the rent of the hotel from April 14, 1875, to March 1, 1876, amounted to $1,590.85. The account of November 8, 1877, was also offered in evidence, from which it appeared that the item of $720 received from the hotel was for the period extending from April 14, 1875, to October 29, 1875, and that the receipts from the hotel averaged about $150 per month, which would amount to about $720 for the period mentioned.

A. W. Thompson, (*L. E. Bulkely*, of counsel,) for appellant. *R. Percy Wright* and *Selden S. Wright*, for respondent.

McFarland, J. This is an appeal by E. Chaquette, administrator of the estate, from an order settling his final account, from the decree of distribution,

and from an order refusing to act upon the administrator's motion for a new trial.

1. The particular items of the account with respect to which appellant contends that the court erred are these: *First.* The item of $415 charged by appellant as money paid to a partner of the deceased to cover loss in running a hotel, and disallowed by the court. Whether such a charge could be allowed under any circumstances it is not necessary to decide, because there was no sufficient evidence of the item. *Second.* Appellant was charged with $501.89, the value of certain real property lost to the estate by the neglect of appellant to pay taxes, etc. We see no error in this ruling. *Third.* Appellant claimed a correction of $600 in a former account, rendered several years before, which was not allowed. We cannot see that the court erred in holding that there was not sufficient evidence to warrant this correction. *Fourth.* Seven hundred and forty-two dollars interest on money of the estate drawn by appellant, and mingled with his own funds, and omitted from his account, and charged to him by the court. This was in accordance with well-settled principles, and there was no error in the ruling. The appeal, therefore, from the order settling the account, presents no grounds for a reversal; and the appeal from the decree of distribution stands on the same footing.

2. After the order settling the account was made, the appellant filed and served a notice of intention to move for a new trial, and prepared and served a statement of the case. The contestants thereupon objected to the settlement of any statement, and to any proceeding on said motion, on the ground that the provisions of the Code relating to new trials were not applicable. The court sustained the objection, and declined to hear, or in any way act on, said motion. If it was the clear duty of the court to settle the statement, and act upon the motion for a new trial, *mandamus* to compel such action would have been the proper remedy; but this non-action of the court—this nothing—cannot be reviewed on a general appeal of the case. It may be remarked, however, that it is doubtful if the true construction of that part of the Code of Civil Procedure relating to probate matters is that every contested motion in probate proceedings assumes the character of a civil action with all the attendants of a right to a jury trial, motion for new trial, etc. Such a construction would greatly confuse and prolong the settlement of estates,—a matter already sufficiently complicated. The subject is discussed to some extent in the opinion of Mr. Justice TEMPLE in the case of *Estate of Moore*, 13 Pac. Rep. 880, and there are reasons for holding that the suggestions there made should be adopted as expressive of the true meaning of the Code. However, all we desire in the case at bar is to be understood as not determining whether it was the duty of the court to entertain the motion for a new trial.

Orders affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; MCKINSTRY, J.; SHARPSTEIN, J.; PATERSON, J.

2 Cal. Unrep. 807

BULL *v.* COE, Adm'r, and others. (No. 12,055.)*

(*Supreme Court of California.* September 30, 1887.)

1. HOMESTEAD—MORTGAGE OF—FORECLOSURE—PRESENTMENT OF CLAIM AGAINST DECEDENT'S ESTATE.

Under Code Civil Proc. Cal. § 1475, providing that claims secured by liens or incumbrances "on the homestead" must be presented and allowed as other claims against the estate, a deed absolute, intended as a mortgage, executed by a husband and wife upon the wife's separate property, which had been declared a homestead, to secure the debt of the husband, cannot be foreclosed after the death of the husband, no claim having been presented against the estate.

*Reversed in banc. See 18 Pac. 808, 77 Cal. 54.

2. SAME—FORECLOSURE OF MORTGAGE.
The provision of Code Civil Proc. Cal. § 1500, that an action may be brought to enforce a mortgage or lien against the property of a deceased person where all recourse against any other property of the estate is expressly waived in the complaint, has no application to a mortgage upon a homestead, whether a probate homestead or one selected and recorded before the death of decedent.

3. SAME—ABANDONMENT OF HOMESTEAD.
Where the homestead, upon which the foreclosure of a mortgage is sought after the death of one of the mortgagors, has been released from the lien of the mortgage by the failure of the mortgagee to present his claim against the estate within the time limited for that purpose, the foreclosure proceedings cannot be sustained on the ground of an abandonment by the attempt of the survivor to get a homestead on other property after the expiration of the time for the presentation of claims.

4. SAME.
By Civil Code Cal. § 1243, a homestead can be abandoned only by a declaration of abandonment, or a grant thereof; and the execution of a deed of the homestead absolute in form, but intended as a mortgage, is not an abandonment.[1]

5. SAME—ENFORCEMENT OF MORTGAGE FOR EXCESS.
Where a homestead has been released from the lien of a mortgage by the failure of the mortgagee to present his claim against the estate of one of the deceased mortgagors, if the right to enforce it as to any excess above $5,000 remains, the burden of proof is upon the mortgagee to show the existence of such excess.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Wells, Vandyke & Lee, for appellant. *Bicknell & White* and *Chapman & Hendrick*, for respondent.

HAYNE, C. The defendant, Hattie W. Strong, and her husband, by a deed absolute in form, mortgaged to the plaintiff the wife's separate property, upon which a homestead had been declared, to secure a debt of the husband. The husband died and the defendant Coe was appointed administrator of his estate, and as such gave notice to the creditors to present their claims. The plaintiff did not present any claim, but commenced an action to foreclose the mortgage, under section 1500 of the Code of Civil Procedure; stating in his complaint that he waived all recourse against the other property of the estate. The court below gave judgment for the defendants, and the plaintiff appeals.

In the case of *Camp* v. *Grider*, 62 Cal. 21, it was held that section 1500 applies only to "mortgages and liens other than liens and incumbrances on the homestead," and that claims secured by liens and incumbrances on the homestead are required to be presented under section 1475. We see no ground for saying that the rule applies only to probate homesteads. Section 1475 expressly mentions "the homestead selected and recorded prior to the death of the decedent;" and it was this "homestead" which the section refers to when it says that, "if there be subsisting liens or incumbrances *on the homestead*, the claims secured thereby must be presented and allowed as other claims against the estate." To say otherwise, would be to make the necessity for the presentation of claims secured by liens upon the homestead dependent upon the intention of the survivor to apply or not to apply to have the property set off as a probate homestead. In view of the fact that there is no time limited for the making of such an application, this test would be too uncertain;

[1] In *California*, a homestead cannot be abandoned except in the statutory mode; and a removal from the premises, even to another state, becoming a citizen thereof, voting in its elections, and being offered as a candidate for office therein, where there is no intention to relinquish a residence in this state, is not such an abandonment. Porter v. Chapman, (Cal.) 4 Pac. Rep. 237.

In general, as to what constitutes an abandonment of a homestead, see Newman v. Franklin, (Iowa,) 28 N. W. Rep. 579, and note; Tipton v. Martin, (Cal.) 12 Pac. Rep. 244; Newton v. Calhoun, (Tex.) 4 S. W. Rep. 645; McElroy v. Magoffin, (Tex.) Id. 547; Reece v. Renfro, Id. 545; Gates v. Steele, (Ark.) Id. 53, and note; Kaes v. Gross, (Mo.) 3 S. W. Rep. 840; Sanders v. Sheran, (Tex.) 2 S. W. Rep. 804; Honaker v. Cecil, (Ky.) 1 S. W. Rep. 302, and note; Repenn v. Davis, (Iowa,) 34 N. W. Rep. 326.

and it cannot be supposed that the legislature intended it. Such a test would enable the survivor to lull the creditor into the belief that the application was not going to be made, and, after the time for the presentation of claims had expired, to cut him out by having the property set off as a probate homestead. We think, therefore, that the rule of *Camp* v. *Grider* is not to be limited to cases where application is made to have the property set off as a probate homestead.

Nor does it make any difference that the property upon which the homestead was declared was the separate property of the wife. The debt was the debt of the husband, and the claim for *it* was against his estate. The language of section 1475 is general, and contains no limitation dependent upon the ownership of the property upon which the homestead was declared. It may well be that, in the opinion of the legislature, it was necessary for the probate court to have before it all the facts as to homestead, so as to enable it to act intelligently upon an application to set off a probate homestead, or in applying the funds of the estate in paying off particular liens. At any rate the requirement of the statute is general, and we do not think the court is warranted in limiting it. The failure to present the claim, therefore, released the homestead from the lien of the mortgage. It is not necessary to consider whether the mortgage can be enforced as to any excess which there may be over the sum of $5,000, for it does not appear that there was any such excess in this case. And, if we assume that the mortgage could still be enforced as to that, we think it incumbent upon the party whose right to recover depends upon the existence of such excess, to show that it in fact exists.

The appellant contends that the parties did not reside upon the property at the time the homestead was declared. But the court finds the fact in favor of the respondent; and, while the testimony of the witness Russell is subject to some criticism for ambiguity, we cannot say that the finding is unsupported by the evidence. It is also contended that the homestead was abandoned by the attempt of the survivor to get a homestead on other property. But, in the first place, this attempt was not made until the expiration of the time for the presentation of claims; and in the second place, a homestead in this state can be abandoned only in the manner specified in section 1243 of the Civil Code. There is no pretense that the acts mentioned in that section were done. The deed to the plaintiff, though absolute in form, was a mortgage, and hence did not operate as an abandonment. *Mabury* v. *Ruiz*, 58 Cal. 15; *Porter* v. *Chapman*, 65 Cal. 365, 4 Pac. Rep. 237.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 564

In re Estate of DOYLE, Deceased. (No. 9,710.)

(*Supreme Court of California.* October 7, 1887.)

1. WILL—PROBATE—CONTEST—PLEADING.
Where the allegations of the contestant of a will are not denied, there is no default, but the proponent makes his proof, and then the contestant proceeds to establish his grounds of contest, and, if he fail in this, the will will be admitted to probate, although no issue was made by denying his ground of contest.

2. SAME.
To the petition of the proponents of a will, appellant filed a written opposition, to which no demurrer or answer was filed by proponents, as provided by Code Civil Proc. Cal. § 1312. The parties, however, went to trial upon the petition. *Held*, that appellant, not having raised the point in the lower court, could not say that no issue was made up between him and the proponents.

3. SAME—NEW TRIAL.

Where facts are assumed to exist which are alleged by one party, and not denied by the other, but the finding is adverse to the admitted facts, the party aggrieved cannot demand a "new trial" on the ground that the finding, being opposed to the admitted fact, is "against law;" his remedy is by appeal.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

R. Percy Wright, for appellant. *H. C. Newhall* and *C. F. Hanlon*, for respondents.

MCKINSTRY, J. A petition for the admission to probate of an instrument as the last will and testament of Michael Doyle, deceased, was presented to the superior court by William R. Doyle, named as executor therein. Richard Doyle, brother of deceased, filed his written opposition to the probate, stating as ground of opposition that "the deceased did not make, sign, publish, or declare as his last will" the instrument propounded. No demurrer was interposed to the written opposition, nor was any written answer thereto filed or served. The superior court tried "the contest," and decided and adjudged that the instrument offered for probate was the last will and testament of said Michael, deceased; that it was executed in all respects as required by law; that the testator at the time of its execution was of sound and disposing mind, and not acting under any undue influence, fraud, or duress; and the court ordered that the will be admitted to probate. No appeal was taken from the judgment or order admitting the will to probate. The contestant, Richard Doyle, moved for *a new trial of the contest*, and has appealed from an order denying his motion.

Section 1312, Code Civil Proc., provides, in effect, that when an opposition is filed and served, the petitioner for probate, or others interested in the estate, may demur to the opposition, or may answer the contestant's grounds, traversing the same, etc.; and that any issue of fact thus raised, must, if requested by either party in writing, be tried by jury; otherwise by the court.

The petition filed by proponent was sufficient; and under its averments he would have been authorized to prove, had there been no contest, that the deceased did "make, sign, publish, and declare as his last will" the instrument offered. Code Civil Proc. § 1308. The petition, therefore, is to have the same effect as if it had expressly averred that the will offered was made, signed, and published as the last will of the deceased. There was, then, in the petition an allegation that the deceased *did*, and in the opposition an allegation that deceased did *not*, make, sign, and publish the instrument as his last will.

Appellant claims that a new trial should have been granted by the superior court, because its decision was "against law," within the meaning of section 656, Code Civil Proc.; that the failure of petitioner to deny, by written answer, the allegation of the written opposition, was an admission that the allegation was true. Code Civil Proc. § 1312. It is insisted that the decision of the superior court that the deceased *did* "make, sign, publish," etc., being contrary to proponent's admission that deceased did *not* sign, etc., was "against law." As we have seen, a direct issue was made by the averment in the petition that the will was executed and published as prescribed by law, and the averment in the opposition that it was not so executed or published. It may be doubted whether section 1312, which provides that an answer "may" be made to the written opposition, requires such answer when the opposition merely denies an averment implied in every sufficient petition for the probate of a will. It may also be very seriously doubted whether the superior court could base a decision against the beneficiaries under the will upon the failure of the *executor* to deny that a will whereby he had been appointed executor, and which he had asked to have admitted to probate upon petition expressly or impliedly averring that it was duly executed and published, was

not duly made and published. But we do not find it necessary to rest the decision of this appeal upon the determination of the question suggested by either of such doubts.

1. The bill of exceptions included in the transcript shows that on a certain day, "*no objection being made*, the court proceeded to try said contest on probate of said will. E. J. Hutchinson, Esq., appearing for Richard Doyle, the contestant and plaintiff, H. C. Newhall, Esq., appearing for William R. Doyle, petitioner and defendant, and J. Howard Smith appearing for absent heirs, and testimony having been offered *in support of said will*, and on the part of contestant in opposition thereto, and the court being *satisfied from said testimony* that said will should be admitted to probate, the court thereupon made its order admitting the said will to probate."

It appears from the bill that at the trial of the contest the course which we believe to be the usual course, and which is one to which the contestant certainly could not object, was pursued; that is, the petitioner made the *prima facie* proof that the will was executed in the manner prescribed by law, and that testator was of sound mind, and the contestant then introduced evidence in support of his ground of opposition to the probate. No objection was made by contestant to testimony in support of the petition for probate; and contestant himself, treating the case as if the averment in his opposition were sufficiently denied by the pleading on the part of the petitioner, offered and put in testimony in support of his written grounds of opposition. For aught that appears, the petitioner then introduced evidence to meet that given on behalf of contestant. Upon the testimony so given on behalf of the petitioner and contestant, respectively, the superior court decided the contest. If the appellant is right in his contention, no evidence was admissible upon the part of the petitioner. A party cannot for the first time in this court object, *on any ground*, to evidence which was introduced by the adverse party at the trial in the court below without objection being made thereto. *Scott* v. *Lumber Co.*, 67 Cal. 75, 7 Pac. Rep. 131; *Bliss* v. *Ellsworth*, 36 Cal. 310. Where evidence is not objected to in the court below because not admissible under the averment of a pleading, it is too late to raise the objection in the supreme court. *Scott* v. *Lumber Co.*, *supra*; *Hutchings* v. *Castle*, 48 Cal. 152; *Henry* v. *Railroad Co.*, 50 Cal. 176.

The contestant not only made no objection to the testimony offered on behalf of the petitioner, but introduced evidence in support of the allegations in his written opposition. He did not move for judgment on the pleadings, nor did he in any way call the attention of the court to what is now called the admission by petitioner of everything charged in the opposition. Section 1312, Code Civil Proc., does not, except by inference, limit the time within which the written opposition may be answered; but, if it must be answered within 10 days, here the contest was tried by mutual assent, without objection, the *day after* the written opposition was filed. Had the objection now urged been made by contestant, there can be no doubt, if it was necessary to make an issue, the court would have allowed the petitioner to file an answer forthwith, or have given him time to file an answer denying the allegations of the written opposition. This would accord with the view expressed in *Stringer* v. *Davis*, 30 Cal. 318; *Clark* v. *Insurance Co.*, 36 Cal. 175; and *Scott* v. *Lumber Co.*, *supra*. The case was tried upon the assumption of all the parties in the court below that the material allegations of the contestant's pleading were denied. It has been repeatedly held, under such circumstances, that the point that the denial was insufficient, cannot be first made in this court. *Cave* v. *Crafts*, 53 Cal. 141. In the case before us, as we have seen, there was direct issue made by the contradictory averments of the petition and the opposition,—the one averring, in legal effect, that the will was duly executed and declared; the other averring that it was not duly executed or declared. The *contest* was made known by formal written allegations, was understood by the court

and parties, and was tried without objection. The appellant ought not to be heard to say that there was no issue made up between him and the respondent in the exact manner provided by the Code.

2. But if the petitioner were entirely correct in his positions in other respects, it would not follow that the court below erred in denying him a "new trial." If the admission by failure to deny is to be treated as evidence that the fact alleged existed, there was no motion for a new trial on the ground that the evidence did not justify the finding, and no specification of deficiency in the evidence. If, however, the admission in the pleadings is to be treated as having other and greater effect than an admission at the trial of a fact denied by the pleadings, still a "new trial" was properly refused. It is here insisted there was no issue as to the execution and publication of the will, and therefore there should have been a new trial. Of what issue? We are unable to understand how there could be a trial or new trial—an examination or re-examination—of an issue which never existed. "A new trial is a re-examination of an issue of fact in the same court." Code Civil Proc. § 656. When a trial is had by the court, without a jury, a fact admitted by the pleadings should be treated as "found." It has been repeatedly held that the court need not expressly find a fact averred in the pleading of one party, and not denied by the other. If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. The mere finding by the court against an averment not denied, does not create an issue which a party has a right to have tried. Here the appellant asked for a second trial of a suppositive issue on the ground that there was no issue which the court had right or power to try the first time.

Where all the material issues made by the pleadings are determined by the findings, and the findings are not attacked as unsustained by the evidence, a party cannot demand a new trial upon the ground the court erroneously applied the law to the facts, or drew the wrong conclusion of law from the facts found. The remedy in such case is by appeal. The Code does not contemplate or provide for a new trial or "re-examination" of issues of fact, the findings upon which are indisputably correct. Nothing to the contrary was decided by a majority of this court in *Simmons* v. *Hamilton*, 56 Cal. 493. In his dissenting opinion in the case last cited, Mr. Justice Ross said: "Since a new trial is a re-examination of a question of fact, where all such issues are correctly found upon, I am unable to find any authority for a 're-examination' of such facts; in other words, for a new trial, or to see any necessity therefor."

In *Martin* v. *Matfield*, 49 Cal. 45, Justice RHODES said: "A new trial is a re-examination of an issue of fact; and when a new trial is granted the finding is set aside, and of course the judgment resting upon it must fall. But the question whether the judgment is authorized by the pleadings or findings cannot be agitated on a motion for a new trial, *for it is not involved in a re-examination of the issues of fact.* The Code has provided other and sufficient modes for the determination of both branches of that question; and it is very clear that the question whether the issues of fact were correctly found does not depend in any manner on the question whether a pleading states sufficient facts to entitle a party to the relief granted by the judgment, or whether the issues as found sustain the judgment."

We fully concur with Justices RHODES and Ross that a new trial cannot be granted on the ground that the judgment, or the conclusion of law on which the judgment is founded, is not authorized by the findings of fact. The rule must be the same where, as the appellant claims is the case here, the material allegations in the pleading of one party are not denied by the other. In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not

upheld by the admitted facts is erroneous. An order purporting to direct a new trial would be a vain thing, since any further action of the court must end in the same result; that is, the facts now admitted will then be admitted. If, after the order, there would be any issue to try, it would be because the order granting a "new trial" would have the effect of declaring—not by its terms, but as its legal result—that the failure of petitioner to deny any of the averments of the opposition *denied* them by implication. But the order was asked on the ground that the petitioner had not denied them.

If the decision of the court was not supported by the facts admitted by the pleadings, the remedy of the contestant was to appeal from the order admitting the will to probate. He was not in a position to demand a "new trial" in the court below. Order affirmed.

PATERSON, J. I concur.

TEMPLE, J. I concur. The provisions of the Code with reference to contesting probate of wills are very peculiar. The enumerated grounds of contest all consist in merely negativing the allegations of jurisdictional facts which the petitioner is bound to aver and prove. All these facts must be found and certified by the court, whether there be a contest or not. The burden of establishing them would naturally be on the petitioner. Yet the statute provides that in the case of a contest the contestant shall be plaintiff, and the petitioner defendant, thus compelling the contestant to assume the affirmative. The contest need not cover all the jurisdictional facts; still, the court must find upon all. Evidently it is not contemplated that the evidence given upon the trial of the contest should be all the evidence submitted. Section 1317, Code Civil Proc., provides that the court shall be satisfied from the proof taken, or from the facts found by the jury. Now, the contest may include all the facts which the court is required to certify to upon admitting the will to probate. If, upon a trial of a contest before a jury, the contestant offered no evidence, since the burden of proof is upon him, the jury would be compelled to find all the facts against him, and in favor of the petitioner. In that case, the court, if the contest is all there is before the court, might base the probate entirely upon findings made in the absence of proof. This was certainly never intended. The same procedure is made applicable to a contest after the will has been admitted to probate, as before. In both, the contestant has the laboring oar, as though he is attacking something which he must overcome by affirmative proof. Under such circumstances, I think the theory of the statute must be that the contest begins after the petitioner has made his *prima facie* case. In such case, the burden would naturally be on the contestant, and all the provisions consistent and harmonious.

In case there is no contest, the petitioner is still required to introduce evidence to establish all the jurisdictional facts. If a contest is inaugurated, and the allegations of the contestant are not denied, there is no provision for a default. In fact, considering the nature of the proceeding, and that the usual case is that there are minors or absent heirs, we should be surprised if anything was taken by default and without proof. When, therefore, the allegations of the contestant are not denied, the petitioner first makes his proof, and then the contestant proceeds, without the presence of the petitioner, to establish his grounds of contest. If he fail in this, the will will be admitted to probate, although no issue was made by denying his ground of contest. On the other hand, if, having heard the proof on the part of the petitioner, the court is then prepared to refuse probate of the will, there would be no occasion to try the contest.

73 Cal. 560

SIDDALL and another *v.* HARRISON and others. (No. 11,675.)

(*Supreme Court of California.* October 7, 1887.)

WILL—ACTION TO CONSTRUE—WHEN IT LIES.

If the superior court has jurisdiction of an action for the construction of a will, (as to which, *quære,*) it is not bound to exercise such jurisdiction, and may properly refuse to entertain an action brought to have plaintiffs' heirship determined, and certain legacies declared void, where the plaintiffs are not mentioned in the will, and no special reason is shown for the intervention of equity, or for the adjudication asked for before final distribution.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

D. Wm. Douthitt, for appellant. *John F. Swift* and *Robert Harrison*, for respondent.

TEMPLE, J. This action is brought against the executors of the will of Elizabeth Traylor, deceased, and a great many other persons who do not appear to have any interest in the estate, or in the controversy, and no reason is shown in the complaint why they are or should be joined as defendants.

The plaintiffs are not mentioned in the will, and claim no interest under it, but they aver that either plaintiff Siddall is the sole heir, or that her co-plaintiff, White, is alone entitled to share the estate with her as heirs at law. By the terms of the will all the property of the testatrix is disposed of, but the complaint avers that various legacies are void, and among them the residuary bequest, and that, the legal and valid legacies being paid, there will be a large sum undisposed of. The plaintiffs aver that the executors claim that neither of the plaintiffs are heirs at law to said estate, and that all the legacies are legal, and should be paid; and they ask that the legacies may be declared void, and that the plaintiffs, one or both, are heirs at law to said estate, and for general relief. To this complaint a demurrer was interposed, which was sustained; the plaintiff declining to amend, final judgment was entered, and the plaintiff appeals.

Among the grounds of demurrer is the claim that the court has no jurisdiction of the action and that the complaint does not state a cause of action. In the recent case of *Williams* v. *Williams*, 14 Pac. Rep. 394, it is said that the jurisdiction of the superior court to construe a will was determined in the case of *Rosenberg* v. *Frank*, 58 Cal. 403. The attention of the court does not seem to have been called to the fact that that case was brought in the district court, and arose under the former constitution, nor to the fact that a majority of the court did not concur in the opinion on the subject of jurisdiction. Only Justices THORNTON, SHARPSTEIN, and the chief justice concurred in the opinion. Mr. Justice ROSS concurred specially, saying that he gave his adhesion only because the former court had held that the district court had such jurisdiction, and perhaps property rights had grown up under such decisions. The cases of *Williams* v. *Williams* and *Rosenberg* v. *Frank*, *supra*, as also the case of *Payne* v. *Payne*, 18 Cal. 292, were all in a sense consent cases. No one objected to the jurisdiction, and all parties interested desired the decision. In view of these facts, and of the weighty reasons against the jurisdiction given in the dissenting opinion in the case of *Rosenberg* v. *Frank*, to which others might be added, I do not know whether the court will adhere to these conclusions, but I am convinced the jurisdiction ought not to be exercised unless some good reason is given for thus interfering with a matter pending in another court. The inconvenience may be very great.

The superior court is liable to be called upon to construe a will to some extent as soon as it is probated. Certain payments, for instance, may be required to be made at once and at intervals. One of the principal reasons given for the interference of a court of equity was to save the executor from

liability for misconstruing the will while executing his trust. Here there is no such trouble; but, suppose he has acted during administration under the directions of the probate judge, and, in an action to construe the will another court takes a different view of its terms, which shall prevail? And, if the latter, is the executor responsible? Take the case put by Judge Story (section 1065, Eq. Jur.) as a proper case for the interposition of a court of equity. The will makes certain real estate subject to payment of debts and legacies. It is doubtful, he says, whether the personal estate is exonerated, or is the primary fund to be exhausted before the real estate can be taken. The probate court is competent to determine this. Suppose it has done it, or is about to do it at the instance of creditors, can the executor delay that court, in compelling the payment of the debts until the clause of the will has been construed in an action in another court? And when the matter has been so determined, why should that construction prevail over that of the court to which the matter is specifically referred by the constitution? Shall this court suspend its proceedings until advised by another court of co-ordinate jurisdiction?

But, as already said, if in a proper case courts of equity have jurisdiction to construe wills, and this court shall finally so hold, it is evident the court is not bound to entertain such suits, and should not do so, except in cases where there are special reasons for it. Its interference is always a matter of discretion, and there must always be some other purpose than a mere desire to obtain the opinion of a court of equity. *Crosby* v. *Mason*, 32 Conn. 482. And since our courts have in probate proceedings most ample powers, and may recognize and declare trusts, and compel their execution, and in the final decree must define all estates, legal or equitable, which pass under the will or the statute of descents, (*Estate of Hinckley*, 58 Cal. 459,) it is evident the occasion which would justify such interference can rarely occur.

There is no such exigency in this case. The plaintiffs are not executors, trustees, or *cestuis que trust*. They claim to be heirs at law, who, in case the residuary legacy is void, might succeed to some of the estate. They ask to have the question of their heirship determined, and some of the legacies pronounced void. No reason is shown why this should be determined in advance of the decree of final distribution. The expense of proceedings of this character is usually saddled upon the estate, and parties should not be permitted to incur costs merely to satisfy idle curiosity.

We think the judgment should be affirmed, and it is so ordered.

We concur: PATERSON, J.; MCKINSTRY, J.

73 Cal. 550

RIVERSIDE LAND & IRRIGATION CO. *v.* JENSEN, Ex'x, etc. (No. 11,950.)

(*Supreme Court of California.* October 7, 1887.)

1. PRACTICE—AMENDMENT OF COMPLAINT AFTER COMMENCEMENT OF TRIAL.
In an action to quiet title brought under Code Civil Proc. Cal. § 738, the plaintiff was permitted, after the commencement of the trial, to file, upon terms imposed by the court, a second amended complaint, which was substantially the same as the original. *Held* no error.

2. EASEMENT—EVIDENCE.
In an action to quiet title, the defendant claimed an easement across plaintiff's land. His claim was based upon certain quitclaim deeds made by plaintiff to defendant subsequent to the construction of the irrigating ditch for which the easement was claimed. The defendant testified that it was understood between both parties that he should have a right of way across the plaintiff's land for his ditch. Two witnesses, the president and ex-president of the corporation plaintiff, testified that plaintiff was ignorant of the existence of the ditch at the time the deeds were made, and that there was never any agreement or understanding between the par-

ties that the right of way should pass by the deeds. *Held*, that the court was justified in finding no agreement to grant defendant the right of way for his irrigating ditch.

3. APPEAL—FINDINGS IN ACCORDANCE WITH ANSWER—DEFENDANT NOT PREJUDICED. In an action to quiet title, the court found the facts concerning defendant's claim to an easement across plaintiff's land to be as alleged in defendant's answer. *Held*, that defendant could not be heard to complain of such findings.

Commissioners' decision. Department 1.

Appeal from superior court, county of San Bernardino; R. E. ARICK, Judge.

Action to quiet title, brought under Code Civil Proc. § 738. The original complaint alleges that the plaintiff, the Riverside Land & Irrigating Company, is a corporation of San Barnardino county, California; that it is the owner of certain lands comprising a part of what is known as the "Rubidoux Rancho," in which the defendant, Cornelius Jensen, claims an adverse interest, and that the defendant's claim is without right. The defendant answered. When the cause came to trial, the plaintiff asked and obtained leave to file an amendment setting forth all the facts out of which grew the defendant's claim. The plaintiff demurred to the defendant's answer, and the demurrer was sustained as to a part thereof, and overruled as to the balance. Upon the trial, certain evidence which the plaintiff attempted to introduce was excluded by the court, and leave was granted a second time to amend the complaint, upon payment of costs. The second amended complaint was substantially the same as the original.

The defendant answered, alleging that he was the owner of the right of way for a water-ditch through which he conducts water for irrigating purposes on lots 25 and 17 hereinafter described; that the land through which said ditch is constructed, until it reaches lot 25, is owned by plaintiff, and is included in the description of the land described in the complaint. Defendant further alleges that he is the owner of two-thirds of the water that flows out of Spring brook into the Santa Ana river, and which is conducted through the ditch aforesaid to and upon lots 27 and 17 for irrigating them, and that said water is necessary for that purpose. For further and seperate answer, the defendant alleges that the Rubidoux *rancho*, in San Barnardino county, California, was at one time owned by Louis Rubidoux, Sr., who had sold, granted, and conveyed to different purchasers several separate tracts of said *rancho*, as many as 20, containing in the aggregate more than 1,000 acres; that the description in each deed was exceedingly vague and indefinite; that the plaintiff, in 1876, bought of the said Rubidoux such interests that he became owner in common with defendant and another of all that portion of said *rancho* not sold in severalty by the original owner. It was then agreed between plaintiff and all these persons who had the deeds of such vague and indefinite descriptions that plaintiff should survey and plat and mark by lots the tracts of land so described, and then execute and deliver to each person a quitclaim deed of his land. The agreement was entered into to make certain and definite each owner's tract. Plaintiff made the survey and plat which is known as "Miller & Newman's Survey;" that lot 25 was of the portion allotted to the defendant; that at the time said partition was made it was understood and agreed between plaintiff and defendant that the latter should have the water out of Spring brook and Santa Ana river to irrigate lot 25; that in May, 1877, the defendant, with the knowledge and consent of the plaintiff, proceeded to construct the ditch, and diverted the water from Spring brook on plaintiff's land into the said ditch, whereby it was conducted to lot 25; that in October, 1878, defendant bought what is known as the "Baldwin Tract," described as lot 17 of the new survey, and the ditch was then extended through lot 25 to lot 17, and the water was there used with plaintiff's knowledge and consent for irrigating purposes; that in July, 1879, the

plaintiff quitclaimed to said defendant the lot 17 by that description, and that he now holds under said deed; that in March, 1877, the plaintiff conveyed to defendant lot 25 by quitclaim, but has never conveyed to him the right of way for the ditch.

The action was tried before the court without a jury. The defendant was the only witness who testified that there was any agreement, understanding, or intention on the part of the plaintiff that the right to construct the irrigating ditch should pass with the conveyance of the land; while, on the other hand, both the president and ex-president of the corporation plaintiff testified that, in all their conversations with the defendant in regard to the resurvey, platting, and partition of the land, there was never anything said that could lead the defendant to suppose they meant to give him the right to construct the ditch across the land of plaintiff, and that, as a matter of fact, no such thing was ever thought of or intended, and that at the time of making the deeds plaintiff was ignorant of the existence of the ditch.

Among other findings of fact, the court found—

"(14) That while the Rubidoux *rancho* was owned by Louis Rubidoux, Sr., he had sold, granted, and conveyed to different persons and purchasers several separate tracts of said rancho,—as many as twenty, containing in the aggregate more than one thousand acres; that the description in each and every grant to the different purchasers aforesaid was exceedingly vague and indefinite; that plaintiff, in 1876, bought of the Rubidoux *rancho* such interest that it became the owner of thirteen-fourteenths, undivided, of all that portion of said *rancho* not sold in severalty by the original owners. It was then agreed between plaintiff and all other persons who had deeds of such vague and indefinite descriptions that plaintiff would survey and plat and mark by lots the tracts of land so vaguely and indefinitely described, as nearly correct as could be done, and would then execute and deliver to each person a quitclaim deed to his land designated by lots, and that each would accept such quitclaim deed, and hold according to the description therein. This agreement was entered into to make certain and definite each man's tract. Plaintiff did make such survey and plat, which is known as 'Miller & Newman Survey.'

"Afterwards, to-wit, on the twenty-sixth day of October, 1878, the defendant bought of the administrator of the estate of William Baldwin, deceased, a tract of land on said Rubidoux *rancho*, known as the 'Baldwin Tract,' which was one of those tracts above referred to with a vague and indefinite description. That upon such purchase defendant immediately took possession of said Baldwin tract, with the knowledge and consent of plaintiff, and from that time to this has cultivated and improved it. On the Miller & Newman survey said Baldwin tract is known as lot 17; it lies below and immediately adjoining lot 25 aforesaid."

"(18) That such quitclaim deed was executed by plaintiff to defendant in pursuance of the understanding hereinbefore mentioned, and not otherwise."

Judgment was rendered for plaintiff, and the defendant appealed. The defendant having died since the appeal was taken, it is prosecuted by his executrix.

Curtis & Otis and *H. C. Rolfe*, for appellant. *Byron Waters*, for respondent.

FOOTE, C. The second amended complaint filed herein shows that the action was instituted under section 738 of the Code of Civil Procedure. The plaintiff at a certain stage in the trial, which was in progress under the first amended complaint, seems to have abandoned the effort to prove certain issues involved in the pleadings, and to have obtained leave of the court (upon conditions as to costs, etc.) to file the second amended complaint, against the objection of

the defendant. The effect of this was that the latter pleading was framed upon the theory of the original complaint filed in the action, and the cause was tried upon that basis. Judgment was rendered for the plaintiff and from that, and an order denying a new trial, the defendant prosecutes this appeal.

The latter, who is now the executrix of the last will of Cornelius Jensen, who died since this appeal was taken, alleges in support of her contention that the court erred in allowing the second amended complaint to be filed; that certain of the findings were not supported by the evidence, and were improperly made.

The gist of the action as stated in the original complaint was the same as that contained in the complaint upon which the trial was had. The amended complaint was only permitted to be filed upon terms imposed by the court, with which the plaintiff complied, and we see nothing in the action taken in the premises, under the circumstances, which worked any hardship or surprise upon the defendant. Therefore, no error was therein committed. Code Civil Proc. §§ 473–475; Hayne, New Tr. §§ 53–56; *Bank* v. *Stover*, 60 Cal. 387.

The appellant, in support of her second point, claims that the quitclaim deed of the plaintiff to her decedent, Cornelius Jensen, dated July 1, 1879, carried with it, as a servitude imposed upon the land thereby conveyed, the right to maintain a certain water-ditch thereon, and use for irrigation the waters running therein; and that the evidence does not sustain the fourteenth and eighteenth findings of the fact; further arguing that those findings were unauthorized, as outside of the issues made by the pleadings. There is nothing in the language of the deed itself which conveys any such right as is thus claimed, and the evidence is conflicting as to whether or not, at the time that deed was executed and delivered, any water-ditch existed as an easement on the land, which had been "obviously and permanently used by the person" (in this case the person being the plaintiff here) "whose estate" was "transferred for the benefit thereof, at the time when the transfer was agreed upon or completed." Civil Code, § 1104. The evidence for the plaintiff negatived the claim that Jensen, the deceased, ever constructed the ditch on its land, or appropriated its water with its consent. On the contrary, it declares that, as soon as it knew of his acts in the premises, it protested against them, and held him as a trespasser. As a consequence of this conflict in the evidence as to the existence of the water-ditch as an easement imposed as a servitude on the land quitclaimed to the defendant by the plaintiff, we cannot say that the court was not justified in making the findings to which the defendant objected, notwithstanding her contention that the evidence showed such an easement as would have impliedly passed under the quitclaim deed. Parol testimony given at the trial supports the findings objected to. The facts which the court recites therein were alleged to be true in the answer. The fourteenth finding contains almost the exact language of that pleading. The eighteenth, referring to the "understanding as hereinbefore mentioned," that is, as set out in the fourteenth finding, says that the quitclaim deed was "executed" in accordance therewith, and "not otherwise." It follows necessarily, then, that the defendant ought not to be heard to complain of those findings, because, as we have seen, the facts which they affirm to have existed were asserted in the answer; and, if the court assented to the defendant's allegations of facts, on which findings were thus invited, we cannot see how it can be said that tribunal committed prejudicial error.

The record discloses nothing which would warrant a reversal of the judgment or order, and they should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 555

In re Estate of FREUD, Deceased. (No. 9,922.)

(*Supreme Court of California.* October 7, 1887.)

WILL—ANNULLING PROBATE FOR INVALIDITY—FORM OF JUDGMENT.

Code Civil Proc. Cal. §§ 1330, 1331, provides that, if a will is found to be invalid, the probate must be annulled and revoked, and the powers of the executor cease. In a will contest, in which the jury found the will to be void for want of testamentary capacity, undue influence, fraud, and menace, judgment was rendered annulling and revoking the will as to contestant, and adjudging the contestant not bound by the will, and that she take the same share as if decedent had died intestate. *Held*, that such judgment was void, and could not be reviewed on appeal, although, by stipulation, no exception was taken to its form.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. RIORDAN, Judge.

Matt. I. Sullivan, for contestant. *Cowdery & McCutchen*, for proponent.

TEMPLE, J. This is a contest as to the probate of a will, commenced after the will had been admitted to probate, but within one year. The contest covered all the grounds expressly defined in the Code as grounds of contest. It was tried before a jury, who found for the contestant: (1) That Morris Freud, at the time of the execution of the proposed will, was not of sound and disposing mind; (2) that he was induced to sign the proposed will by means of undue influence exercised against contestant by the proponents of the will; (3) that the proposed will was procured to be signed by means of fraud or fraudulent misrepresentations, practiced upon him by proponents; and (4) that the will was signed while acting under menace by proponents.

The trial was on September 8th. November 2d following, this stipulation was filed:

"STIPULATION RESPECTING ENTRY OF JUDGMENT AND JUDGMENT ROLL.

[Title of court and cause.]

"It is stipulated that the judgment or order setting aside the last will of the said deceased as to said contestant, Sophia Alexander, may be entered as of November 17, 1884, and proponents' bill of exceptions may be served within ten days thereafter, notwithstanding the said order or judgment may not have been actually entered. It is further stipulated that the judgment roll herein shall consist of the last will of deceased, the order admitting it to probate, the amended grounds of opposition of Mrs. Alexander, proponents' answer, a copy of the verdict of the jury and judgment, and the stipulation as to form of judgment and this stipulation.

"*Dated November* 2, 1884.

"MATT. I. SULLIVAN, Attorney for Contestant.

"COWDERY & MCCUTCHEN, Attorneys for Proponents."

(Indorsed:) "Filed Nov. 2, 1884."

Afterwards the following stipulation was filed.

"STIPULATION AS TO JUDGMENT.

[Title of court and cause.]

"It is hereby stipulated that the proponents of the will of said Morris Freud, deceased, will take no exception on motion for new trial, on appeal, or otherwise, to the form of the judgment herein in favor of contestant, Sophia Alexander, nor because the said judgment sets aside the proposed will and the probate thereof, only as to the said contestant.

"*November* 17, 1884.

"COWDERY & MCCUTCHEN, Attorneys for Proponents."

(Indorsed:) "Filed November 17, 1884."

On the same day judgment was entered, by which it was adjudged that the probate of the will be annulled "as to contestant, Sophia Alexander, and that probate of said will be, and the same is, hereby annulled and revoked to the extent that said contestant, Sophia Alexander, is not bound by said will, and shall take, upon distribution of the estate of said deceased, the same share as she would have taken if the said Morris Freud had died intestate."

There can be no question as to the character of the judgment which the statute directs to be entered on such a verdict. The probate is annulled and revoked, and the powers of the executor cease. Sections 1330, 1331, Code Civil Proc. No objection is raised here to the judgment, but the record shows that it is void, and a review of it upon an appeal would be a vain thing.

The cause is remanded, with directions to vacate the unauthorized judgment, and render that required by law.

We concur: McKINSTRY, J.; PATERSON, J.

73 Cal. 558

In re Estate of CUNNINGHAM, Deceased. (No. 12,205.)

(*Supreme Court of California.* October 7, 1887.)

EXECUTORS AND ADMINISTRATORS—SALE OF LAND—PUBLICATION OF NOTICE.

Under Code Civil Proc. Cal. § 1547, directing a notice of sale of the property of a decedent to be "published in a newspaper for three weeks successively;" and section 1705, providing that, when any publication is ordered, the judge or court may order a publication for a less number of times than each issue of the paper,—a sale of decedent's property at the instance of creditors, the notice of which was published in a daily newspaper once a week for three successive weeks, pursuant to an order of the court, is valid.

Department 1. Appeal from superior court, city and county of San Francisco.

R. Percy Wright, for appellant. *Thos. F. Barry, Naphtaly, Freidenrich & Ackerman*, and *M. I. Sullivan*, for respondent.

TEMPLE, J. This is an appeal from an order confirming a sale of real property, and the ground of the appeal is that it appears from the return of sale that the notice of sale was published in a daily newspaper, once a week for three successive weeks. Section 1547, Code Civil Proc., directs that the notice shall be published in a newspaper for three weeks successively. It is contended that the notice must be published in each issue of the paper, and that on those days on which it is not so published it is not published at all, and, therefore, in such case it will not be published for or during three weeks. The phrase "three weeks successively" evidently means the same thing as "three successive weeks." It simply indicates the time during which the sale must be advertised, and not the manner of the publication, as that it shall be published *successively* during the period. The word "successively" refers to weeks, and not to the publications of the paper. It is, therefore, within the provisions of section 1705, Code Civil Proc., a case in which the judge or court may order a publication for a less number of times than each issue of the paper; that is, it is not otherwise expressly provided. In this instance such an order was made by the court.

It is claimed that section 1705 only applies to publications ordered by the court; but this is not the language of the Code. "When any publication is ordered" may as well be held to include all notices ordered by the statute. Indeed, if it is not so read, it will be found to apply to very few publications required.

And no reason is apparent why the dispensing power should exist as to the publications directed by the court, and not to those ordered in probate proceedings by the statute. Besides, all the probate proceedings are under the direction of the probate judge. The word "ordered" in the section was prob-

ably intended to have the same meaning as the word "required." The order of sale having been made, the administrator was thereby required to make the publication. The question is not whether the court can direct in what paper it shall be advertised, but whether, under section 1705, the court can dispense with the publication in each issue of the paper. In this case it is suggested that the appellant, as administrator, was contumacious, and refused to proceed with the sale, which, at the instance of creditors, had been ordered. To force obedience, an order was made directing the administrator to act, and specifically directing how he should proceed. We think the record discloses no error.

As it appears very plainly that the order must be affirmed on the merits, we have not thought it necessary to determine whether the proper record is before us. Order affirmed.

We concur: McKinstry, J.; Paterson, J.

73 Cal. 583

In re Estate of NOAH, Deceased. (No. 11,634.)

(*Supreme Court of California.* October 24, 1887.)

HUSBAND AND WIFE—SEPARATION—ALLOWANCE FROM DECEASED HUSBAND'S ESTATE.

A husband and wife, after being married six weeks, entered into a written agreement for separation; the husband giving the wife $10,500, and she agreeing to receive it in satisfaction of all marital claims, alimony, and support. They had no children. She continued to live apart from him without any effort to set aside the agreement, or demand for further support, until his death. She then applied to the court for $100 per month, under Code Civil Proc. Cal. §§ 1466, 1467, providing for the granting of a reasonable allowance for the support of the family of a decedent, during the settlement of his estate. *Held*, that she did not constitute the immediate "family" of the deceased, within the meaning of the statute, and that the allowance was properly refused.

Department No. 1. Appeal from superior court, city and county of San Francisco; J. V COFFEY, Judge.

Pillsbury & Blanding, for respondents. *Horace G. Platt*, *Wm. Loewy*, *E. N. Dempsey*, and *Gordon Blanding*, for heirs. *Henry P. Highton*, for appellant.

MCKINSTRY, J. The appellant, Harriet T. Noah, as widow of the deceased, petitioned the superior court for an allowance of $100 a month for her main-

tenance, under sections 1466 and 1467, Code Civil Proc. There was no child the issue of the marriage of petitioner and decedent.

The executors answered the petition; and at the trial testimony was given to prove that decedent and petitioner were married October 14, 1875, and, after living together five or six weeks, separated, and thenceforth lived separate and apart until his death, which occcurred on the twenty-eighth of August, 1883; that, within six weeks prior to the marriage, decedent gave to the petitioner $2,825 for her personal use, and supplied her liberally during the time they lived together; that the separation was by mutual consent of the parties; that upon the separation the petitioner for the allowance received from the decedent $10,500,—$500 of which was paid by her to an attorney at law who negotiated the settlement for her; that at the time of the marriage decedent owned certain improved real estate at the corner of Spring and California streets, San Francisco, the income from which was then about $500 a month, and had in cash about $35,000; that after the separation the decedent contributed nothing to her support, and she did not look or apply to him for her support or maintenance,—they were as utter strangers, and never spoke or corresponded; that she had expended the money paid her on the separation prior to a point of time about four years before the filing of her petition for the allowance, and during such four years she supported herself from her own earnings, with the assistance of her mother and brother. The value of the property in the hands of the executors when the petition for allowance was heard was $26,400. There was no community property of the marriage. The petitioner, although informed of the death of decedent, did not attend his funeral.

The executors introduced a written agreement for separation, whereby, in consideration of the consent of the decedent that the said Harriet T. should live separate and apart from him, and of the receipt of $10,500 by her, she agreed not to demand any alimony or support from him; that she would not contract any debts on his account; that the $10,500 should be in full satisfaction of "all her marital claims," etc.

By our law, a husband and wife may agree in writing to an immediate separation, and may make provision for the support of either of them during such separation. Civil Code, 159. Of course, the transaction is subject to the rules which control the contracts of those occupying confidential relations. Civil Code, 158.

It is said by appellant that, upon her application for an allowance, the burden was on the executors of alleging and proving the "fairness" of the contract. The answer of the executors was not demurred to by the petitioner. The answer set forth facts which, if proved, justified the court in finding the agreement to have been fair, and the evidence admitted without objection tended to establish its fairness. The precise objection that the agreement was not admissible under the averments of the answer was not made by appellant when the agreement was offered in evidence. The objection was that it was "incompetent, immaterial, and irrelevant, *on the ground* that it was not sufficient in law to vary, alter, or affect the legal rights of the petitioner, on her application, as the widow of the deceased." Moreover, the agreement, as far as it was an agreement to separate, and for her support during the separation, was fully executed during the life-time of the deceased. The husband paid the money, and never sought to compel subsequent cohabitation. The wife received the money, applied it to her support, and ever after voluntarily lived separate and apart from her husband. The order of the superior court was not based upon the agreement alone, but on the further facts that, in accordance with its terms, she ceased to live with him, and from thenceforward was not a member of his family.

In this court the appellant urges that the agreement is void because not acknowledged by her in the manner prescribed for the acknowledgment of con-

veyances of the separate property of the wife. The objection was not taken in the court below; and, when the contract was entered into, the wife had no vested interest—certainly no "separate" interest—in the separate property of the husband.

But it is said the agreement did not affect the rights of the appellant as a widow,—rights which did not accrue until after the death of Joel Noah. It is not necessary here to decide that appellant, by entering into the agreement, waived or released any of her rights as *heir* of Joel Noah, deceased. We do not think she was absolutely entitled, as of right, to an allowance during the administration of his estate.

It was held in Massachusetts that while an antenuptial agreement between the widow and deceased, whereby she covenanted to accept a certain settlement in lieu of dower, and in place of any and every claim against his estate, would, if performed, be effectual as a release of dower, it was no answer to her claim for a distributive share of personal estate left by her husband. *Sullings* v. *Richmond*, 5 Allen, 187. And that such an agreement was of itself no defense to a petition for an allowance for necessaries. *Blackinton* v. *Blackinton*, 110 Mass. 461. See, also, *Wentworth* v. *Wentworth*, 69 Me. 254. The decisions seem to be based on the limited and inferior jurisdiction of the probate courts in Massachusetts, which had no power to construe or enforce marriage contracts. *Sullings* v. *Richmond*, *supra*. The contracts in the cases referred to—which preceded the marriage, and contemplated its continuation until the death of one of the parties—in no way operated to disturb the harmony of their personal relations, and they continued to live as husband and wife until the decease of the husband. In none of the cases was there any question that the surviving wife, or wife and children, constituted the family of the deceased at the time of his death.

It was held in New York that an antenuptial contract such as above mentioned, precluded the widow from demanding certain articles of personal property directed by statute to be set apart to her. *Young* v. *Hicks*, 92 N. Y. 235.

Section 1465 of the California Code of Civil Procedure provides that, upon the return of the inventory of an estate, the court wherein the administration is pending may set aside for the use of the surviving wife, or wife and children, the property exempt from execution. And section 1466 provides that if the amount set apart be insufficient for the support of the widow, or widow and children, the court, or the judge thereof, "must make such reasonable allowance out of the estate as may be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate."

By statute of Maine it was enacted: "When an estate is insolvent, or no provision is made for the widow in the will of the husband, the widow *shall be entitled* to so much of the personal estate * * * as the judge deems necessary, according to the degree and estate of her husband, and the state of her family under her care." *Gilman* v. *Gilman*, 53 Me. 191. In *Kersey* v. *Bailey*, 52 Me. 201, the court said the original intention of the statutes of Maine, giving the power to the probate court to set aside property to her, was to furnish a temporary supply for the wants of the widow and family while the estate was in process of settlement. And the learned court also said: "From the tenor of the statute [in this respect like the provision of our Code authorizing an allowance] directing the attention of the judge to the estate and condition of the husband, and the state of the family under the widow's charge, it is apparent that the legislature, in making the provision, was contemplating the ordinary case where the parties to the marriage relation have lived together till death severed the tie." In that case the widow, though the legal wife of the deceased, had not lived or cohabited with him as such for more than 40 years. He had *deserted* her;

but she, supposing him to be dead, married another man, with whom she lived as his wife until the death of her real husband. She lost nothing by his death which she had before possessed, and there seemed to have been a tacit relinquishment by each of all claims upon the other for a long period of time. The court concluded she was not entitled to have any part of the estate set aside to her under the statute. The same court had previously held the widow's claim for an allowance was not an absolute right; that the order was in the discretion of the probate judge *Murray* v. *Cargill*, 32 Me. 516.

Section 122 of the former probate act of this state reads: "The probate court or judge shall make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to the circumstances," etc. In *Estate of H. H. Byrne*, the learned judge of the probate court of San Francisco (afterwards one of the justices of this court) said that the right to an allowance, under the section of the statute quoted, was founded on the statute alone. "It is quite different from the right of the heir to inherit, or of the widow to her dower, or the right to one-half of the community property. It is an allowance made to *the family*. * * * I think that the statute was intended to embrace those who were the immediate family of the deceased; those who were by law entitled, up to his death, to look to him for support and protection. * * * Yet any person to be entitled to any allowance out of the estate must have been in the receipt or in law entitled to demand of deceased a maintenance before his death." *Estate of Byrne*, Myr. Prob. 1.

We concur in this view of the law. We also think that, in enacting section 1466 of the Code of Civil Procedure, the legislature had in contemplation the ordinary case where "the parties to the marriage relation live together until death severs the tie." The letter of the statute may cover other cases. We are not to be understood as saying that, in every instance where the husband and wife have separated, the widow should be denied an allowance. She may have been driven from her home by the cruelty of her husband, and in such case the superior court may, perhaps, make an allowance, although the widow made no effort during the life-time of deceased to reassume matrimonial relations with him. It is enough to say that—since the appellant voluntarily made an agreement with her husband for separation, such as our law authorizes, received and enjoyed the benefits of the money paid for her support during the separation, and voluntarily continued to live apart from him, without any attempt to set aside the agreement, or to assume again the matrimonial connection, or even to demand further means for her separate support—the court below was justified in holding that the petitioner did not constitute the immediate family of the deceased, to whom was to be continued during the settlement of the estate the "reasonable support" which the husband in ordinary cases is presumed to furnish his wife. Order affirmed.

We concur: TEMPLE, J.; PATERSON, J.

73 Cal. 590

In re Estate of NOAH, Deceased. (No. 11,635.)

(*Supreme Court of California.* October 25, 1887.)

1. HOMESTEAD—SETTING APART BY COURT—BUSINESS PROPERTY.

M. died, making no provision in his will for his widow, leaving no community property, and a four-story brick business block, valued at $25,000, his only separate real property. This could not be divided without material loss. No homestead was set apart during the husband's life-time. The widow applied to the court to set one apart, under Code Civil Proc. Cal. § 1465, providing that the court shall set apart a homestead, none having been selected during the life-time of deceased, out of his real estate. *Held*, as the property in question was of such nature that it could not have been selected as a homestead during the life-time of deceased, the petition was properly denied.

2. SAME—MONEY IN LIEU OF.
Where there has been no selection of a homestead during the life of deceased, the court cannot substitute money therefor, under Code Civil Proc. Cal. § 1476, providing for the sale of a selected homestead by the court, and a distribution of $5,000 to the widow.

3. SAME.
Under Code Civil Proc. Cal. § 1468, providing for the setting apart of a homestead, out of the separate property of the deceased, for a limited period, the court has no power, in case such property is not capable of proper division, to substitute therefor the payment of $5,000 to the widow.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Pillsbury & Blanding, for respondents. *Horace G. Platt, Wm. Loewy, E. N. Dempsey*, and *Gordon Blanding*, for heirs. *Henry E. Highton*, for appellant.

MCKINSTRY, J. Deceased left a will wherein no provision was made for his widow, Harriet T. Noah, the appellant. The will was duly probated September 28, 1883; and on the sixth day of August, 1884, appellant petitioned the superior court for an order setting apart a homestead out of the real property of the estate, "or for such other or different order as may be just and proper in the premises." There was no community property, and the only separate real property of the deceased at the time of his death was a certain lot in San Francisco, covered entirely or partially by a brick building four stories high, and which was and had been used exclusively for business purposes. The answer of the executors to the petition of the widow, beside the facts above mentioned, set forth the matters averred in the answer to the application of the widow for an allowance, as contained in the transcript in *Re Estate of Noah*, (No. 11,634,) *ante*, 287. It is averred in the petition for *homestead* that the property above described "cannot be divided without material injury."

In the view we take, it is unnecessary to inquire what might have been the legal effect of the post-nuptial contract given in evidence had there been any property out of which a homestead could have been carved, or whether the court below erred in overruling the objection to the introduction of that contract in evidence.

Appellant contends the order of the court below refusing to set apart a homestead should be reversed, because the court did not find upon the issues made by the pleadings. But, if the findings were proper, the bill of exceptions fails to show that they were not waived.

Section 1465, Code Civil Proc., provides, if no homestead (as was the case here) has been selected, designated, and recorded during the life-time of the deceased, "the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife, and the minor children, * * * out of the common property, or, if there be no common property, then out of the real estate belonging to the deceased." The sections of the Code relating to homesteads to be set apart by the court—probate homesteads—do not define the word "homestead."

It may be conceded that the real property set apart as a homestead to the surviving husband or wife, by order of the court, need not be actually occupied at the time when the order is made; but it would seem that it must be property which could have been selected as a homestead during the continuance of the marriage. Mr. Justice RHODES, speaking for the supreme court, said that there was nothing in the homestead act, as it existed in 1866, "which tended to the conclusion that any property could be set apart as a homestead by the probate court which might not have been dedicated as a homestead under the homestead act immediately preceding the death of the deceased." *Kingsley* v. *Kingsley*, 39 Cal. 666. So far as they bear upon the question we

are considering, we find no substantial variance between the provisions of the Codes and those of the homestead act referred to in *Kingsley* v. *Kingsley*.

It would be doing violence to the plain intent of the statute to attempt to set apart as a homestead a lot and four-story brick building, of the value of $25,000, the building having been erected and occupied exclusively for business purposes, when, as averred in the petition here, "the property could not be divided without material injury." The homestead consists of a dwelling-house on which the claimant resides, and the land on which the same is situated. Civil Code, 1237. The property spoken of in the petition was dedicated to business purposes, and the owner could not have converted an undivided portion of it into a homestead by living in some of the rooms, and filing a declaration.

The probate court may, in a proper case, set apart a homestead, the value whereof—that is, the value of the land and dwelling-house—does not exceed $5,000. The law does not authorize the court to set apart $5,000 worth of property, or $5,000 worth of land on which a dwelling-house may subsequently be erected. This is the more apparent with reference to setting apart as a homestead, for the use of the survivor, separate real property of the deceased "for a limited period." Code Civil Proc. 1468. The superior court would be justified in refusing to set apart land as a homestead unless it were made to appear that there was thereon an edifice which could be used as a dwelling-house. Where the survivor seeks to have set apart a portion of a large building, "and the land on which the same is situated," it should, at least, be made to appear affirmatively that partition of the land and building was practicable. Here, it only appeared to the court below that the property was the separate property of the deceased; that it was of the value of $25,000; that the building was of brick, four stories high: that it had been rented to divers persons, who carried on various kinds of business therein; and that the property could not be divided without material injury.

It is urged by appellant that the court below should have ordered the land and improvements sold, and that $5,000 of the proceeds be paid to her in lieu of a homestead. It is difficult to see why, if she was not entitled to a homestead, she should have money as a substitute for a homestead. But there is no provision of the Codes which authorizes such an order, and by strong implication such an order is prohibited. When a homestead, selected in the life-time of the deceased, is inventoried at more than $5,000, and a homestead of $5,000 cannot be carved out of it, the court may order a sale of the homestead as selected, and distribute to the surviving wife $5,000 of the proceeds. Code Civil Proc. 1476. Here, no homestead was selected during the life-time of the decedent. Moreover, the appellant sought to have set apart to her a homestead out of the *separate property* of deceased. In such cases the court can only set apart a homestead "for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order." Code Civil Proc. 1468. How was the court to estimate the cash value of the use as a homestead, for a period never fixed by order, of part of property, undivided and inseparable? There certainly is no statutory provision authorizing the court to substitute $5,000 in money for the temporary use of property as a homestead. Order affirmed.

We concur: TEMPLE, J.; PATERSON, J.

73 Cal. 580

PEOPLE v. TRAVERS. (No. 20,329.)

(*Supreme Court of California.* October 8, 1887.)

1. BURGLARY—DEGREE OF CRIME—VERDICT.
An information charged defendant with an attempt to commit burglary, but did not state the time the attempt was committed, nor specify the degree of the crime. The verdict was "guilty as charged." Pen. Code Cal. § 460, provides that "every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the day-time is burglary of the second degree." *Held*, that the verdict should have stated the degree of the crime, under Pen. Code, § 1157, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

2. SAME—REVERSAL—JEOPARDY.
The reversal of a judgment in a criminal case on the ground that the verdict failed to state the degree of the crime, as required by Pen. Code Cal. § 1157, is not sufficient to warrant the court to order the discharge of the accused under Const. Cal. § 8, art. 1, which provides that "no person shall be twice put in jeopardy for the same offense."[1]

In bank. Appeal from superior court of the city and county of San Francisco; JOHN HUNT, Judge.

Frederick McGregor and *Garrel W. McEnerney*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. The defendant was charged in the information with an attempt to commit burglary; whether in the night-time or day-time is not stated. The degree is not specified in the information. The defendant pleaded "not guilty." A trial was had, the jury rendered a verdict of "guilty as charged," and the court sentenced the defendant to imprisonment at San Quentin for the term of two years. The defendant appealed from the judgment, and his contention is that the verdict is a nullity by reason of the omission to specify the degree of crime of which the jury found the defendant guilty.

Burglary is divided into two degrees: "Every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the day-time is burglary of the second degree." Pen. Code, 460. "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Id. 1157. Prior to the adoption of the Code the statute provided that "the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree." Wood, Dig. 331. The Code has extended this provision to all crimes "distinguished into degrees." Therefore the construction given to the clause of the statute as it existed before the Code, in murder cases, may guide us in construing it in its broader application.

In *People* v. *Marquis*, 15 Cal. 38, the defendant was indicted for murder. The verdict of the jury was, "guilty as charged in the indictment." The judgment was reversed. The court said: "The statute [Wood, Dig. 331] provides that the jury shall designate in their verdict the degree of the offense. This they have not done; and the court in a capital case cannot assume that they designed from a general finding to fix the grade of the crime." The judgment was reversed and the cause remanded for a new trial. In *People* v. *Campbell*, 40 Cal. 129, the court reversed the judgment because the verdict did not designate the degree of the crime. Under a similar statute the su-

[1] Neither the plea of jeopardy nor former acquittal can be interposed by an accused at a subsequent trial, upon a showing that his conviction on his former trial was set aside because of an illegal verdict, Robinson v. State, (Tex.) 4 S. W. Rep. 904, and note; and a conviction upon a void proceeding or indictment, when the penalty has not been inflicted, does not operate as a bar to a subsequent indictment for the same offense, U. S. v. Jones, 31 Fed. Rep. 725.

preme court of Alabama held it to be error to pass sentence upon a verdict which did not specify the degree of murder of which the jury found the defendant guilty. The court said that the statute which required the jury to specify the degree was imperative, and that it was the right of the accused to have it complied with. *Robertson* v. *State*, 42 Ala. 509. To the same effect are the cases of *McGee* v. *State*, 8 Mo. 595; *Dick* v. *State*, 3 Ohio St. 89, and *Parks* v. *State*, Id. 101. We are unable to find any case in which the contrary has been held. Since the adoption of the Code this court held it to be error, under section 1192, Pen. Code, to sentence a defendant, upon a plea of guilty to a charge of burglary, without first determining the degree. *People* v. *Jefferson*, 52 Cal. 452.

It therefore follows that the judgment must be reversed. And here the question arises, what further order should be made? Appellant's counsel insists that we should order the discharge of the defendant under that clause of the constitution which declares that "no person shall be twice put in jeopardy for the same offense." Section 8, art. 1, Const. In none of the cases which we have followed thus far was there an order that the defendant be discharged from custody, but in each of them there was an order that the cause be remanded for a new trial. Since we reverse the judgment on the authority of those cases, we deem it proper to make the same orders which were made in them.

Judgment reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; TEMPLE, J.; MCFARLAND, J.

73 Cal. 574

PEOPLE *ex rel.* DUNN *v.* MELONE. (No. 20,313.)

(*Supreme Court of California.* October 8, 1887.)

1. LIMITATION OF ACTIONS—RUNNING OF STATUTE AGAINST STATE.

Code Civil Proc. Cal. § 345, provides that the limitations prescribed in chapter 3 "apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." An action was brought in the name of the state against a defaulting secretary of state. *Held*, that there was no presumption that the state was not barred in such an action; but the statute of limitations applied to the state without being made expressly applicable to such case.

2. SECRETARY OF STATE—LIABILITY FOR FAILING TO ACCOUNT—COMPTROLLER'S ACCOUNT AS EVIDENCE.

Pol. Code Cal. § 437, provides that "whenever any person has received moneys belonging to, or held in trust for, the state, and fails to render an account thereof, and to make settlement with the comptroller within the time prescribed by law, * * * or who fails to pay into the state treasury any money belonging to the state, upon being required so to do by the comptroller, within 20 days after such requisition, the comptroller must state an account with such person, charging 25 per cent. damages, and interest * * * from the time of failure. A copy of such account in any suit therein is *prima facie* evidence of the things therein stated." *Held*, that this section applied to an action brought by the comptroller against an ex-secretary of state for fees received and not paid into the treasury by the latter.

3. SAME—LIMITATION OF ACTION.

Held, further, that the word "whenever," beginning said section, should not be construed to mean "at whatever time moneys have been received," so that no limitation would apply to the action authorized by this section.

4. SAME.

A secretary of state was sued by the state comptroller for fees received and not accounted for by the former. Pol. Code Cal. § 437, provides that where any person fails to pay into the state treasury any money belonging to the state upon being required so to do by the comptroller, within 20 days after such requisition, the comptroller must state an account with such person, etc. *Held*, that the liability of the secretary accrued at the time he was in default, and not when the comptroller made demand for the deficit, and stated an account; and the statute of limitations began to run from the former period. THORNTON, J., dissenting.

In bank. Appeal from superior court, city and county of Sacramento; W. C. VAN FLEET, Judge.

Langhorn & Miller, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

TEMPLE, J. Respondent was secretary of state for the term of four years, ending December, 1875. It was his duty as such officer to collect and pay over to the state monthly the fees received by him. On the first of July, 1886, the relator, as comptroller, demanded of him that he account for, and pay into the state treasury, the sum of $11,109.50, alleged to have been received by him while in office, but for which it was claimed he had failed to account, or make settlement with the comptroller, as required by law. Respondent taking no notice of this demand, the comptroller proceeded to state an account under the provisions of section 437, Pol. Code. The account so stated was served upon respondent, who still failed to make any response, or to pay any portion of the amount claimed from him. This suit was commenced August 14, 1886. A demurrer was interposed on the ground that the claim was barred by the statute of limitations. The demurrer was sustained, and judgment entered against the plaintiff, who takes this appeal.

Our statute of limitations is divided into two chapters,—one treating of actions for the recovery of real property; the other of actions other than for the recovery of real property. Section 345, Code Civil Proc., is in this last-mentioned chapter, and is as follows: "The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." In the case of *Piller* v. *Railroad Co.*, 52 Cal. 42, it was held that subdivision 1, § 339, Code Civil Proc., is applicable to all actions at law not specially mentioned in other portions of the statute. The effect of this must be that all actions at law other than for the recovery of real property are barred by some provision of chapter 3, Code Civil Proc., unless, of course, expressly excepted from its operation by that or some other statute. There can be nothing in the suggestion that the same kind of action as this is cannot be prosecuted by a private party, and, therefore, under section 345, the limitation cannot apply. There is no such requirement in that section. The limitation is to apply in the same manner. Therefore, if we find that the action brought by the state is within the terms of the statute, interpreted by precisely the same rules which would be applicable if the suit were brought by a private party, the action is barred. Under this rule there can be no doubt that the statute is applicable.

It is claimed, however, that the action is founded on section 437, Pol. Code, and by the terms of that section that (1) the statute of limitations does not apply; and (2) the cause of action does not accrue until the account is stated, and demand made as provided in that section. The portions of section 437, Pol. Code, so far as material here, are as follows: "Whenever any person has received moneys belonging to, or held in trust for, the state, and fails to render an account thereof, and to make settlement with the comptroller within the time prescribed by law, * * * or who fails to pay into the state treasury any money belonging to the state, upon being required so to do by the comptroller, within twenty days after such requisition, the comptroller must state an account with such person, charging 25 per cent. damages and interest * * * from the time of failure. A copy of such account in any suit therein is *prima facie* evidence of the things therein stated."

In reply to this position on the part of the state it is contended: (1) The section 437, Pol. Code, does not apply. It is not averred that respondent did not make monthly settlements, as the law required him to do, during his term of office. If his accounts rendered were false, his case does not fall within this statute; (2) the statute gives no right of action, but only prescribes the procedure, and a rule of evidence; and (3) if no right of action

accrues until an account is stated, and demand made, then it had become a stale demand, and, no account being stated within a reasonable time, plaintiff's right of action, and right to make a demand, became barred.

The claim that by the terms of section 437, Pol. Code, no limitation applies to the action authorized by it, is made to depend principally upon the use of the word "whenever." "Whenever any person has received moneys," etc., counsel contends means, "At whatever time moneys have been received." A simple reference to the language of the section will show that this is a forced and unnatural construction. There is a general requirement that those who receive money shall account. The word "whenever" here simply means the same as "if," *i. e.*, in those cases in which parties receiving money do not account, etc.

The next question in logical sequence is the contention of respondent that section 437, Pol. Code, does not apply to this case. Here, too, it seems that a simple reference to the language of the section is sufficient to dispel all doubt. The proceeding is not authorized against those who render no accounts, and make no settlement, but against those who have received money, and render no accounts *thereof;* and also against those who fail to pay into the treasury moneys belonging to the state, upon being required so to do by the comptroller. The complaint shows that while secretary of state respondent received $11,109.50 as fees, which he has never accounted for, and that he has failed to pay the same, or any portion thereof, into the state treasury, although he had been required by the state comptroller so to do.

The next inquiry naturally is whether a right of action accrued against the respondent upon demand being made upon him under the provisions of section 437, Pol. Code. In addition to that section, it is provided in section 433 of the same Code, that the comptroller may institute suits against persons who, by any means, have become possessed of public money, and who fail to pay over the same, and that of such suits the courts of Sacramento county shall have jurisdiction, without regard to the residence of the defendants. It was conceded, on the oral argument for the plaintiff, that some sort of an action might have been brought on behalf of the state for the alleged default, without proceeding under section 437. This is a weighty concession on the part of the state. Much the strongest position would have been, if on other grounds it were tenable, that the remedy provided in section 437 is exclusive. But under the circumstances, I presume the learned counsel for the people did not deem that position open to him. It is true that when a demand is necessary in order to fix the liability, and put the party in default, the cause of action does not accrue, and the statute does not commence to run until demand has been made. But can it be said that there is not a fixed liability where there is a dereliction which may amount to a criminal default, and for which, perhaps, the defendant might have been at once prosecuted and convicted? The defendant was required, as secretary of state, to account and pay over monthly, during his term, all moneys which should come to his possession. Can it be possible that he has failed to do this, and has retired from office a defaulter in a large amount, and yet has incurred no liability? Of course it was competent for the state to have removed the limitation altogether, but the question is, has it done so? There is certainly no plain provision in the statute to that end. There is nothing to indicate such an intent. It creates no right of action where one did not exist before. It has not, according to the construction given, substituted the new remedy for the old. It merely provides that in case of a defalcation an account may be stated, which shall cast the burden of proof on the officer alleged to be in default, and impose a penalty. There is nothing in the suggestion that the presumption is that the state is not barred, and therefore the statute of limitations must be construed, if possible, so as not to apply to the state. The rule merely amounts to this: The limitation does not apply to the state unless expressly made ap-

plicable. There is very little room for the operation of such a presumption here, where our Code expressly provides that the limitations shall apply to the state in the same manner as to private parties.

I think the judgment should be affirmed, and it is so ordered.

We concur: SEARLS, C. J.; PATERSON, J.; MCFARLAND, J.; MCKINSTRY, J.; SHARPSTEIN, J.

THORNTON, J. I dissent. The examination of the law bearing on this case, which is comprised in the statutes, (I refer to part 3, tit. 1, c. 3, arts. 5–7, Pol. Code, relating to the secretary of state, comptroller, and treasurer,) shows, in my judgment, that the failure by the secretary of state to render an account, and make settlement, or his failure to pay into the state treasury any moneys belonging to the state, upon being required to do so by the comptroller within 20 days after such requisition, so far as regards moneys which he has never inserted in any account rendered by him, is, under section 437 of the Political Code, an additional breach of his duty under the law, for which he is responsible. On such failure by the officer within the 20 days above mentioned, it is made the duty of the comptroller to state an account with such officer, charging him with 25 per cent. damages, and interest at the rate of 10 per cent. per annum from the time of the failure. On this account so stated an action may be brought, and on the trial of this action a copy of the account is, by section 437, *supra*, made *prima facie* evidence of the things therein stated.

The statute of limitations did not commence to run in this case earlier than the failure of the secretary of state to account, say at the end of the period of 20 days above mentioned. In this case the requisition of the comptroller was made on or about the first of July, 1886, and the action was commenced on the fourteenth of August, 1886. The action was, then, commenced within 30 days after the end of the 20 days. If it is urged that the defendant was already in default long before the demand by the comptroller was made, upon which default the statute of limitations had run, the reply is that Melone held his office under the law (section 437, Pol. Code) which made his failure to account or pay over a new or additional breach for which he was responsible. That the legislature was competent to enact such a law there can be no doubt. Melone took and held office with this power in the legislature. It was competent for the legislature to impose new and additional duties.

I am of opinion that the judgment should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer to the complaint.

73 Cal. 594

In re Estate of SCHEDEL, Deceased. (No. 11,533.)

(*Supreme Court of California.* October 24, 1887.)

WILL—BEQUESTS TO "CHILDREN"—GRANDCHILDREN.

S. died April 22, 1878, having executed a will April 9th. He bequeathed $2,000 to each of the children of his deceased sister, when he or she should arrive at majority or his brother should die. If either of the children should die before his brother, leaving lawful issue, such issue to receive the parent's share. The sister of S. had died 42 years, and the last of her children 7 years, before the making of the will, which was known to the testator. There were four minor grandchildren of the sister of S. living at the time of the making of the will. *Held*, that the word "children," as used by testator in referring to the issue of his deceased sister, should be construed to mean "grandchildren."

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco county; J. V. COFFEY, Judge.

S. W. Holladay, for respondents. *Matt. J. Sullivan*, for legatees.

BELCHER, C. C. George Schedel duly executed his last will on the ninth day of April, 1878, and died on the twenty-second day of the same month. In the will he uses the following language: "I hereby direct my said executors to

pay to my said brother, Claus Schedel, all the net interest, income, and revenue, of all and singular my estate and the property left by me, during the term of his natural life, to be paid to him by my said executors monthly. On the death of my said brother, Claus Schedel, I give and bequeath—*First*, to each of the children of my said brother, Claus Schedel, the sum of two thousand dollars, gold coin; and to each of the children of my deceased sister, Elizabeth Rosenbohm, *nee* Schedel, late of Loven, near Boemerlehe, Germany, the sum of $2,000, gold coin; and to be paid to them when he, she, or they shall have arrived at the age of majority, or as soon thereafter as my said brother, Claus Schedel, should die; and if either of the children of my said brother or sister shall have died before the death of my said brother, Claus Schedel, leaving lawful issue, such issue to receive the parent's share." The residue of the estate was given to certain charitable or benevolent societies, but the bequests failed, because the testator died within 30 days after executing his will. The testator was never married, and his parents both died before he did. Claus Schedel died on the second day of February, 1885, and left surviving him two sons and a daughter, and one grandchild, the son of a daughter who died in 1874. The sons and daughter were past the age of majority when the will was executed, but the grandchild was then under age. The sister, Elizabeth Rosenbohm, died in March, 1836, and the testator knew when he made his will that she died in that year. She left surviving her one daughter and two sons, named John and George Rosenbohm. The daughter died in 1845, at the age of 13, without issue. John married, and had one son, named John George. John died in San Francisco in December, 1869, and the testator knew of his death and attended his funeral. John George died in San Francisco in October, 1870. George Rosenbohm, the other son of Elizabeth, married in New Orleans, and died there in February, 1871. He left surviving him four children, the issue of his marriage, named respectively, Henry, Andrew, Amelia, and Johanna Rosenbohm, all of whom were minors when the testator's will was executed, but are now of age and living.

When the estate was ready for distribution the above-named grandchildren of the testator's sister, Elizabeth, claimed that they were entitled, under the will, to have $2,000 distributed to each one of them. The court thought otherwise, and distributed to each one of them only $509, or in the aggregate $2,000. They appealed from the decree, and now insist that the word "children" as used in that clause of the will reading, "to each of the children of my deceased sister," etc., should be construed to mean "grandchildren."

It has been held that grandchildren, and even great-grandchildren, may sometimes take under a will giving bequests to "children." Chancellor WALWORTH states the law upon this subject as follows: "As a general rule the testator must be presumed to have used words in their ordinary or primary sense, unless it appears from the context of the will that he probably used them in some other sense; or unless, by reference to extrinsic circumstances, the use of the words in their primary sense would render the provision of the will insensible or inoperative. Wigram, Wills, 20. The word 'children,' in common parlance, does not include grandchildren, or any others than the immediate descendants in the first degree of the person named as ancestor. But it may include them where it appears there were no persons in existence who would answer to the description of children in the ordinary sense of the word at the time of making the will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of the other words, that he used the word 'children' as synonymous with 'descendants,' or 'issue,' or to designate or include illegitimate offspring, grandchildren, or step-children." *Mowatt* v. *Carow*, 7 Paige, 339.

Judge Redfield also states the rule as follows: "The word 'children,' as well as all other similar descriptive terms of classes or relatives, it will be

borne in mind, must always be understood in wills in its primary and simple signification, where it can be done; in short, where there are any persons in existence at the date of the will, or before the devise or legacy takes effect, answering the meaning of the term. And where the term 'children' has received a larger and more extended construction, as synonymous with 'issue,' it has generally been based upon something in the will, unless it resulted, as already intimated, from the fact that there were no children in existence. And where, from the construction of the whole clause, it can be made to appear that the testator meant by 'children' to include children and the issue of such children as were deceased, that construction will be adopted. Hence the term 'children' has been held to include, in that way, all the descendants of the person named. And there are numerous American cases wherein it has been held that grandchildren and great-grandchildren will take under a bequest to children, whenever that is necessary in order to give effect to the words of the will, or that appears to have been the evident intention of the testator." Redf. Wills, pt. 11, p. 336; see, also, 1 Roper & W.'s Leg. 68.

What did the testator in this case mean by the words, "children of my deceased sister?" His sister died 42 years, and the last of her sons 7 years, before he made his will. There were at that time, then, no persons in existence who were children of his sister in the ordinary sense of that word, and could be none when the legacies would take effect. He also made the legacies payable to the children of his sister "when he, she, or they shall have arrived at the age of majority." But he knew that his sister died in 1836, and must have known, therefore, that her children, if living, could not be under the age of majority in 1878. It is suggested by counsel for respondent that the requirement that these legacies be paid when the legatees "shall have arrived at the age of majority" is obviously misplaced by inadvertence; that it should have come in at the *end* of the paragraph quoted. But we are unable to see that there was any obvious misplacement. Courts construe wills as they are written, and are not authorized to transpose their provisions, and thereby change their meaning and import.

The will also provides that if either of the sister's children "shall have died before the death of my said brother, Claus Schedel, leaving lawful issue," such issue should receive the parent's share. The words, "shall have died" import a death occurring after the date of the will. But the testator knew of the death of one of his sister's sons in 1869, for he attended his funeral, and must be presumed to have known, seven years after it occurred, of the death of the other one. Taking, then, the whole will, and looking at all of its provisions in the light of the well-settled rules of law, it seems to us that the word "children," as used by the testator in describing the issue of his deceased sister, should be construed to mean "grandchildren."

It follows that the decree of distribution should be reversed, and the cause remanded for further proceedings in accordance with this opinion.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT: For the reasons given in the foregoing opinion the decree of distribution is reversed, and cause remanded for further proceedings in accordance with the views expressed therein.

73 Cal. 617

ENGLISH *v.* KORN and others. (No. 9,861.)

(*Supreme Court of California.* October 29, 1887.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is so conflicting that the appellate court cannot deny the sufficiency of the evidence to support the findings of the court below, the judgment will be affirmed.

Commissioners' decision. Department 2.

Appeal from superior court, Solano county; JOHN M. GREGORY, Judge.

J. F. Wendell, for appellant. *J. McKenna* and *Geo. A. Lamont*, for respondent.

FOOTE, C. This is an action of ejectment for a narrow strip of land which the plaintiff claimed as against eight different defendants, who he alleged each held possession of a separate portion of it. It seems that the main question at issue with reference to the legal title involved in the action was as to where the division line between the parties actually existed upon the ground. And this depended upon the evidence introduced upon the trial. There was a very sharp and decided conflict of testimony as to that matter, and therefore it is not to be said the findings of the court in reference thereto are not supported by the evidence. And so appears to be the case with reference to the fact stated in the findings as to the defense of the statute of limitations. We have examined the very voluminous transcript filed here with care, and fail to find any prejudicial error committed by the court on the trial of the cause. The judgment and order refusing a new trial should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

73 Cal. 641

BYRNE *v.* CRAFTS. (No. 11,793.)

(*Supreme Court of California.* October 31, 1887.)

IRRIGATION—WASTE WATER—RES ADJUDICATA.

In a former proceeding plaintiff and others had been adjudicated to be the owners of the waste water of defendant's ranch, which was defined to be "that portion of said waters which is not necessary to irrigate the * * * ranch and for household purposes thereon." In an action by plaintiff to restrain defendants from interfering with his use of the water in question, *held*, under the former decision, the defendants were entitled to use the water only on their ranch, and only so much as was necessary for the immediate purposes clearly defined in the adjudication, and testimony tending to show how much water was required by defendants for those purposes, and how much had been diverted to other uses, should have been admitted.

Department 1. Appeal from superior court, San Bernardino county; JAMES H. GIBSON, Judge.

Byron Waters and *H. M. Willis*, (*W. G. Webb*, of counsel,) for appellant. *Curtis & Otis*, for respondent.

PATERSON, J. In *Cave* v. *Crafts*, (affirmed 53 Cal. 135,) it was adjudicated "that that portion of the said waters which is not necessary to irrigate the Carpenter ranch, and which is known as the waste water of the Carpenter ranch, and for household purposes thereon, had, for more than five years prior to the commencement of this suit, been used and appropriated by defendant Leffingwell and Byrne, and their grantors, adversely to and against the owners of the lands of Cottonwood Row, and so used by them to irrigate, and for agricultural purposes, and for domestic uses; that the irrigation, cultivation,

and profitable ownership of said orchards, farms, and vineyards of these plaintiffs solely and entirely depend upon these plaintiffs having and enjoying the full and entire use of the flow of said water according to their ownership, flowing without interference, hinderance or diminution thereof from any person; that plaintiffs are the owners of all the waters of Mill creek, and are entitled to have the same flowing in said *zanja*, to and upon their respective lands, and to use the same for the purpose of irrigating their respective parcels of land; that defendants are the owners of the waste water of the Carpenter ranch or place, and to use the same upon other places to irrigate the same."

The judgment roll in that cause was introduced in evidence in the court below on the trial of this action, and the construction placed upon the findings which we have quoted by the court is shown in its twenty-fourth finding of fact, which is as follows: "(24) That neither one-third nor any fixed portion of the water of said Mill creek constitutes the waste water of the said Carpenter ranch, but said waste water consists entirely of such water, if any, as may be allowed by the owners of said Carpenter ranch to flow past their said land when entitled to use the same, and which said owners may not care to use for any purpose thereupon."

The rulings of the court upon the testimony offered also show that the contention of counsel for defendants was sustained. That contention is thus stated by them: "The decree practically allowed to them a certain amount of water in absolute ownership to-wit, the amount that was necessary at the time of the decree for the irrigation of the Carpenter ranch. It decreed them the amount of water absolutely, and irrespective of any point of user of the same. If they had chosen to use no portion of it upon the Carpenter ranch, and to use it upon outside lands, not included within the boundaries of the Carpenter ranch, so long as they did not exceed the amount of water awarded them, we submit that plaintiff can make no complaint."

The court excluded testimony tending to show that the defendants had used water upon land other than the Carpenter ranch. We do not think that the waste water referred to in the findings quoted above "consists entirely of such water, if any, as *may be allowed* by the owners of said Carpenter ranch to flow past their land when entitled to use the same, and which said owners *may not care to use for any purpose* thereupon."

The decision of the court in the former case defines waste water to be "that portion of said waters which is not necessary to irrigate the Carpenter ranch, and for household purposes thereon;" and the judgment awarded to them in that case the use of the water "for the purpose of irrigating their respective parcels of land at the times respectively distributed to them, as aforesaid, * * * and so much of said water as may be necessary for household purposes and watering stock on their respective places." It is nowhere said in the decision or in the judgment in that case that the waste water was such as might be allowed by the plaintiffs to flow past their land, and which the owners *might not care* to use *for any purpose* thereupon. If the construction placed upon the decision of the court in the former case by the court below be correct, then the defendants here could lock up the water in lakes and ditches, and use the same for boating and fishing or any other purpose. It is clear that, under the adjudication made in *Cave* v. *Crafts*, the defendants are entitled to use the water only upon the Carpenter ranch. The quantity of water reasonable and necessary for the purposes of that ranch were matters of legitimate inquiry in the court below on the trial of this cause, and testimony tending to show how much water was required for, and how much was diverted from the Carpenter ranch, should have been admitted.

One of the objects of this suit was to enjoin the defendants from interfering with plaintiff's water rights. It is immaterial, so far as this branch of the case is concerned, that the plaintiff asked for a decree entitling him to the use

of one-third of all the water. As stated by the court in its finding, neither one-third, nor any fixed portion of the water constitutes the waste water of the Carpenter ranch. But the defendants claim to own all the water, including the waste water of the Carpenter ranch, and it was admitted by the defendants that they had taken in several acres of land not included in the Carpenter ranch, and irrigated the same with the waters of Mill creek; and they denied that, "by the irrigation of said lands, any water belonging to the plaintiff had been absorbed, or used by said defendants, or either of them," and denied "that, by the taking in of new, or any lands by defendants, or any of them, not heretofore irrigated, * * * water belonging to plaintiff had been absorbed or used by defendants or any of them. The building of a reservoir was admitted, and, if the testimony offered by the plaintiff had been allowed by the court, it might have shown that the defendants had used the water wastefully upon the Carpenter ranch, or diverted large quantities to and upon other lands. If such a showing had been made by the plaintiff, it seems that he would have been entitled to an injunction, though other portions of his prayer were denied.

The twenty-eighth finding of the court upon the question of adverse user and claim of right by defendants is somewhat ambiguous; but, as we understand the respondent, no claim is made other than that for domestic and household purposes during the months of July and August of each year on the days when the Carpenter ranch is entitled to water. There was evidence to support the finding of the court to this extent, at least.

Judgment and order reversed, and cause remanded for a new trial.

We concur: TEMPLE, J.; MCKINSTRY, J.

73 Cal. 599

WEEKS *v.* GARIBALDI SOUTH GOLD MIN. CO. and others. (No. 11,784.)

(*Supreme Court of California.* October 25, 1887.)

1. JUDGMENT—BY DEFAULT—VALIDITY—AFFIDAVIT OF PUBLICATION—JUDGMENT ROLL.
Where service was made by publication under Code Civil Proc. Cal. § 415, and on default judgment rendered, on appeal from the judgment, *held*, that no affidavit of publication, as required by subdivision 3 of that section, being in the judgment roll, the court had no jurisdiction, and the judgment was invalid.

2. CORPORATIONS—FILING ARTICLES OF INCORPORATION—PLEADING.
Civil Code Cal. § 299, which prohibits corporations from maintaining or defending any action relating to its property, or the rents, issues, or profits thereof, unless it shall have previously filed a certified copy of its articles of incorporation in the county where such property is situated, does not apply to an action against a corporation for work and labor done at its request; and hence in such an action it is error to render judgment for plaintiff on the pleadings simply for the reason that the answer fails to allege that the defendant has filed a copy of its articles of incorporation under the above section.

3. APPEAL—JUDGMENT ON PLEADINGS—BILL OF EXCEPTIONS NOT NECESSARY.
In an appeal, where the judgment recites that it was entered on the pleadings, a bill of exceptions is not necessary.

Commissioners' decision. Department 1.

Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Reddick & Bolinsky, for appellants. *F. W. Street*, for respondent.

FOOTE, C. This is an action to recover a certain sum of money alleged to be due for work and labor done and performed at the defendant's request, in and about certain mining property. The Garibaldi Mining Company is a foreign corporation, having no managing or business agent, cashier, or secretary, resident in the state of California. An effort was made to serve the defendants Spruance and Rodgers, by publication of summons under section 412 of the Code of Civil Procedure. It appears, however, that no affidavit of the printer, his foreman or principal clerk, that such publication took place, as

required by subdivision 3, § 415, Code Civil Proc., was made. Hence the proof is lacking of the service of summons, as required by law, and the record does not affirmatively show that the court had jurisdiction to render the judgment against those two persons. It has been held by this court that, upon a direct attack, as by appeal, upon the validity of a judgment, it is necessary that the record should show that the court had jurisdiction of the person against whom the judgment was rendered, and that in determining such a question a recital in the judgment cannot be regarded; that upon such a direct attack the recitals in the judgment will not be accepted as a substitute for the proof of service of a summons. *McKinlay* v. *Tuttle*, 42 Cal. 577.

The record on the appeal here consists of the notice of appeal and the judgment roll. Section 950, Code Civil Proc. The complaint was not answered by Spruance or Rodgers; hence, so far as concerned them, that roll, if properly made up, should consist of the complaint, the summons, with the affidavit or proof of its service, the memorandum of default, and a copy of the judgment. Sub. 1, § 670, Code Civil Proc. As we have seen, the record here shows an entire absence of any proof of publication of summons. The amended certificate of the clerk of the court filed here, shows that the transcript filed in this court "contains a full, true, and correct copy of the judgment roll in said action," and "full, true, and correct copies of *all* the papers contained in the judgment roll in said action on file in my office." It is not, therefore, affirmatively shown by the record that the court below had jurisdiction of the persons of the two defendants heretofore named, and on that account, as to them, it must be held on this appeal, which is a direct attack on the judgment, that the latter is invalid. The case of *Mahoney* v. *Middleton*, 41 Cal. 51, cited to us as conclusive against the views we have just expressed, is not in point. There the attack made upon the judgment was collateral; here it is direct.

The corporation defendant filed an answer traversing all the material allegations of the complaint. The plaintiff moved the court to render judgment against the defendant upon the pleadings, for the reason, as alleged, that the answer did not state facts sufficient to constitute a defense to the action. It was claimed that such a proceeding should be had by the court, because, as was alleged, the corporation did not aver in the answer that a copy of its articles of incorporation had been duly filed in the office of the county clerk as required by section 299, Civil Code. The court rendered the judgment as moved for. The pleadings show that all the material allegations of the complaint were denied by the answer. It was not necessary for the defendant to have pleaded in the answer that its articles of incorporation had been filed with the county clerk, under section 299, *supra*. The action was instituted to recover money for work and labor done at the instance and request of the defendant. The section of the Civil Code, *supra*, upon which the respondent bases this contention, does prohibit corporations from making defense to certain kinds of actions, unless they have previously filed their articles of incorporation in the office of the clerk of the county where such corporation has its property. But that prohibition only extends to such actions or proceedings as may be brought "in relation to such property, its rents, issues, or profits." It is clear that the action under consideration is not one which is included in the provisions of that section. There is nothing contained in its provisions which necessitates that a corporation defending such an action as this shall either aver in its answer, or prove as a fact on the trial, that its articles of incorporation had been filed in the county clerk's office.

The respondent makes the point that a judgment upon the pleadings cannot be reviewed without a bill of exceptions, and urges that the minutes of the court printed in the transcript cannot be considered as a part of the record. It is undoubtedly true that the minutes of the court are not a part of the record on appeal, unless incorporated therein in some mode authorized by

statute. And if the record did not show that the judgment had been rendered on the pleadings without a trial, the court would have to presume in support of the judgment that a trial had taken place. The absence of findings would not overcome this presumption, because it would be presumed that finding had been waived. *Mulcahy* v. *Glazier*, 51 Cal. 626; *Smith* v. *Lawrence*, 53 Cal. 31; *Carr* v. *Cronan*, 54 Cal. 600; *Reynolds* v. *Brumagim*, Id. 254. In such a case a bill of exceptions would be necessary to enable the court to see that the judgment had in fact been given upon the pleadings. But in this case it appears from the judgment itself that it was rendered upon the pleadings. It states that "the attorney for plaintiff moved the court for judgment on the pleadings in said action, as against the said defendant, the Garibaldi South Gold Mining Company, on the ground that the answer filed herein by said defendant did not state facts sufficient to constitute a defense to said action. After argument of said motion by the respective counsel for plaintiff and said defendant, and the court having fully considered the same, said motion for judgment upon the pleadings was granted."

In view of this statement in the judgment, what need is there for anything further? A bill of exceptions is only for the purpose of making something appear of record which without it would not so appear. In order to say that one is necessary in this case we should have to say that the statement above quoted had no proper place in a judgment, and must be entirely disregarded. But while there are undoubtedly some matters which it is improper to place in a judgment, yet we think that such matters as the one under consideration are not among the number, and that when placed there they must be regarded. See Hayne, New Trial, § 231, p. 694. The court having given a judgment for the plaintiff which on its face shows that it was rendered upon the pleadings in an action, where the judgment roll shows that all the material allegations of the complaint were denied in the answer, and there existing no condition precedent placed by law upon the defendant's right to file its answer and defend the action, it follows that such judgment cannot stand.

The judgment should be reversed, and cause remanded for further proceedings in accordance with the views herein expressed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for further proceedings in accordance with the views therein expressed.

73 Cal. 604

FREDERICKS v. JUDAH and another. (No. 9,100.)

(*Supreme Court of California.* October 27, 1887.)

1. QUIETING TITLE—CHARACTER OF POSSESSION—EVIDENCE.
Plaintiff, in an action to quiet title, testified that he took possession in 1867, "to take care of the property under the same old agreement." *Held*, that prior leases of the property to plaintiff were admissible to show the character of plaintiff's possession; it being for the jury to determine whether plaintiff re-entered under the terms of the leases, or under a parol agreement, as testified by him.

2. SAME—INSTRUCTIONS.
The title of defendants' ancestor had been quieted by decree of court as against the city. The court instructed the jury that a later deed made by M. and others in behalf of the city vested the title in the ancestor. *Held*, that the instruction was harmless, even if the deed was void, as plaintiff's claim to adverse possession did not arise until after the making of the deed.

3. EVIDENCE—IN FORMER TRIAL—WITNESS SINCE DECEASED—PARTIES.
Under Code Civil Proc. Cal. § 1870, subd. 8, providing that evidence "of the testimony of a deceased witness, * * * given in a former action between the same parties, relating to the same matter," is admissible, testimony of a deceased witness given in an action brought by the executrix of the estate of which defendants are heirs, against the plaintiff as lessee of the property in question, is admissible in a subsequent action between the plaintiff and the heirs on questions of tenancy and adverse possession; the testimony being exclusively as to whether plaintiff held the property as tenant or as his own.

4. NEW TRIAL—MISCONDUCT OF COUNSEL—CORRECTION BY TRIAL COURT—PRESUMPTION.
Affidavits on motion for new trial, claiming that defendants' attorney, in his argument to the jury, referred to facts of which there was no evidence, and to testimony ruled out by the court, do not sufficiently show misconduct to warrant a new trial. It must appear that the court, on objection to the statements, failed to correct them; the presumption being that it did so if they were improper.

5. SAME—MISCONDUCT OF JURY—AFFIDAVITS OF JUROR TO SHOW GROUNDS OF VERDICT.
Under Code Civil Proc. Cal. § 657, subd. 2, the verdict can be attacked by affidavits of the jury, only to show that it was obtained by resort to the determination of chance. Affidavits of a juror showing the grounds upon which the verdict was rendered are inadmissible for that purpose.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Bill to quiet title.

The plaintiff alleged title in fee to the property in question by purchase from defendants' ancestor. The defendants alleged that they were the heirs of one John Ferguson, deceased, who at his death was seized in fee of the premises, and that the plaintiff was at that time in possession as his lessee; that in an action in the county court of San Francisco the defendants recovered judgment against the plaintiff, decreeing that he held the lot as defendants' lessee. They further claimed under tax titles. The jury found in their favor and the court entered judgment that they have possession of the property. The plaintiff appealed.

P. B. Ladd, for appellant. *Wm. H. Shays*, (*Wilson & Otis*, of counsel,) for respondent.

PATERSON, J. The transcript contains copies of affidavits filed by the plaintiff in the court below in support of his motion for a new trial, showing, in substance, that the defendants' attorney persisted in arguing to the jury that the defendants had paid all of the taxes on the premises in controversy from 1861 to the time of the trial; that plaintiff had never paid any taxes thereon; that, as a fact, no evidence whatever was before the jury on the question of taxes, and that he also persisted in arguing to the jury that the county court had decided that the plaintiff was the tenant of defendants, notwithstanding the fact that the court had ruled out all evidence relating thereto, and there was no evidence before the jury on that subject. There is here no sufficient showing of irregularity or misconduct to warrant a new trial. We

are not informed whether the court, on the objection of plaintiff, corrected the statement of defendants' attorney. If the objection of plaintiff was well taken, we must presume that the court instructed the jury to disregard the assertions made by the defendants' attorney.

The affidavits of the jurors, in which it is stated that "the principal grounds of the verdict were that the plaintiff proved no title by the deed; that defendants had three tax deeds; that plaintiff never paid any taxes, and that defendants paid all the taxes; and the county court had decided that plaintiff was a tenant of defendants,"—were inadmissible and cannot now be considered. A juror cannot thus impeach his own verdict. There is but one ground upon which a verdict can be assailed in this way. It is expressed in the Code: "Whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." Section 657, subd. 2, Code Civil Proc.; *Polhemus* v. *Heiman*, 50 Cal. 438; *Turner* v. *Tuolumne W. Co.*, 25 Cal. 397.

The leases were properly admitted in evidence. They were admissible to show the character of plaintiff's possession,—whether for himself, or as tenant of Ferguson. The plaintiff testified that he took possession in 1867, "to take care of the tract under the same old agreement." The leases contained this provision: "And to pay the rent as above stated during the term; also, the rent as above stated for such further term as the lessee may hold the same." It was for the jury to determine whether plaintiff re-entered upon the premises under the terms of the lease, or under the parol agreement testified to by plaintiff.

It was not error to admit in evidence the testimony of Dean, deceased, which had been taken down by the short-hand reporter, on a trial in the county court. Evidence may be given "of the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties relating to the same matter." Section 1870, subd. 8, Code Civil Proc. Although in that action Mrs. Judah, as executrix, was plaintiff, it was an action between the same parties, within the meaning of this provision, for the executrix represented the heir therein, and the judgment in such cases is binding upon the heirs, whether they be made parties or not. *McLeran* v. *Benton*, 14 Pac. Rep. 879, and cases cited therein. It was an action "brought against the plaintiff, as lessee, under and by the terms of the lease." The testimony of the witness Dean was directed exclusively to the question whether the plaintiff held possession of the lot in controversy under the terms of the lease, and as tenant of Ferguson, or for himself, claiming the property as his own. The judgment in unlawful detainer is conclusive on the questions of tenancy and refusal to surrender, (*Willson* v. *Cleaveland*, 30 Cal. 201;) and the judgment in an action for forcible entry is admissible in a subsequent action of ejectment to show adverse possession. *Unger* v. *Roper*, 53 Cal. 39. Conceding, therefore, that the test as to the admissibility of such evidence is as stated by appellant, would a judgment in the first case be evidence in the second, and was the witness open to cross-examination? The testimony of Dean was admissible upon the questions of tenancy and adverse possession.

The court instructed the jury in effect that by virtue of a deed made by Frank McCoppin and others, on behalf of the city and county of San Francisco, in pursuance of the provisions of certain ordinances, acts of congress, and the legislature of California, "all the estate and interest, present and future, of the said city and county of San Francisco, in and to such lands," had been granted unto the said Ferguson, and to his heirs and assigns forever. We are unable to see any prejudicial error in the giving of this instruction. There can be no doubt that Ferguson was the beneficiary under

the ordinance and the acts of congress. He was in the *bona fide*, actual possession thereof, by himself and his tenants, on the date of the passage of the act of congress, approved March 8, 1866.

Prior to the execution and delivery of the McCoppin deed, by a decree rendered in favor of the plaintiff in the case of *John Ferguson* v. *The City and County of San Francisco*, in the twelfth district court, July 8, 1865, the title of plaintiff as against the said city to the premises in controversy had been quieted. This appears from a statement in the transcript, and from evidence admitted on behalf of the defendants without objection. The plaintiff does not claim to have been in possession for himself in 1866, when the ordinance title passed. On the contrary, he recognizes Ferguson as the possessor and owner of the property down to the fall of 1867, when he, the plaintiff, claims to have gone into possession, under a verbal contract to purchase the same from Ferguson. He testified that in July or June, 1867, Miller was in possession, and refused to let him enter until Ferguson returned. He testified further: "Miller delivered up the premises to me because I was to re-enter under an agreement to take care of the tract under the same old agreement." At the request of the plaintiff, the jury was instructed: "If you find that the plaintiff went into possession of the lot in question under a lease or leases in 1861 or 1864, and that he thereafter surrendered and gave up the possession of the lot, then the relation of landlord and tenant ceased. * * * Any subsequent taking possession by plaintiff would not necessarily restore the relation of landlord and tenant. * * * If you find that he, after such surrender, took possession of the lot under an agreement with the owner that he (the plaintiff) was to have the lot as his own property in consideration for certain services, and he performed such services, he thereby became the absolute owner of the lot." In his evidence and in his instructions, he recognized Ferguson as the owner of the lot in 1867, and the evidence of the defendants shows beyond all controversy that the title of the city vested in Ferguson and his heirs. If it be conceded, therefore, that the McCoppin deed was void, the instruction of the court referred to was harmless.

Other instructions, excepted to by the plaintiff, correctly stated the law under the evidence. The order is affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; TEMPLE, J.

(74 Cal. 1)

BARKLY v. COPELAND. (No. 11,878.)

(*Supreme Court of California.* October 31, 1887.)

1. LIBEL AND SLANDER—MITIGATING CIRCUMSTANCES KNOWN TO DEFENDANT AFTER PUBLICATION.
 Defendant, in his answer in a suit for slander, alleged circumstances in mitigation, which came to his knowledge after the words complained of were spoken. The court instructed the jury that only circumstances within the knowledge of defendant before the words were spoken could be shown in mitigation of damages. *Held*, that the refusal of the court to strike out that portion of the answer worked no injury to plaintiff, in view of the charge of the court.

2. SAME—EVIDENCE.
 In an action for slander for charging plaintiff with connection with one S. in the theft of certain cattle, it is admissible for defendant to introduce the testimony of S. as to agreements with plaintiff in regard to the theft of other cattle.

3. SAME—CONVERSATIONS BETWEEN PLAINTIFF'S AGENT AND THIRD PARTY.
 Testimony as to conversations between plaintiff's driver and S., when it appeared that plaintiff had told S. he would report to him through the driver, *held* admissible.

4. SAME—EVIDENCE OF DEFENDANT'S WEALTH.
 Testimony as to the wealth of defendant is admissible in an action for slander.

5. Evidence—Offering Declarations of Witness to Support Testimony before Impeachment.
It is no ground for reversal that prior declarations of the witness were given in evidence to support his testimony before it was impeached, when the record shows that evidence was subsequently introduced, which, if offered before the declarations were testified to, would have made them competent.

6. Same—Impeachment—Foundation.
Evidence as to a conversation with a witness, whose attention had not been called to it, *held* properly excluded.

7. Trial—Order of—Discretion of Court—Permitting Defendant to Testify after Plaintiff has Closed.
After plaintiff had closed his case in rebuttal, defendant, who had been present during the entire trial, was permitted to testify fully as to his defense. *Held*, that this was in the discretion of the court, and can only be reviewed when the discretion is abused.

Department 2. Appeal from superior court, Tehama county; Chas. P. Braynard, Judge.

Plaintiff sued defendant for slander, alleging that defendant had stated that he knew the cattle he bought of S. were stolen, when he bought them, and that he was in with S. Defendant, in his answer, pleaded the truth of the words spoken, and also set up matter in mitigation of damages. The jury found for the plaintiff in the sum of one dollar, and plaintiff appealed.

Jackson Hatch and *Clay W. Taylor*, for appellant. *Chipman & Garter*, *John F. Ellison*, and *L. V. Hitchcock*, for respondent.

Thornton, J. Action to recover damages for slanderous words spoken by defendant of plaintiff. The plaintiff recovered a verdict of one dollar damages. He then moved for a new trial, which was denied, and from the judgment and the above order plaintiff appealed.

In regard to the motion of plaintiff to strike out certain portions of defendant's answer, to which our attention is first called, we will remark that only such mitigating circumstances as were within the knowledge of the defendant when he spoke the words complained of can be alleged in the answer. See *Willover* v. *Hill*, 72 N. Y. 36; *Hatfield* v. *Lasher*, 81 N. Y. 249. But, as the jury were instructed as to such circumstances in accordance with the above, the error of the court below in refusing to strike out that portion of the answer which set forth the circumstances of mitigation, not known to the defendant when he uttered the words counted on, worked no injury to the plaintiff.

The defendant offered in evidence the deposition of Russell Speegle, who had been convicted of stealing the cattle of Thomas Polk, in relation to which theft the disparaging words uttered by the defendant had been spoken. Speegle testified to statements made by him to several persons in regard to the theft of the cattle. The statements or declarations were made to Laura Moore, David Burke, Pope, Costello, Mitchell, and I. Speegle, and were testified to by all of the last-named except Laura Moore, who does not appear to have been called. They tend to corroborate his testimony in regard to the connection of the plaintiff with the stealing of the cattle, by showing that, about or not long after his (Speegle's) arrest for the larceny of the cattle, he made statements in regard to it similar to those which he made in his testimony. The statement to Laura Moore was made shortly before the cattle were taken to the plaintiff. The statements made to the other witnesses were made after his arrest. The statements were allowed to go to the jury against the objection and exception of plaintiff, and before any evidence impeaching the witness Speegle had been introduced.

It has been held in this state that, where an attempt has been made to impeach a witness by proving former contradictory statements, he cannot be supported by evidence that he has made to other persons declarations consistent with his testimony. This ruling was made in *People* v. *Doyell*, 48 Cal.

90, 91. But in the same case it was said: "Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, when it may be shown that the same account was given before its ultimate effect and operation, (arising from a change of circumstances,) could have been foreseen; and also, perhaps, in other peculiar cases." 48 Cal. 91. It has been frequently held that, when the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist. See *Gates* v. *People*, 14 Ill. 438; *Stolp* v. *Blair*, 68 Ill. 543; *State* v. *Dennin*, 32 Vt. 158; *State* v. *Vincent*, 24 Iowa, 570; Whart. Ev. § 570.

When the evidence objected to was admitted, no evidence impeaching Speegle had been put in. The declarations of Speegle were offered by defendant in putting in his defense, and the impeaching evidence was offered by plaintiff in rebuttal. The impeaching evidence consisted of the depositions of three convicts in the state prison, and was to the effect that soon after certain persons representing the defendant had visited the state prison, and had an interview with Speegle. Each of them had had a conversation with Speegle in which he had said that Barkly had sued Copeland for damages, for saying that he was in with him in stealing cattle; that these representatives of the defendant had told him that if he would swear that Barkly was in with him in stealing the cattle they would get him pardoned right away; that Speegle also stated that Barkly was not in with him, but that if there was any way to get out of prison he was going to do it. This testimony introduced by plaintiff tended to show that Speegle was testifying at the trial under the influence of a promise to procure his pardon in case he would so testify as to inculpate the plaintiff; that his testimony had been given under the influence of a motive prompting him to make a false statement. This state of things would undoubtedly bring the case within the rule allowing the prior declarations of like character to be given in evidence to support his testimony, if the impeaching evidence had been offered before the prior statement had been testified to. Is it error for which a judgment of reversal should be here given, because impeaching evidence was put in before the statements objected to were introduced? There can be no doubt, we think, that, if the court had ruled out the prior declarations of Speegle when offered, it would have ruled correctly. But, having admitted the declarations before the introduction by plaintiff of the evidence to impeach, we do not think we should pronounce a judgment of reversal, when we find in the record, though subsequently introduced, evidence which would have authorized the admission of the prior declarations or statements, if offered before they were testified to. The evidence of the witness Snelling, detailing a conversation had by him with Russell Speegle, which came in after the impeaching evidence had been put into the case, was of the character of those just above considered, and was admissible on the same grounds.

The testimony of Russell Speegle concerning an effort of plaintiff made in June, 1884, to get the witness to steal cattle belonging to Dicus, and drive them to him, was admissible. Speegle details this as a part of the general understanding between him and plaintiff, by which the former was to steal cattle, drive them to plaintiff to be butchered, and the proceeds to be shared between them. We think this evidence was admissible to show the relations and transactions between the witness and the plaintiff as bearing on the question of the stealing of Polk's cattle, and to sustain defendant's plea of justification.

There was no error in admitting the declarations of N. Barkly, plaintiff's driver, to R. Speegle. There was evidence tending to show that the plaintiff had told Speegle, (who testified to these declarations,) that he could trust this driver, and that plaintiff would report through him to Speegle. The tendency

of the above was to show that this driver was to be the medium of communication between Speegle and the plaintiff. The declarations objected to appear to have been made in a report to Speegle of the condition of the cattle stolen by him and turned over to the plaintiff. The above was evidence of such a relation between Barkly and the driver as rendered his declarations admissible.

Plaintiff offered to prove by defendant that in June, 1885, and at the time of the utterance of the language admitted by him in his answer, he was worth, at least in property, $100,000. The offer was disallowed, and there was exception by plaintiff. In actions of slander and libel such evidence has been held admissible in many of the states. We cite the following cases: *Brown* v. *Barnes*, 39 Mich. 211; *Hayner* v. *Cowden*, 27 Ohio St. 292; *Bennett* v. *Hyde*, 6 Conn. 24; *Buckley* v. *Knapp*, 48 Mo. 153; *Hosley* v. *Brooks*, 20 Ill. 115; *Humphries* v *Parker*, 52 Me. 502; *Karney* v. *Paisley*, 13 Iowa, 89; *Adcock* v. *Marsh*, 8 Ired. 363; *Lewis* v. *Chapman*, 19 Barb. 252. See, also, 1 Suth. Dam. 743, 745. Such evidence is admitted on the ground that defendant's wealth is an element in his social rank and influence, and therefore tends to show the extent of the injury suffered from the defendant's words, (*Buckley* v. *Knapp*, 48 Mo. 163; *Bennett* v. *Hyde*, 6 Conn. 24-27; *Lewis* v. *Chapman*, 19 Barb. 252;) and, where punitive or exemplary damages are allowed, the evidence is admitted by which to graduate the punishment. 6 Conn., *supra*. In this case, if the jury had rejected the evidence of the mitigating circumstances, it might have found punitive or exemplary damages. We are of opinion the court erred in rejecting the offer of plaintiff to introduce the testimony as to defendant's wealth.

The court committed no error in excluding the testimony of Clark, concerning a conversation had with Speegle the night after the arrest of the latter, as the proper foundation had not been laid for it, by calling Speegle's attention to it.

When the plaintiff had closed his case in rebuttal, the court, against the objection and exception of plaintiff, allowed the defendant, who had been present during the entire trial, to be called, and to testify fully as regards his defense. While this was a most unusual course, and one not to be commended, still we consider it, under the decisions of this court, as within the discretion of the court, and one which, unless such discretion is abused, cannot be reviewed here. As the plaintiff was not inhibited from offering evidence in reply to that of defendant, and, in fact, did offer some evidence in reply, we cannot say that there was here such an abuse of discretion as would justify this court in ordering a reversal.

A large number of requests for directions to the jury were asked by both parties; and while some of those asked by plaintiff, and refused, might well have been given, yet we are of opinion that the instructions as given covered substantially the same points, and fairly presented to the jury the law bearing on the case.

For the error above pointed out the judgment and order must be reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; SHARPSTEIN, J.

73 Cal. 634

BEARDSLEY, Assignee, etc., *v.* FRAME and others. (No. 12,199.)

(*Supreme Court of California.* October 29, 1887.)

APPEAL—NOTICE OF—MUST BE SIGNED BY ATTORNEY OF RECORD—ATTORNEY NOT QUALIFIED TO PRACTICE IN APPELLATE COURT.

In California an appeal from a superior court must be initiated in that court by a notice signed by the appellant's attorney of record in that court; and the fact that such attorney is not qualified to practice in the appellate court will not affect the validity of the appeal.

Commissioners' decision. In bank.

Appeal from superior court, Del Norte county; JAS. E. MURPHY, Judge.

Motion to dismiss appeal.

L. F. Coburn, for appellant. *R. W. Miller*, for respondent.

FOOTE, C. The notice of appeal is the initiatory step taken in the superior court in order to obtain a hearing upon appeal in this court. That notice must be signed by the attorney of record in that court. *Prescott* v. *Salthouse*, 53 Cal. 221; affirmed in *Whittle* v. *Renner*, 55 Cal. 395. Being a proceeding which must be commenced in the superior court where the trial was had, it is not necessary that the attorney who there conducts it shall be entitled to practice law, and be heard in that capacity in this court, provided he be qualified to act, and is the attorney of record in the court below.

The motion to dismiss the appeal should be denied.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the motion to dismiss the appeal is denied.

73 Cal. 610

CITY AND COUNTY OF SAN FRANCISCO *v.* LUNING. (No. 11,718.)

(*Supreme Court of California.* October 28, 1887.)

1. TAXATION—ACTION BY CITY AND COUNTY TO RECOVER—LIMITATION OF.
 Code Civil Proc. Cal. § 338, provides that an action on a liability created by statute must be begun within three years. Section 339 provides that an action upon a liability not founded upon an instrument in writing must be begun within two years. Section 345 provides that these limitations shall apply to actions by the state, or for its benefit. *Held*, that an action by the city and county of San Francisco to recover city, county, and state taxes, more than seven years after right of action accrued, is barred by these sections.
2. SAME—LIMITATION OF ACTION FOR PERSONAL JUDGMENT.
 Pol. Code Cal. § 3716, provides that every tax has the effect of a judgment against the person, and every lien created by the same the effect of an execution, and that the judgment is not satisfied nor lien removed until the tax is paid. Section 3717 provides that a tax upon the personal property shall be a lien on the real property of the owner. *Held*, that an action to recover a personal judgment on the original tax was subject to the statute of limitations, it not being an action on a judgment or to enforce a lien.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John P. Bell and *Louis H. Sharp*, for appellant. *Sidney V. Smith & Son*, for respondent.

MCFARLAND, J. It is averred in the complaint that "defendant is indebted to plaintiff" in a certain sum of money for city and county taxes, with certain penalties for non-payment, and interest at a certain rate per month, from the fifth day of August, 1874; and, further, that "defendant is also indebted" in a certain other sum of money for state taxes, with like penalties and interest, from the sixth day of January, 1876. And judgment is prayed for said several sums, with interest and costs. Defendant filed a demurrer by which, in addition to the general ground of demurrer, he also pleads that the alleged cause of action is barred by the provisions of sections 338, 339, and 343 of the Code of Civil Procedure. The demurrer was sustained, and, plaintiff declining to amend, judgment was rendered for defendant. From this judgment plaintiff appeals.

The sections of the Code of Civil Procedure, from 335 to 348, inclusive, being chapter 3, tit. 2, p. 2, prescribe the period within which "actions other than for the recovery of real property" may be commenced. Section 338 provides that "an action upon a liability created by statute" must be commenced

within three years. Section 339 provides that "an action upon a contract, obligation, or liability, not founded upon an instrument in writing," must be commenced within two years. Section 343 is as follows: "343. An action not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." And section 345 provides that "the limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." The complaint in this case was filed April 25, 1883, more than seven years after the cause of action accrued. The action is therefore certainly barred by one of the sections above quoted, unless there be some principle of law, or some other statutory provision, by which it is taken out of the operation of said section.

1. The rule that statutes of limitation do not apply to the state, according to the maxim *nullum tempus occurrit regi*, has no force here in face of section 345, above quoted.

2. Appellant also relies on section 3716 of the Political Code, which provides as follows: "3716. Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied, nor the lien removed, until the taxes are paid on the property sold for the payment thereof." Also upon section 3717, which provides that "every tax upon personal property is a lien upon the real property of the owner thereof, from and after 12 o'clock M. of the first Monday in March of each year." But this is not an action upon a judgment, or to enforce a lien. It is possible that there is a subsisting judgment or lien for the taxes sued for which the tax collector may enforce by sale in the usual way. It is possible an action might lie upon the tax as a judgment or to enforce the lien. It is possible, also, that there is a lien without any provision for its enforcement, in which case it is simply a right without a remedy. But this is merely an action to recover a personal judgment upon the original tax itself, which, by the way, is averred to be an *indebtedness*. The action was brought under the act of April 23, 1880, (St. 1880, p. 136;) but, although taxes are usually collected in this state in a summary manner, there are several other statutory provisions about actions for taxes, and in none of them is it indicated that the action is deemed to be an action upon a judgment, although, in one particular instance only, it is provided that the board of equalization may "direct the *foreclosure of the lien* of such tax by action, which proceeding is hereby authorized to be had." Pol. Code, § 3812. This last provision shows that there is a clear distinction intended between an action for the foreclosure of a lien and an ordinary suit, such as is provided for in sections 3808, 3899, and 3900 of the Political Code, and in the act of 1880, under which this suit was brought. And it will be observed that in the case provided for in section 3900 a general writ of attachment must issue as in an ordinary civil action. It would seem clear, therefore, that a suit merely to recover taxes against a defendant personally, is not an action upon a judgment, or an action to foreclose a lien. The point upon which this case turns was elaborately argued and considered in *State* v. *Yellow Jacket S. M. Co.*, 14 Nev. 220. The provisions of the statute of limitations were the same there as here. With respect to taxes, the statute of Nevada made a tax a lien on the property indefinitely until it was paid, but did not designate it as a "judgment." The court after a thorough examination of the questions presented, held that the action to recover the taxes was barred by the statute of limitations, even though the lien might not be considered as removed. And the difference above indicated between the statute of that state and this, does not make the principle upon which that case was decided inapplicable to the case at bar. Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

73 Cal. 630

CAREY *v.* CAREY. (No. 11,677.)

(*Supreme Court of California.* October 29, 1887.)

DIVORCE—WILLFUL DESERTION—EVIDENCE.

In an action for divorce for willful desertion, the evidence showed that the plaintiff, after the desertion, had requested the defendant, by letter, to return, and that, although they had met several times on the street, defendant had not spoken to plaintiff, nor in any way signified a willingness to live with him until more than a year after such request, when defendant, by letter, stated that she was ready to live in a fit and proper place with plaintiff, but refused to condone any offense which he might have committed against her or his marriage obligations. *Held*, that the court was justified in finding willful desertion, and in granting a decree for plaintiff.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

The plaintiff, Wilson Carey, brings this action to obtain a divorce from the defendant, Nancy G. Carey, on the grounds of willful desertion. The plaintiff testified that the defendant had not lived with him for nearly two years, although he had sent her a letter requesting her to return to his home, which was a good house, suitable for her to live in, and located on a ranch on the Sonora road; that he did not get any response to his letter until more than a year after it was sent to her; that, though he had seen her a number of times during the year prior to the commencement of the suit, she had never spoken to him; that defendant had not lived or cohabited with him at all during the two years last past. The letter introduced in evidence bears date July 9, 1883. Plaintiff and two other witnesses, who saw the letter before it was posted, testify that it was written and mailed on that day. On cross-examination, plaintiff testified to having received a letter from his wife, July 19, 1884, dated at Stockton, July 15, 1884, signifying a willingness to reside with the plaintiff in any fit and proper place that he might name, and saying that she would await his call and request to that end; but that she could not condone any offense which he may have committed against her or his marriage obligations. The letter also stated that defendant had no means to take her to plaintiff. Defendant testified that the letter written by plaintiff was received by her July 19, 1883, and that the letter sent by her dated July 15, was mailed July 19, 1884. She testified that she had never refused to live with plaintiff, but that she delayed answering his letter for a year in order to ascertain whether he was acting in good faith; that she had no means with which to go to her husband, but had raised $800 by mortgage of her property; that she could not go to plaintiff because she did not know where he lived; that she did not consider the homestead, where he had asked her to go, a fit and proper place for her; that she had never had any conversation with plaintiff, though she had met him on the street shortly after receiving his letter; that she would not go to live with him at the homestead. Upon the evidence, the jury found that defendant had refused to live with plaintiff for more than a year previous to bringing the suit, whereupon judgment was rendered for plaintiff.

Louttit, Woods & Levinsky, for appellant. *W. L. Dudley*, for respondent.

BELCHER, C. C. The plaintiff and defendant were married in June, 1879, and thereafter lived together as husband and wife until some time in December, 1882. They had no children, and, so far as appears, no common property. In January, 1883, the defendant commenced an action against her husband for a divorce. It does not appear upon what ground the divorce was asked, but the case was tried in May, 1883, and the divorce denied. In August, 1884, this action was commenced by the plaintiff to obtain a divorce from the defendant on the ground of willful desertion. The defendant, by her answer,

admitted that she had not, since the nineteenth day of December, 1882, cohabited with the plaintiff, but alleged that her failure so to do had been by reason of the refusal and neglect of the plaintiff, and not by reason of any act or fault on her part. After trial the court below, among other things, found "that for more than one year prior to the commencement of this action defendant willfully neglected and refused to live with plaintiff, and at all of said time had the intent to desert him." And as a conclusion of law it was found "that the defendant, Nancy G. Carey, has willfully deserted her said husband, and is, and at the commencement of this action was, guilty of willful desertion, and by reason thereof that the plaintiff is entitled to have the bonds of matrimony between himself and defendant dissolved." Judgment was accordingly entered, dissolving the bonds of matrimony between the parties. The defendant moved for a new trial, and has appealed from the judgment and an order denying her motion. The only point made for the appellant is that the evidence did not justify the decision and the judgment.

It is unnecessary to state the facts shown by the record. It is enough to say that, after carefully reading all the testimony brought before us in the transcript, we are of the opinion that the evidence was sufficient to justify the findings of fact, and the conclusion of law drawn therefrom.

The judgment and order should therefore be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 621

CITY OF STOCKTON *v.* WESTERN FIRE & MARINE INS. CO. and others.
(No. 11,864.)

(*Supreme Court of California.* October 29, 1887.)

1. TAXATION—COLLECTION—PLEADING—LEGISLATIVE POWER.
It is competent for the legislature to prescribe the form of complaint to be used in an action by a city to recover delinquent taxes.

2. SAME—COLLECTION—MUNICIPALITIES.
The complaint, in an action for delinquent taxes by a city organized under a special charter, was according to the form prescribed by a section of the charter. There was nothing to indicate that such section had been repealed or modified prior to the adoption of Const. Cal. 1879, or that the city as a corporation ever reorganized under the act of 1883, (Acts Cal. 1883, p. 235,) providing for the organization of cities under general laws. *Held*, that the complaint was not obnoxious to Const. Cal. 1879, art. 11, § 6, providing that "corporations for municipal purposes shall not be created by *special* laws; but the legislature, by *general* laws, shall provide for the incorporation, organization, and classification, in proportion to population of cities, towns," etc.

3. SAME—VALIDITY OF ASSESSMENTS—TIME OF MAKING.
Const. Cal. 1879, art. 13, § 8, provides that "the legislature shall by law require each tax-payer to make and deliver to the county assessor annually a statement under oath, setting forth specifically all the real and personal property owned by such tax-payer, * * * at 12 o'clock meridian on the first Monday of March." Under this section it was claimed that the mortgage assessed by plaintiff, being executed on the thirteenth of March, was not assessable for the taxes of that year. Plaintiff's charter, however, provided that "the city council shall have authority to assess, levy, and collect annually taxes upon all the property within the city taxable for state purposes;" and by another section of the charter: "It shall be the duty of the assessor to prepare between the first day of January and the first Monday in April of each year a list of all the real and personal property within the city taxable for state and county purposes," etc. *Held* that, under these sections, the assessment was valid; and such sections being in force before the adoption of Const. Cal. 1879, were continued in force until repealed by some general law, by virtue of Const. Cal. art. 11, § 6; providing, *inter alia*, that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

D. P. Terry and *J. C. Campbell*, for appellant. *Frank H. Smith*, for respondent.

FOOTE, C. This is an action instituted by the city of Stockton to recover certain delinquent taxes which had been assessed upon a mortgage for $35,000, executed by the Masonic Hall Association of said city to the Western Fire & Marine Insurance Company, on the thirteenth day of March, 1884, upon certain real estate and improvements. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were overruled, and, the defendants failing to answer, judgment passed for the plaintiff, from which this appeal is taken. The technical objections urged as to the form of the complaint are, it seems to us, not well founded. It is competent for the legislature, in such special action as this, to prescribe the form of complaint to be used. *Richardson* v. *Tobin*, 45 Cal. 31; *Sullivan* v. *Mier*, 67 Cal. 265, 7 Pac. Rep. 691.

The form of the complaint filed in this action is that prescribed in section 21 of the charter of the city of Stockton, which was approved on the twenty-seventh of March, 1872. It was a general form to be used in all cases for the collection of city taxes authorized to be assessed and levied under that charter. There is nothing in the record, or in the acts of the legislature, to show that, prior to the adoption of the constitution of 1879, that section was modified or repealed. There is no general law passed since that time which so affects it. There is nothing before us which indicates that the city of Stockton, as a corporation, ever reorganized under the act of 1883. Acts 1883, p. 235.[1] It must be true, therefore, that, as a matter of law, the form of the complaint is not obnoxious to anything contained in section 6, art. 11, Const. 1879. *Thomason* v. *Ashworth*, 14 Pac. Rep. 618.

But the further point is made that the complaint makes it patent that the tax was illegally assessed, because it was done after the first Monday in March of the year 1884. In support of this contention, section 8, art. 13, Const., is cited. It provides that "the legislature shall by law require each tax-payer in this state to make and deliver to the county assessor annually a statement under oath, setting forth specifically all the real and personal property owned by such tax-payer, or in his possession, or under his control, at 12 o'clock meridian on the first Monday of March." It is true that the complaint shows the mortgage was not executed until the thirteenth of March, 1884, and therefore it could not have been assessed for taxation on the first Monday in March of that year. But it does not follow from this that the assessment was invalid.

The charter of 1872 provides, among other things, as follows:

"Sec. 15. The city council shall have full power and authority to assess, levy, and collect annually taxes upon all the property within the city taxable for state purposes, not exceeding 1 per cent. upon the assessed value thereof, which shall be paid into the general fund for current expenses."

"Sec. 17. It shall be the duty of the city assessor to prepare, between the first day of January and the first Monday in April of each year, and present to the city council, with his certificate of its correctness, a list of all the real and personal property within the city taxable for state and county purposes, with a true valuation thereof."

The assessment in controversy was made under the authority given by the sections of the charter of the city of Stockton, *supra*, which existed prior to

[1] An act to provide for the organization, incorporation, and government of municipal corporations, approved March 13, 1883.

the adoption of section 8, art. 13, Const. This court, in discussing the character of charters such as the one under consideration, said in *Desmond* v. *Dunn*, 55 Cal. 246–248: "All such charters must remain in force until superseded or changed in the mode prescribed by the constitution. In the absence of any positive provision to the contrary, this is necessarily implied;" and this particular rule thus laid down has not been overruled. In *Thomason* v. *Ashworth*, 14 Pac. Rep. 618, the latest declaration upon the matter, this language occurs: "It is argued that, according to the views herein expressed, a city may have its charter changed without its consent. This is a proper deduction from the ruling herein, but this cannot be done by a special or local law applicable alone to a particular charter. The result can only be reached by a general law affecting all corporations or may be all of a class." We do not mean to imply that the legislature, even by a general law, can substitute an entirely new charter for an old one without the consent of the people of the locality. To that extent we understand the decision in *Desmond* v. *Dunn* to be the law.

It would seem, therefore, under section 6 of article 11 of the constitution, that the sections of the charter heretofore quoted are continued in force. And section 8 of article 13 of the constitution, having reference to prospective assessments for taxation, does not affect the sections of the charter, *supra*, because they were in force prior to its adoption, and are continued in force by section 6 of article 11 of the constitution until modified or repealed by some general law enacted with reference to "all corporations, or may be those of a class."

There is nothing in the complaint which makes it evident that the money assessed for taxation was not within the limits of the city of Stockton on the first Monday of March, 1884; and, there being no answer filed in the cause, there is nothing in the record which shows that any double taxation was in fact levied.

The judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 618

ARNAZ *v.* GASSEN. (No. 11,846.)

(*Supreme Court of California.* October 29, 1887.)

1. CONVERSION—PURCHASING CATTLE WITHOUT EXAMINING EAR-MARKS.

In an action for the conversion of certain cattle, it appeared that plaintiff lost the number claimed to have been converted; that defendant bought and slaughtered cattle, but kept no book in which he entered the brands of cattle purchased; that he went to defendant's slaughter-house, and found about 60 ears of cattle bearing his mark, and some hides with his brand, and while thus engaged was ordered away by a man who said he had charge of the place; that after the cattle were missed defendant said he bought cattle, and paid for them, and asked no questions, etc., and when called as a witness did not deny the above facts, nor that he received and killed the cattle, but said he didn't know what marks were on the cattle he purchased about the time these were lost, did not examine the brands, nor look for ear-marks, and did not know anybody's ear-mark or brand in the county. He claimed, simply, that he paid value for the cattle. *Held*, that a judgment for plaintiff was sustained by the evidence.

2. APPEAL—HARMLESS ERROR.

Where it appears that the errors assigned could not have prejudiced the appellant, the decision of the lower court will not be disturbed.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Wells, Van Dyke & Lee and *H. T. Gage*, for appellant. *Howard & Scott*, for respondent.

BELCHER, C. C. This is an appeal from a judgment in favor of plaintiff, and from an order denying the defendant's motion for a new trial. The action was brought to recover damages for the alleged conversion of certain cattle. The court found that defendant had wrongfully converted to his own use 25 head of cattle which were the property of plaintiff, and of the value of $450.

The appellant insists that the findings were not justified by the evidence; but we think they were. It was proved that in the month of September, 1884, 32 head of cattle, consisting of cows, heifers, and steers, were missed from plaintiff's herd; 25 of them being his, 4 his daughter's, and 3 belonging to other parties. The plaintiff had not sold any cattle for a year. Diligent search was made for the lost animals, but they were never found. The defendant was engaged in the business of buying and slaughtering cattle, but he kept no book in which he entered the marks or brands of the cattle slaughtered. Between the ninth and thirteenth of October the plaintiff went, with the man who had charge of his stock, to the defendant's slaughter-house, and there found, as he estimated the number, about 60 ears of animals which had his mark upon them, and also 3 or 4 hides which were marked with his brand. While he was examining the hides, a man came out who said he was in charge of the slaughter-house, and forbade any further examination. The cattle were supposed to have been stolen, and, shortly after they were missed, one of the witnesses, who was employed to inquire into the matter, and see if he could find out anything about them, asked the defendant if he had bought from certain parties any cattle belonging to the plaintiff, and his reply was: "I buy cattle, and pay for them, and I don't ask any questions." The witness further said to him: "You bought cattle from these two young boys?" and the reply was, "I bought cattle. I don't know who I bought them from. I paid for them." The defendant was called as a witness and testified in his own behalf. He did not deny that he had received the plaintiff's cattle, nor that the slaughter-house referred to was his, nor that the marked ears and hides were found there, as testified by plaintiff. On the contrary, he admitted that he bought some twenty odd head of mixed cattle; and in reference to them, on his cross-examination, said: "I don't know anything about what marks these cattle had on them, or brands either. I did not examine the brands; there are so many brands. I do not look for ear-marks. I do not know anybody's ear-mark, or anybody's brand, in the county." The defendant claimed that he paid the full value of all the cattle he received, and seems to have thought, if he did that, he was not liable.

Upon these facts—and they were uncontradicted—it is difficult to see how the court could have come to any other conclusion than that shown by its findings.

It is further insisted that the court erred in overruling objections made by counsel for defendant to certain questions put to witnesses for plaintiff, and in refusing to strike out the answers of the witnesses when given. We are unable to see that the defendant was, or could have been, prejudiced by any of the rulings complained of. It is unnecessary to speak of them separately. Some of the objections were frivolous, and all of them, in our opinion, were properly overruled.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 20

Ex parte CAMPBELL on *Habeas Corpus.* (No. 20,324.)

(*Supreme Court of California.* October 31, 1887.)

1. INTOXICATING LIQUORS—GENERAL AND LOCAL LAWS—CONSTITUTIONALITY.
Const. Cal. art. 11, § 11, provides that any county, city, town, or township may enforce within its limits all such local police regulations as are not in conflict with general laws. *Held*, that an ordinance of the city of Pasadena prohibiting the keeping of any place for selling or giving away liquors was a police regulation, the power to pass which was, under the constitutional provision, expressly delegated to the municipality, and conflicted with no general law of the state, nor with any clause of the United States constitution. *Ex parte Smith*, 38 Cal. 708; *People* v. *Martin*, 60 Cal. 156,—followed. MCFARLAND, J., dissenting.

2. APPEAL—PRACTICE—STIPULATIONS.
An appellate court is warranted in refusing to consider a question submitted for decision under a stipulation of facts which by reason of its uncertainty does not present the matter in a full and clear manner.

In bank. Proceedings on *habeas corpus* from county of Los Angeles; W. A. CHENEY, Judge.

Rearden & Ray, for petitioner. *N. P. Conroy*, City Atty. of Pasadena, and *Williams & McKinley*, for respondent.

PATERSON, J. The petitioner is before us on a writ of *habeas corpus* to test the validity of an ordinance of the city of Pasadena, duly passed, approved, and published, for a violation of which he has been duly convicted. The ordinance was passed February 19, 1887, and took effect on the first Monday in May, 1887. The following provisions only are germane to the matter before us:

"Section 1. It shall be and is hereby made unlawful for any person or persons, either as owner, principal, agent, servant, or employe, to establish, open, keep, maintain, or carry on, or assist in carrying on, within the corporate limits of the city of Pasadena, any tippling-house, dram-shop, cellar, saloon, bar, bar-room, sample-room, or other place where spirituous, vinous, malt, or mixed liquors are sold or given away; * * * provided that the prohibitions of this ordinance shall not apply to the sale of liquors for medicinal purposes by a regularly licensed druggist, upon the prescription of a physician entitled to practice medicine under the laws of the state of California; nor shall such prohibitions apply to the sale of such liquors for chemical or medicinal purposes."

Violations of the ordinance are declared to be misdemeanors. The complaint under which petitioner was convicted charged that the said Campbell, at the time and place aforesaid, (May 3, 1887,) did keep and maintain a certain dram-shop, saloon, and bar-room, where spirituous and malt liquors were then sold, said defendant being then and there the owner thereof; that said defendant was not then and there a regularly licensed druggist, and the liquors then and there sold by him were not sold for either chemical or medicinal purposes.

In addition to the facts above stated, counsel for the petitioner and for the people have stipulated "that there has not since the first day of May, 1887, been any ordinance of the city of Pasadena requiring a license to sell vinous, malt, or mixed liquors in any quantity. That there was an ordinance of the city of Pasadena requiring a license to retail spirituous, vinous, malt, and mixed liquors, passed in June, 1886, which was in force up to the first day of May, 1887; and the said city issued a license under said ordinance to petitioner to retail and sell spirituous, vinous, malt, and mixed liquors up to the first day of May, 1887; but said ordinance was repealed February 19, 1887, the repeal taking effect May 1, 1887. That the petitioner has paid all county and municipal taxes assessed against the spirituous, vinous, malt, and mixed liquors owned, kept, and sold by him in said saloon in said city of Pasadena."

It is claimed by the petitioner that the ordinance is void, because it conflicts with section 13, art. 1, of the constitution of this state, which provides that no person shall be deprived of life, liberty, or property without due process of law. It has been held that an act which substantially destroys the property in intoxicating liquors owned and possessed by persons within the state when the act took effect, by preventing the sale, keeping, or giving away of the same, except for medicinal purposes, is violative of this provision of the constitution, and in its application to such liquors is inoperative and void. *Wynehamer* v. *People*, 13 N. Y. 378; *Bertholf* v. *O'Reilly*, 74 N. Y. 516.

That question, however, is not properly before us in this proceeding. It is not shown by the record when, if ever, the petitioner became the owner of the liquor sold. The last paragraph of the above stipulated facts, as to payment of taxes, was intended, no doubt, to present the question arising out of ownership for an opinion, but the language is so uncertain in its effect that it ought not be taken as the basis of a decision upon so grave and important a constitutional question. In all inquiries upon matters of this kind the facts should be full and clear, or the court should refuse to consider the question. *Bartemeyer* v. *Iowa*, 18 Wall. 129. The same may be said of the contention that the ordinance is void under section 8, art. 1, subd. 3, Const. U. S., because no distinction is made between imported wines and liquors, remaining in the original and unbroken packages, and other wines and liquors; there is nothing to show the character of the liquors sold by the petitioner. Furthermore, the petitioner is charged with keeping a *bar-room, and we consider the case only upon that basis.* It is further claimed that the ordinance is void, because, "under the municipal corporation act, the city of Pasadena was not authorized to pass the ordinance, (St. 1883, c. 49, § 862, subd. 1–10;) for, if the legislature had intended to confer the power to prohibit the sale of wines and liquors upon cities of the sixth class, (of which Pasadena is one,) it would have said so in direct terms, as was done in the case of cities of the fourth class."

Prior to the adoption of the constitution of 1879, the local authorities possessed only such powers as were expressly, or by necessary implication, conferred upon them by their charters. It is now provided that "any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws." Article 11, § 11, Const. Under this provision, every county, city, town, or township may adopt and enforce such constitutional police regulations as are not in conflict with general laws. It has the same powers over its own local police and sanitary affairs as were formerly granted by the legislature, and, unless the exercise thereof will conflict with the operation of general laws, it may make and enforce the same through its local government. That such a law as the one before us is not repugnant to any clause of the constitution of the United States there can be no doubt. The supreme court of the United States has decided uniformly that "the usual ordinary legislation of the states regulating or prohibiting the sale of intoxicating liquors raises no question under the constitution of the United States prior to the fourteenth amendment of that instrument. The right to sell intoxicating liquors is not one of the privileges and immunities of the citizen of the United States, which by that amendment the states were forbidden to abridge," (*Bartemeyer* v. *Iowa*, *supra*; *License Cases*, 5 How. 504; *Beer Co.* v. *Massachusetts*, 97 U. S. 32;) and that the power to license, regulate, or prohibit *tippling-houses* is a constitutional right, which may be enforced as a police regulation through proper legislation, is no longer an open question in this state. In *Ex parte Smith*, 38 Cal. 708, it was said: "Legislatures have enacted a variety of laws, which undoubtedly, in a general sense, affect the rights of life, liberty, property, safety, and happiness by way of restraint. Of such are laws regulating the slaughter

of animals, the interment of the dead, the erection of buildings in cities and towns of inflammable material, the manufacture and keeping of gunpowder and other explosive compounds, the vending of poisons and other noxious drugs, the sale of intoxicating beverages to certain classes of persons, as Indians, and even to all classes of persons, as in the case of the prohibitory liquor laws of Maine and Massachusetts." *Ex parte McClain*, 61 Cal. 437.

Unless we are prepared, therefore, to overrule the decisions of our own state, and disregard the opinions of the supreme court of the United States, we must hold that the ordinance in question is free from objection so far as its constitutionality is concerned; that it is not violative of any clause of the constitution of the United States, and that it is in its scope and operation within the police powers which may be lawfully enforced under the provisions of the constitution of this state.

There is but one question remaining to be considered: Is the ordinance "in conflict with general laws?" Section 11, art. 11, Const., clearly subordinates the powers conferred upon counties, cities, towns, and townships to the general laws of the state. It is claimed that the ordinance before us is in conflict with general laws, because "the one prohibits, the other makes full provision for, the granting of licenses for the sale of spirituous, vinous, and malt liquors." In support of this contention, counsel cites sections 3356, 3381, 3382, 4045, 4408, Pol. Code, and subdivision 93, § 25, of the county government act, (St. 1883, p. 303.) The provisions of the Political Code referred to are unconstitutional, and no longer operative. This was decided in *People* v. *Martin*, 60 Cal. 156, where it is said that "the taking of the power to impose such taxes [licenses] from the legislature, and vesting it in the local authorities, is but another of the many evidences to be found in the new constitution of the intention to bring matters of a local concern home to the people." Those sections of the Code, therefore, stand annulled by the constitution.

Section 25 of the county government act confers upon the boards of supervisors, in their respective counties, power to make and enforce "all such local police, sanitary, and other regulations as are not in conflict with general laws." There is nothing in the case before us to show whether the board of supervisors of Los Angeles county have ever made any regulations with respect to the sale of wines or liquors in saloons and bar-rooms; but manifestly, such regulations, if made, could not operate to divest the authorities of the city of the right to legislate upon the same subject, and enforce such regulations within the city limits. The regulations of the board of supervisors would not be a general law, within the meaning of the provisions of section 11, art. 11, Const.

Our attention has not been called to any general law from which an intention on the part of the legislature to prohibit such ordinances as the one before us—local police regulations in cities—can be inferred. It is true, as claimed by the petitioner, the legislature has by many acts manifested the policy of encouraging the growth of the grape, and the manufacture of wines and brandies, by our people, and has considered the liquor traffic heretofore as a legitimate source of revenue; but no act now in force and effect is by its express terms, or by implication, a limitation upon the powers of the municipalities of the state to regulate or prohibit the sale of intoxicating liquors in bar-rooms. The legislature has prohibited the sale of liquors to minors, and in the lobbies of theaters, near camp-meetings, and in and about certain public buildings and institutions of learning. It has also repealed what was known as the "Sunday Law," and by an act recently passed has made it unlawful to sell, or offer to sell, under the name of wine, or under any name designating pure wines, any substance or compound except pure wine or pure grape must, as defined in the act; and has appropriated a large sum of money for the use of the state board of viticulture. All these are indicative of a policy to regulate.

There is nothing in these acts inconsistent with the constitutional authority vested in the municipalities to make and enforce such local regulations respecting saloons, etc., as may be deemed best by the local legislative bodies. Section 11 of article 11 is itself a charter for each county, city, town, and township in the state, so far as its local regulations are concerned, and nothing less than a positive and general law upon the same subject can be said to create a conflict within the meaning of that section. *Ex parte Ah Toy*, 57 Cal. 92.

There is nothing in this case which requires us to determine any other question than the right of the city to prevent tippling-houses, dram-shops, and bar-rooms,—a question entirely different from that sought to be raised by petitioner, arising out of the ownership and manufacture of wines, etc.

Not only is there nothing in the provisions of the ordinance before us inconsistent with general laws, but its provisions are in harmony with the authority expressly vested in cities of the sixth class by section 862 of the municipal corporation act of March 13, 1883, which provides that the board of trustees shall have power "to pass all ordinances not in conflict with the constitution and laws of this state, or of the United States." This act of March 13, 1883, is in harmony with, and passed in obedience to, the provisions of section 6, art. 11, Const. In cases of this kind we have nothing to do with the policy of the law. That is a matter for the legislature. In determining the question whether there is a *conflict*, we look only at the law itself, which is the best and only evidence of the policy of the state on the question before us.

The petitioner is remanded to custody.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; TEMPLE, J.; SHARPSTEIN, J.

MCFARLAND, J. I dissent. There is no pretense that the ordinance in question is the result of the exercise of the power to *regulate*, or to raise revenue for municipal purposes by license or tax. Its clear purpose is practically to destroy the ownership of certain commodities which, in other parts of the state, are recognized and dealt with as property as fully as is flour, or bacon, or sugar. One of them—wine—is the product of a leading industry. It provides that these commodities shall not be sold or given away at any place within the bounds of the municipality. The power to sell or dispose of property gives to it its main valuable quality; and to take away this quality is to substantially confiscate it. Without discussing the many other grave constitutional questions which the case presents,—the discussion of which other duties prevent,—I will content myself with saying here that in my opinion the ordinance is "in conflict with general laws." The text of a state constitution is necessarily terse and concise, and it may be assumed that its framers, in stating a rule or principle, used as few words as would fairly express the idea intended. The evident intention of the clause above quoted was to prevent any confusion or discord or incongruity between the general legislation of the state in its broad sovereign capacity, and the special legislation of its dependent municipalities. An ordinance, therefore, may be in conflict with general laws, although the latter may not in express terms forbid the passage of the former. Whatever is inconsistent or inharmonious or at variance with or contradictory of or repugnant to the general policy of the state, as expressed in its general laws, is "in conflict" with those laws. And that there is a conflict in this sense between an ordinance which substantially declares that certain commodities shall not be property, and general laws of the state which not only impliedly, but expressly, declare that they *are* property, seems to be too clear for discussion. From the first to the last session of the legislature of this state, wines and liquors have been recognized as property, and as a legitimate source of revenue. The policy of the state has been to encourage, not to cripple, their manufacture.

Prior to the new constitution, the state usually licensed their sale. Since the new constitution was adopted, that source of revenue has been turned over to the counties. The county government bill, which is a "general law," expressly authorizes the county governments to license such sale; and the city of Pasadena is not authorized by its charter to suppress it. The state, too, has provided for a "State Board of Viticulture," and appropriated to its use a large sum of money. Among the duties prescribed for this board is the selecting of persons competent to lecture and impart instruction "in methods of culture, pruning, fertilizing, fermenting, distilling, and rectifying." It is also provided that the board of regents of the University of California shall provide for special instruction "in the arts and sciences pertaining to viticulture, the theory and practice of fermentation, distillation, and rectification, and the management of cellars, to be illustrated," etc.; also for an examination and report upon the woods of the state "procurable for cooperage;" also for an analysis of "soils, wines, brandies, and grapes." And, furthermore, the legislature, at its recent session, passed an act expressly providing for the sale of wine, and for the prevention of fraud "in the manufacture and sale thereof." St. 1887, p. 46. It expressly provides that the state comptroller shall furnish printed labels to be put on the bottles and packages "in which wine is sold." Section 7. Section 6 provides that "*in all sales, and contracts for sale*, production, or delivery, of *products defined in this act*, such products, in the absence of a written agreement to the contrary, shall be presumed," etc. Section 8 provides that "it is desired and required that all and every grower, manufacturer, trader, handler, or bottler of California wine, *when selling, or putting up for sale*, any California wine, * * * shall plainly stencil, brand," etc. The act is quite a long one, and provides in detail for the sale of wine, and the prevention of its adulteration. Now, suppose that the legislature had passed another act providing that neither spirituous, vinous, nor malt liquors should be sold or given away at any place, is there any sensible man who would not say that the two acts were "in conflict?" But the provision above supposed has been put into an ordinance of the city of Pasadena; and is not the conflict clearly there?

The notion of local self-government was never intended to be pushed to the extreme of disregarding and defeating the will of the legislature, which speaks and acts for the state.

In my opinion the petitioner should be discharged.

74 Cal. 30

People *v.* Lee Chuck. (No. 20,311.)

(*Supreme Court of California.* November 1, 1887.)

1. Homicide—Evidence—Cross-Examination of State's Witness—Facts Material to Defense.

On the trial of an indictment for murder, where the theory of the defense is that there had been a controversy between two societies called the "Bo Sin Sear Society" and the "Guy Sin Sear Society," deceased and a prosecuting witness belonging to the former, and the defendant to the latter; that the members of the former society were specially hostile to the defendant; that the witness and deceased, as representatives of theformer society, had met defendant and others, as representatives of the latter society, to settle the controversy; and that at the meeting the witness and deceased threatened the life of defendant,—it is proper, on cross-examination of such witness, and for the purpose of showing his hostility, to ask questions tending to prove such state of facts and threats, although such evidence may tend to prove a fact material to the defense.

2. Same—Self-Defense—Threats—Evidence.

Where, on the trial of an indictment for murder, the evidence for the prosecution shows that, at the time of the killing, defendant was incased in a steel armor, and armed with four pistols, it is competent for defendant to explain this fact by showing that he had had reason to think his life in danger, and for that reason had so

armed himself. And evidence tending to show that two organizations, of which deceased was a member, had threatened defendant's life, and that defendant had been informed of such threats, is competent for that purpose.

3. SAME—INSTRUCTIONS—STATING THAT DEFENDANT HAS NOT DENIED THE KILLING.
On the trial of an indictment for murder it is improper for the court, in charging the jury, to say that the defendant did not dispute that he killed the deceased, where such admission was neither made at the trial, nor implied in the theory of the defense.

4. SAME—ADMISSION OF KILLING IMPLIED BY THEORY OF DEFENSE.
Where the theory of defendant, in an indictment for murder, is that he and others were walking peacefully along a street, when they were surprised by shots fired by deceased, and that thereupon defendant and his companions began firing, and were fired at by deceased and others with him, and that in the affray deceased was killed, but by whom was uncertain, this theory does not imply an admission that the deceased was killed by defendant.

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

McAllister & Bergin, *Lyman A. Mowry*, and *Wm. A. Nygh*, for appellants. *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted for the murder of Yin Yuen, who was killed at about noon, on Washington street, in San Francisco. The witnesses who were present when the homicide was committed are Chinese, and there is a wide discrepancy in their testimony, although the evidence of all the witnesses on either side harmonizes wonderfully with the testimony of the other witnesses on the same side. On the part of the prosecution it is made to appear that defendant, with several other Chinamen, was standing on Washington street when the deceased came peaceably along, and, just as he passed the defendant on the sidewalk, defendant presented his pistol and fired; that Yin Yuen instantly fell, and defendant again fired at him; and thereupon the others who were standing there, some five or six, commenced firing at the deceased, who was lying helpless on the ground. The defendant's witnesses all state that some five or six Chinamen were standing at the same point on Washington street, when the defendant with two other Chinamen came along up Washington street. As they passed the group, Yin Yuen fired a shot at the defendant, who stepped into the street, and looked around. As he did so Yin Yuen fired the second shot, and thereupon defendant and his two friends drew their pistols, and commenced firing, as did also the other Chinamen who were with Yin Yuen. That the two groups fired several shots at each other, and that during the firing Yin Yuen fell.

On the trial Chow Hin was the principal witness on the part of the prosecution. According to his own testimony, he was in company with Yin Yuen, or immediately behind him, walking along Washington street, at the time Yin Yuen was attacked and killed by the defendant. The defense attempted to show, on cross-examination of this witness, that he was hostile to the defendant. I will quote from the bill of exceptions sufficient to show the nature of the controversy: "*Question.* Who is the person who keeps that book? *The Court.* What is the object of it? *Counsel for Defendant.* The object is this, your honor: We are seeking to show the feeling of this witness, and the *animus* which he has in this prosecution. He is a member of the Bo Sin Sear society. There has been a feud between that society and the Guy Sin Sear society for a long time. The deceased was a member of the Bo Sin Sear society. They had quarreled for two months previous to this shooting. They had been out to the cemetery together to settle their disputes, and had gone through with certain ceremonies. Lee Chuck was out there; this witness was out there. They attacked Lee Chuck the day previous on Jackson street. They also threatened Lee Chuck on the very day previous to this shooting that he should not leave. This witness is a member of that society. The deceased is another. We want to show his connection with the society; we want to

show his previous quarrels. We want to show what his *animus* is. We want to show that this society has subscribed money to carry on this prosecution, and we want to show this man does not stand here as an impartial witness; that he stands here as a member of the Bo Sin Sear society, with a bitter feud on the part of the society against the Guy Sin Sear society, and against Lee Chuck as a member thereof. That the Bo Sin Sear society has been indulging in threats against the Guy Sin Sear society, the result of which was that Lee Chuck went and got a coat-of-mail, and armed himself with three or four pistols, in order to protect himself, and was attacked on Washington street in this city. We have a right to show the *animus* of the witness, and show his feelings toward the defendant." The objection that the evidence was incompetent, irrelevant, and immaterial was sustained by the court, and the defendant excepted.

The question was repeated in various forms, with the same result. The last two questions and the rulings were as follows: "*Question.* Did you and the deceased, two or three months before this shooting, go out to the cemetery as members of the Bo Sin Sear society, and meet there Lee Chuck and certain members of the Guy Sin Sear society? Did you go through there certain ceremonies, such as cutting a chicken's head, and trying to settle the feud between those two societies? Did you part in enmity, and did you and the deceased on that occasion make distinct threats against the life of Lee Chuck? *The Assistant District Attorney.* The same objection, your honor. *The Court.* Same ruling and exception. *Counsel for Defendant.* We shall except on the part of the defendant. *Q.* Did you and the deceased, representing the Bo Sin Sear society, with a party of other men, go out to the cemetery two or three months before this shooting? Did you meet there Lee Chuck and a number of men representing the Guy Sin Sear society? Did you have any angry controversy at that time? Did you and the deceased both then make threats at Lee Chuck? Did the deceased then draw his pistol on Lee Chuck, and threaten to shoot him at that time? *The Assistant District Attorney.* The same objection, your honor. *The Court.* Same ruling. *Counsel for Defendant.* We except on behalf of the defendant."

There may be some matters in the original offer which would not be proper evidence on cross-examination, but this cannot be said of the subsequent questions. It is implied that there was a feud between two Chinese societies, and that the society of which the deceased and the witness were members were specially hostile to the defendant, and it was sought to be shown, in connection with this, that the deceased and the witness, when the two societies met to arrange their controversy, threatened the defendant. This evidence was clearly admissible. It is no objection to such evidence that it would tend to prove some fact material to the defense, if it were also under the rules of evidence legitimate cross-examination.

The case of *Thornton* v. *Hook*, 36 Cal. 223, only sustains the proposition that the court, having a certain discretion to control the order in which testimony may be introduced, may sometimes refuse to allow cross-examination as to matters which would more properly be received as direct testimony from the party seeking to cross-examine. Here the object was to show that the witness was hostile. The defendant could not justly be compelled to recall and make the witness his own to do that. The court erred in sustaining the objection.

Since the case must be reversed on other grounds, it is not necessary to notice the unfortunate remark of the court, made while counsel for the defense was opening his case to the jury, further than to say that the line of defense there indicated seems to have been a proper one, and the judge was not justified in discrediting it in any way.

It appeared from the evidence of the prosecution that, at the time of the homicide, Lee Chuck was incased in a steel coat-of-mail, and was armed with

four pistols. These were brought in and displayed before the jury. They were intended to have, and doubtless did have, great weight in convincing the jury that Lee Chuck had prepared himself for the deadly encounter in which Yin Yuen lost his life. To explain this fact, and to show that the defendant had reason to think his life in danger, and for that reason, and not to prepare himself to make a murderous assault upon the deceased, defendant put on a coat-of-mail and armed himself, the defense offered to show that the Bo Sin Sear society and another organization of which Yin Yuen was a member, had threatened to take the life of defendant, and that defendant had been informed of the fact. This evidence was objected to as incompetent, and the objection was sustained. This ruling cannot be maintained. The fact of the extraordinary armor worn by the defendant at the time of the homicide was important evidence for the prosecution. To refuse to permit the defendant to show that the preparation was for a different purpose, and for reasons which implied no intent to assault the deceased, was a denial of a most essential right.

It is claimed that the court erred in its charge to the jury. The first objection is stated in the bill of exceptions as follows: "The charge of the court to the jury in these words: 'It is not disputed by the defense that on the twenty-eighth day of July, 1886, Yin Yuen, the person named in the information, was shot and killed on that day by the defendant,'—was an incorrect statement of facts made to the jury, and an incorrect statement of the position taken by the defense. Neither defendant nor his counsel did ever admit on the trial of this action that the deceased, Yin Yuen, was killed on the twenty-eighth day of July, 1886, by defendant. The claim of the defense was that on the twenty-eighth day of July, 1886, an affray was commenced on Washington street by Yin Yuen and his associate shooting at Lee Chuck and some two associates who were with him, and that in the course of said affray, so commenced by Yin Yuen, deceased, Yin Yuen, was killed; that neither the defendant nor his counsel, or either of them, in the course of the trial of this case, ever admitted that Yin Yuen was killed by Lee Chuck. This incorrect statement of fact to the jury in charging the jury was never subsequently corrected by the court in any further charge, or in any further observations made to the jury."

The statement fails to show any such admission on the part of the defense, and no such admission was involved in the theory of the defense. On the contrary, the theory of the defense, which was sustained by the testimony of several witnesses, was that the defendant and two others were walking peacefully along the street when they were surprised by shots fired by Yin Yuen; that thereupon they all three commenced firing and were fired at by Yin Yuen, and five or six others, with whom Yin Yuen seemed to be associated. In this affray Yin Yuen was killed, but by whom did not appear. On the other hand, the theory of the prosecution was that defendant shot deceased while he was going peacefully along from his work, and that Yin Yuen did not shoot at defendant, and that there was no affray at all, the shots all being fired at Yin Yuen by defendant and his partisans. It is plain, therefore, that this assumption was not justified by the facts, and that it was favorable to the theory of the prosecution.

Other instructions are objected to, but we do not deem it necessary to discuss them. Some of them, if isolated from the others, are probably defective; but on the whole we think the law was fairly presented on the points complained of. The cause is remanded and a new trial ordered.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; MCKINSTRY, J.; PATERSON, J.; THORNTON, J.

73 Cal. 635

PEOPLE v. KETCHEM. (No. 20,332.)

(*Supreme Court of California.* October 29, 1887.)

1. INDIANS—HOMICIDE OF ONE INDIAN BY ANOTHER—JURISDICTION OF STATE COURT.
Where both defendant, in a prosecution under an indictment for murder, and the deceased, are full-blooded Indians, but it does not appear that defendant is a member of any tribe of Indians having its chief and tribal laws, nor that his ancestral tribe had been treated with by the government, but it does appear that he had lived among the whites several years, the state courts of California have jurisdiction to punish him for the crime.[1]

2. CRIMINAL PRACTICE—TESTIMONY OF DEFENDANT'S WIFE—ERROR CURED BY DEFENDANT'S ADMISSIONS.
Where the testimony of the wife of a defendant accused of murder is admitted against his objection, on the ground of Pen. Code Cal. § 1322, providing that a wife shall not testify against her husband in a criminal action if he object, though the admission of such testimony is erroneous, yet it is cured by the husband subsequently testifying in his own behalf to substantially the same facts.

Commissioners' decision. In bank.

Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

J. N. Gillett, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

BELCHER, C. C. The defendant was charged with the crime of murder, and convicted of manslaughter. He moved for a new trial, and has appealed from the judgment and order denying his motion.

Defendant is an Indian 29 years of age, and was born and raised in the county of Humboldt. He was accused of killing another Indian, named Billy Barlow. At the trial, after several witnesses had been examined to prove the commission of the alleged offense, an Indian woman named Jennie Bill Ketchem was called and sworn as a witness for the prosecution. The defendant objected to her testifying upon the ground that she was his wife, and, therefore, under section 1322 of the Penal Code, incompetent to be a witness against him. In support of the objection it was proved that some three or four years before the time of the homicide the defendant asked the witness to be his "woman," and she said "All right." He also asked her father and mother if he might have her for his woman, and they consented. Before that, she had lived with another Indian for about four years, but he had left her. She then lived with defendant as his woman in a cabin built by him for that purpose, until a few weeks before the homicide, when he went away and left her. While they were so living together she had two still-born children. Before leaving, he told her that he was going to leave her, and afterwards told several other parties that he would never live with her any more. Defendant admitted that he made the statements imputed to him, but said he was joking when he made them, and that he intended all the time to return and live with her. It was further proved that what is called the "marriage relation," among the Indians was formed by a male taking a squaw and living with her, and that he could dissolve the relation whenever he chose to do so by leaving her, and could then take another squaw.

Upon these proofs the court overruled the objection, and the defendant reserved an exception. The witness was then examined and cross-examined, and thereupon the prosecution rested. The defendant then offered himself, and was sworn and examined as a witness in his own behalf. He admitted that he killed Billy Barlow, and testified to all the facts connected with the killing substantially as his alleged wife had testified to them.

Whether, in view of the fact that they were Indians, the defendant and his

[1] Under the act of congress of March 3, 1885, the state courts have no jurisdiction over the Indians within the state, and on their reservations, for crimes committed by and against each other, so long as they maintain their tribal relations. U. S. v. Kagama, 6 Sup. Ct. Rep. 1109; Ex parte Cross, (Neb.) 30 N. W. Rep. 428.

"woman" should be regarded as husband and wife, within the meaning of those words as used in section 1322 of the Penal Code, is a question which we do not deem it necessary to decide. The question, so far as we are advised, has never before arisen in this state, and upon somewhat similar facts the courts in other states have ruled differently. See *Johnson* v. *Johnson*, 30 Mo. 72; *Smith* v. *Brown*, 8 Kan. 610; *Wall* v. *Williams*, 11 Ala. 839. *Contra: Roche* v. *Washington*, 19 Ind. 53; *State* v. *Ta-cha-na-tah*, 64 N. C. 614. If it be conceded that the parties were husband and wife, and that the court therefore erred in overruling the defendant's objection, still the error was rendered harmless and immaterial, when the defendant voluntarily became a witness for himself. Under his own testimony he was clearly guilty of manslaughter, if not of murder, and could not therefore have been prejudiced by the ruling. *People* v. *Montgomery*, 53 Cal. 576; *People* v. *Marseiler*, 70 Cal. 98, 11 Pac. Rep. 503; *People* v. *Daniels*, 70 Cal. 521, 11 Pac. Rep. 655.

The point is also made that the trial court had no jurisdiction of the case, because both the defendant and the party killed were full-blooded Indians; and in support of this position counsel cite *State* v. *McKenney*, 18 Nev. 182, 2 Pac. Rep. 171. In that case it was claimed that the state courts had "no jurisdiction of crimes committed by one Indian against another, when both are members of an organized tribe having laws for the government of their own internal affairs." And in commencing its opinion the court said: "Let it be remembered that what follows is intended to apply to the case before us, where one Indian belonging to a tribe which is recognized and treated with as such by the government, having its chief and tribal laws, is accused of killing another of the same tribe. * * * It does not refer to a case where an Indian leaves his tribe and joins the whites." Evidently the law as declared in that case, whatever might be said of the conclusion reached, has no application to this case. Here it does not appear that the defendant is a member of any tribe of Indians having its chief and tribal laws, nor that the tribe of which his ancestors may have been members was ever recognized or treated with by the government. On the contrary, it appeared that he had lived among the whites for several years. He had his own cabin, and about three acres of land around it, which he cultivated and on which he raised vegetables. He was asked what he did to support his woman, and replied: "I sheared sheep around, and hunted and worked for anybody. Herded sheep for anybody."

In our opinion the court below had jurisdiction to try the case, and the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

SEARLS, C. J., and TEMPLE, J. We concur in the foregoing opinion, upon the ground that the witness Jennie Bill Ketchem was not shown to be the lawful wife of the prisoner, and was therefore a competent witness.

73 Cal. 614

VANDOR *v.* ROACH, Adm'r. (No. 11,323.)

(*Supreme Court of California.* October 29, 1887.)

1. GIFT—CAUSA MORTIS—FRAUD OR INCAPACITY OF DONOR, MATTER OF DEFENSE.
One claiming property by gift *causa mortis*, is not under obligation to disprove fraud or prove a sound and disposing mind on the part of the donor, as fraud or incapacity are matters to be set up and proved as a defense.

2. SAME—WHAT CONSTITUTES A GIFT.
A person on his death-bed took from under his pillow a package and handed it to plaintiff saying: "These bonds are for you," or words to that effect. *Held*, that the transaction sufficiently manifested an intention to make a gift.[1]

3. SAME—ACTION TO RECOVER GIFT.
In an action against an administrator to recover five United States bonds of a certain denomination, which plaintiff claimed were given to her by deceased *causa mortis*, the complaint showed that plaintiff possessed five bonds, and showed their numbers, and defendants admitted the allegation, and did not prove that deceased owned other bonds, while there was evidence tending to show that the bonds claimed were the identical ones given. *Held*, that the court was justified in finding the bonds claimed were the ones given.

Commissioners' decision. Department 1.

Appeal from superior court of the city and county of San Francisco; J. F. SULLIVAN, Judge.

T. C. Van Ness, for appellants. *M. C. Hassett*, for respondent.

HAYNE, C. The plaintiff claimed that the defendant's intestate gave to her, on his death-bed, five United States bonds which stood in his name. There was no indorsement or written transfer, and she brought this action to obtain a decree directing the administrator "to make a good and sufficient transfer of said bonds to plaintiff, by his assignment in writing." The court below gave judgment for the plaintiff, and the defendant appeals.

The only points made on behalf of the appellant are the following:

1. It is argued that the burden of proof was upon the plaintiff to show that "the gift was fair," and that there was no evidence on the subject. If this means that it was incumbent upon plaintiff to show that there was no fraud practiced upon the deceased, we cannot agree to it. Fraud is never presumed. And if there is nothing in the circumstances to create a suspicion of wrong, we cannot see why the plaintiff should be required to go further and negative possibilities. Nor can we agree to it if it means that the plaintiff is required to show that the deceased was of sound and disposing mind at the time of the gift. Soundness of mind is presumed until the contrary appears. In the case of a will, proof that the testator was of sound mind is required by express provision of the statute. There is no such provision as to gifts *causa mortis*. The point was expressly decided in *Bedell* v. *Carll*, 33 N. Y. 586, in which case the court said: "He establishes a *prima facie* case when he shows that the disposition has been attended by all the requisites which the common law prescribes to give it validity. Certainly he is not required to prove affirmatively that the donor was of sound disposing mind and memory when he made the gift, and that the delivery of the subject was his free and voluntary act. These are matters of defense equally applicable to gifts *inter vivos* and *causa mortis*."

2. It is argued that what was done did not show sufficient intention of giving. The counsel says that "the operative words of a gift are: 'I give' or 'I have given;'" and that these words are wanting. But we do not think that any formula or set phrase is necessary. It is sufficient if there was delivery, and any words importing an intention to give. The only evidence on the subject was that of the physician, who testified that the dying man took a package from under his pillow, and handed it to the plaintiff, saying: "These bonds are for you." The witness did not pretend to give the precise words uttered, but stated that this was the substance of what was said. This, we think, was a sufficient manifestation of intention to give.

[1] To sustain a gift, the intention of the donor must be established by clear and precise evidence. Appeal of Madeira, (Pa.) 4 Atl. Rep. 908. And a *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent. Basket v. Hassell, 2 Sup. Ct. Rep. 415; Shuckleford v. Brown, (Mo.) 1 S. W. Rep. 390.

3. It is urged that there was nothing to identify any particular bonds. But the complaint alleges that the deceased "was the owner of five United States registered bonds, issued under an act of congress in the year 1877, and more particularly designated and known by the name of 'four per cent. consols of the United States;' and by the numbers 131,641, 131,642, 131,643, 131,644, and 131,645, each of said bonds being issued to said Frederick Biringer, and standing in his name in the registry department of the United States government." This is expressly admitted by the answer. And the statement shows that "plaintiff put in evidence five United States bonds, $1,000 each, numbers 131,641, 131,642, 131,643, 131,644, and 131,645, being the same as set out in the complaint." It does not appear that deceased had any other bonds. And the evidence tends to show that the ones mentioned in the pleadings and produced by plaintiff at the trial, were the ones given to her. The physician did not know what was in the package which he saw delivered, but heard the deceased refer to it as "these bonds;" and he thought he recognized the package produced at the trial as the one he saw given by the deceased. The plaintiff testifies that after the package was received by her, she mislaid it, but subsequently found it in the bed-clothes which deceased had used. She says that the bed-clothes had been taken to the basement, and that she "went down and found the package and *these bonds*."

Upon the whole we think there was a *prima facie* case, and, as no contradictory evidence was put in, the court below properly rendered judgment for the plaintiff. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

73 Cal. 625

PRICE *v.* BEAVER. (No. 11,889.)

(*Supreme Court of California.* October 29, 1887.)

1. PUBLIC LANDS—APPLICATION FOR PURCHASE OF SWAMP LAND—AFFIDAVIT OF "NO SETTLERS."

Under Pol. Code Cal. § 3443, providing that a person who makes application to purchase swamp or overflowed land must show in his affidavit for that purpose that he "knew the land applied for, and the exterior bounds thereof, and that he knew *of his own knowledge* that there were no settlers thereon," a person is qualified to make this affidavit by information obtained by going upon the land, and examining it as indicated by a guide, unless it is proved that the guide pointed out the wrong land. The knowledge required is not necessarily derived from a personal survey.

2. SAME—AFFIDAVIT BY FEMALE APPLICANT.

The provision of Pol. Code Cal. § 3444, as to the affidavit to be filed by one seeking to purchase swamp or overflowed land, requiring that, "if the applicant is a female, such affidavit must show that she is entitled to purchase real estate in her own name," is complied with by a statement in such affidavit that applicant "is an unmarried woman, over the age of eighteen years, a citizen of the United States, and a resident of the state of California, of lawful age."

Commissioners' decision. Department 2.

Appeal from superior court, Tulare county; W. W. CROSS, Judge.

Chas. E. Wilson and *C. A. Webb*, for appellant. *Lambertson & Taylor*, for respondent.

BELCHER, C. C. The defendant, on the twenty-fifth day of May, 1885, filed in the office of the surveyor general of the state her application to purchase 640 acres of swamp and overflowed land, situate in Tulare county. The land sought to be purchased had been segregated as swamp and overflowed land, by authority of the United States, for more than six months, and was subject

to sale by the state to any qualified applicant. The defendant was qualified to purchase the land, and her affidavit properly stated all the facts required in such case to be stated therein. The plaintiff, on the seventeenth day of June, 1885, made application to purchase the same land. He was also a qualified purchaser, and his application was sufficient and proper in form. On demand of the plaintiff, the question as to which of the parties had the better right to purchase the land, was referred by the surveyor general to the superior court of Tulare county for determination. Proper pleadings were filed by the parties, and after a full hearing of the case, the court, among other things, found as follows:

"*Third.* That said defendant is a native-born citizen of the United States, and was, at the time of filing said application to purchase said land, of the age of thirty-one years, an unmarried female, and a resident of the state of California; that at said time she knew the land applied for, and the exterior bounds thereof, and knew, of her own knowledge, that there were no settlers thereon; that she desired to purchase said land under the law providing for the sale of swamp and overflowed and tide lands, and that she did not own swamp and overflowed lands which, together with that sought to be purchased, and applied for in said application, would exceed six hundred and forty acres; that she did not know of any valid claim to the said land other than her own; and that there was no other valid claim to said land at the time said defendant filed her application, or at any time since.

"*Fourth.* That the said land is not suitable for cultivation."

And as a conclusion of law, the court further found "that the application of the defendant, Hattie M. Beaver, to purchase the east half of section 19, and the west half of section 20, in township 22 south, range 23 east, Mount Diablo base and meridian, (the land in question,) is good and valid, and said defendant has a right to purchase the same, and that she is entitled to have her said application approved by the surveyor general of said state of California," etc.

Judgment was entered in favor of the defendant. The plaintiff then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

It is claimed for the appellant that the finding "that at said time she knew the land applied for and the exterior bounds thereof, and knew, of her own knowledge, that there were no settlers thereon," was not justified by the evidence; and this is the principal point made for a reversal of the judgment.

We do not think the judgment should be reversed for the reason urged. It was proved that the defendant was the widow of John H. Beaver, who had filed an application to purchase the land in question, and died in April, 1885. The defendant was a witness in her own behalf, and on her direct examination testified that at the time of making her application she knew the land applied for, and knew the exterior bounds of the land, and that there were not any settlers on it at that time; that, about a week before she made her application, she went on the land with J. W. Beaver, the brother of her deceased husband, and went where he said the corners of the land were. On cross-examination she said that when she was on the land her brother-in-law showed her certain stakes, but she didn't remember the marks on them and couldn't say whether they were section stakes or not; that she depended on her brother-in-law, and, as a matter of fact, did not herself know any of the exterior boundary lines of the two half sections applied for.

J. W. Beaver was called as a witness, and testified that about the fifteenth of May, 1885, he went with defendant to look at the land, and showed her, at that time, what he supposed to be the land now in controversy, and that he afterwards went back to the place for the purpose of determining whether he had correctly shown her the land in controversy or not. On his cross-examination he said, in substance, that he found a section corner between sections

19 and 20; that there was a stake there with marks on it, which he did not remember, and that he believed the stake was pulled up and lying by the corner; that he did not know whether the stake was a corner stake or not, and only judged from the marks; that he and defendant went over the land in search of the other corners, but he did not know that they found any stakes, except the one at the junction of sections 17, 18, 19, and 20; he thought they found a stake directly east,—a half-mile stake,—but as to that was not positive; that they did not measure, or follow the exterior boundary lines of the land; that he informed defendant what he supposed to be the boundaries and boundary lines, but that he was not a surveyor, and had never seen the land surveyed, and did not at that time know its exterior boundaries; that he could see two or three miles in every direction, and did not see any evidence of any settlement, except what his brother had put there.

Another witness was called, and testified that he knew the land described in the complaint, and saw it surveyed; that he was with the surveyors, and saw them set the corner stake between sections 19 and 20 on the north; that about a month and a half before the trial he went on the land with J. W. Beaver for the purpose of showing it to him, and positively identifying it as the land which defendant made application to purchase; that he had lived on the land for five months in a house which defendant's husband had built; that he found a stake at the north-east corner of section 19, which had been pulled up, but was lying on the ground just where it was stuck to mark the true corner.

This was substantially all the evidence introduced upon the question in hand, and in our opinion it was sufficient to justify the finding complained of.

It is true, the Code requires any person desiring to purchase swamp and overflowed land to state in his affidavit "that he knows the land applied for, and the exterior bounds thereof, and knows, of his own knowledge, that there are no settlers thereon." Pol. Code, § 3443. And it is also true that in cases of this kind each party is an actor, and must allege and prove that he has strictly complied with the law. But it is not required that the purchaser of swamp land shall know "of his own knowledge" the land applied for, and the exterior bounds thereof. Ordinarily he does not, and, unless he is a skilled surveyor, must gain this information from others. Having gained it, however, he can and must then state, if such be the fact, that he knows of his own knowledge that there are no settlers on the land. The defendant was shown by her brother-in-law what he supposed to be the corners and boundary lines of the land in controversy. She relied and acted upon the information thus received, and there was no attempt to show that it was not correct. It is not pretended that she did not go upon the land which she desired to purchase, nor that she was incorrectly informed as to its bounds or limits, nor that there were any settlers on the land. The claim is only that J. W. Beaver did not *at the time know* the true lines and corners, and so, however correct her information may have been, her application must fail. If this be the correct view, then it must follow that, if defendant had employed a surveyor to show her the land, and he had made mistakes as to the corners and lines, and had incorrectly located its bounds, her application could be successfully assailed by any subsequent applicant. We do not think that such a result was intended by the law-makers, or should receive sanction from the courts.

The point is also made that the defendant's application was insufficient because she did not state in her affidavit that she was entitled to purchase real estate in her own name. Defendant stated in her affidavit that "she is an unmarried woman, over the age of eighteen years, a citizen of the United States, and a resident of the state of California, of lawful age."

The Code (section 3444, Pol. Code) provides: "If the applicant is a female, such affidavit must also show that she is entitled to purchase real estate in her own name."

It is urged that an unmarried woman, though she be more than 18 years of age, and a citizen and resident of the state, is not necessarily entitled to purchase real estate in her own name, because "she may be incompetent—an idiot or lunatic, for instance," and it is therefore necessary that she should state in her affidavit that she is entitled to purchase, etc. There is nothing in this point. The Code, as we have seen, says that the affidavit must *show* a female is entitled to purchase, not simply state that fact. The defendant's affidavit fully complied with the law in this respect, and was sufficient. She was presumed to be of sound mind, and was not called upon to negative in her affidavit the fact that she was an idiot or lunatic.

The judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

GOLDTREE and others *v.* THOMPSON and others. (No. 11,749.

(*Supreme Court of California.* October 4, 1887.)

WILL—ACTION TO CONSTRUE—JURISDICTION OF SUPERIOR COURT.

Siddall v. *Harrison*, *ante*, 130, followed.

Commissioners' decision. Department 1.

Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Graves, Turner & Graves, for appellants. *Wm. Shipsey*, guardian *ad litem*, for minors.

FOOTE, C. According to the views expressed by this court in Department 1, in the case of *Siddall* v. *Harrison*, *ante*, 130, filed October 7, 1887, the present action was not one of which the trial court had rightful jurisdiction. Therefore, in accordance with the reasons stated in the opinion in the cause *supra*, it would seem to follow that the judgment herein should be reversed, and the cause remanded, with directions to the court below to dismiss the action.

I concur: BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to the court below to dismiss the action.

74 Cal. 109

In re LOWENTHAL, on *Habeas Corpus*. (No. 20,362.)

(*Supreme Court of California.* November 8, 1887.)

CONTEMPT—OBSTRUCTING EXECUTION OF WRIT—JURISDICTION OF COURT TO PUNISH.

Petitioner was tried before the superior court for contempt against that court in obstructing and taking from a police officer, by means of legal process, certain personal property taken by such officer under a search-warrant issued by the presiding judge of the superior court, and fined and committed to the county jail. *Held*, on *habeas corpus*, that the superior court had jurisdiction of the subject-matter and person of petitioner, and had authority to render such judgment, and that the petitioner would be remanded.

In bank. *Habeas corpus*. Superior court of the city and county of San Francisco; J. V. COFFEY, Judge.

E. B. Stonehill, Dist. Atty., and *Matt. I. Sullivan*, for respondent. *J. F. Dunn*, for petitioner.

BY THE COURT. The petitioner was fined and committed to the county jail for a term of five days for a contempt of the process of the superior court, department 9, in and for the city and county of San Francisco. The alleged contempt of petitioner consisted in obstructing and taking from a police officer, by means of legal process, certain personal property taken by such officer under a search-warrant, issued by J. V. COFFEY, presiding judge of said superior court, for the purpose of securing certain documents and papers averred to have been used as a means of committing a felony. Petitioner had a hearing before the superior court, and upon the testimony, *pro* and *con*, was found guilty and sentenced as hereinbefore stated.

We have examined the record with some care, and are of opinion the superior court had jurisdiction of the subject-matter, and of the person of the petitioner, and that the judgment rendered was such as, upon the showing made, the court was authorized to make. The increasing volume of business brought before this court under the original jurisdiction conferred upon it, and the time necessarily consumed thereby, to the exclusion of other and equally important business, prompts us to brevity of opinion in cases where, like the present, our jurisdiction is not appellate. These are some of the considerations which restrain us in the present case from arguing *in extenso* from the premises up to the conclusions we have reached.

The petitioner is remanded to the custody of the sheriff.

THORNTON and TEMPLE, JJ., expressing no opinion.

74 Cal. 49

EUREKA & T. R. Co. *v.* MCGRATH and others. (No. 11,679.)

(*Supreme Court of California.* November 4, 1887.)

1. APPEAL—FROM ORDER REFUSING TO ANNUL JUDGMENT.
 A judgment against the defendants condemning a right of way for plaintiff's road through defendants' land was recovered by plaintiff, and defendants' damages were assessed at $600. Afterwards plaintiff moved the court that "the judgment entered in said action be set aside and annulled." After a hearing on the motion, the court made and entered the following order, "that the motion of plaintiff to annul the judgment in this action be denied and dismissed." *Held* that, as plaintiff could have appealed from the judgment, he could not appeal from the order.
2. RAILROAD COMPANIES—CONDEMNATION PROCEEDINGS—SUBSEQUENT CHANGE OF LINE—ANNULLING JUDGMENT.
 Plaintiff recovered a judgment condemning a right of way through defendant's land, but afterwards determined to change its line, and filed a petition and made a motion to have the judgment rendered set aside and annulled. The court entered an order denying plaintiff's petition and motion. *Held* that, although the motion was based upon new matter occurring subsequently to the judgment, there was no statutory provision for such a motion, or for the proceedings which plaintiff sought to institute.

In bank. Appeal from superior court. Humboldt county; JOHN J. DE HAVEN, Judge.

S. M. Buck and *J. A. McQuaid*, for appellant. *Horace L. Smith*, for respondents.

MCFARLAND, J. The plaintiff, a railroad corporation, on the seventeenth day of February, 1885, filed its complaint in the court below, asking a judgment condemning a right of way for its road through and over a lot of land belonging to defendants in the city of Eureka. Defendants answered, denying all the averments of the complaint, (except ownership of the lot,) and claiming $1,600 damages in case of condemnation. The case was tried with a jury, and all the facts necessary to support a judgment for plaintiff were found in its favor, and defendants' damages were duly assessed at $600. Judgment upon the verdict was duly entered on August 29, 1885. The judgment, after reciting the proceedings in the case, decrees that plaintiff is en-

titled to use and enjoy the strip of land described in the complaint as the right of way for the construction of its railroad, upon paying to defendants, or depositing in court for them, the full amount of compensation or damages assessed by the jury. Plaintiff then duly moved for a new trial, which was denied, and thereafter, on October 1, 1885, it appealed to this court "from so much of the judgment as directed the payment to defendants of the damages assessed by the jury." It gave a bond to stay execution during the pending of the appeal, in form as provided in section 942, Code Civil Proc. On the eleventh of January, 1886, the appeal was dismissed by this court because the transcript was not filed in time.

After the appeal had been dismissed, viz., on January 30, 1886, plaintiff filed a petition in the court below in which it was stated that "since the trial of said action, plaintiff has determined to change its line where it passes through defendants' land, as described in the complaint herein, and substitute a line further north, which will not require of defendants' land more than a narrow strip from the north-east corner of said lot, not exceeding 10 feet in width, if any." It also served defendants with notice that upon said petition, and upon other matters and proceedings, it would, on the fourth day of February, 1886, move the court "that the judgment entered in said action on the twenty-ninth day of August, 1885, be set aside and annulled."

After a hearing of this motion—at which hearing plaintiff introduced a resolution of its board of directors declaring its determination to change its line of road as stated in said petition—the court, on March 5, 1886, made and entered on its minutes an order "that the petition and motion of plaintiff to annul the judgment herein be denied and dismissed." From this order denying the motion to annul the judgment the plaintiff now appeals; and respondent moves to dismiss the appeal, on the ground that the order appealed from is not an appealable order.

In *Tripp* v. *Railroad Co.*, 69 Cal. 631, 11 Pac. Rep. 219, the appeal was from an order refusing to set aside a former order dismissing the action as to certain defendants; and the court says: "As to the order of dismissal, when entered, it was a final judgment which was itself appealable. The appeal should have been prosecuted from such judgment. This court, as it is well settled, will not take the jurisdiction of an order refusing to set aside a judgment or order itself appealable." And the court in its opinion refers to *Henly* v. *Hastings*, 3 Cal. 342; *Holmes* v. *McCleary*, 63 Cal. 497; and *Railroad Co.* v. *Railroad Co.*, 65 Cal. 295, 4 Pac. Rep. 13,—all of which cases clearly sustain the rule. In the case at bar, therefore, as the judgment sought to be set aside by the motion was itself appealable, there is no appeal from the order denying the motion, and the appeal should be dismissed. Counsel for appellant contends that, as his motion was based upon new matter occurring subsequently to the judgment, therefore the rule above stated does not apply. But, as there is no statutory provision for the motion which he made, or for the proceeding which he sought to institute, how can he invoke for this particular new matter any new rule that does not apply to any other kind of new matter?

Whether or not a railroad corporation, after having pushed a condemnation proceeding to the extreme of a money judgment in favor of the defendant therein, upon which an execution may issue, has the right, in any way, to avoid such judgment by a determination to change the line of its road; and if there be such right, what, if any, is the remedy,—these are questions which we are not called upon here to determine.

Appeal dismissed.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.; TEMPLE, J.; MCKINSTRY, J.

73 Cal. 639

GROSS *v.* KELLEHER. (No. 12,338.)

(*Supreme Court of California.* October 31, 1887.)

FORCIBLE ENTRY AND DETAINER—APPEAL—STAY OF PROCEEDINGS—DISCRETION OF TRIAL COURT.

Defendant appealed from a judgment in an action for unlawful detainer, and the court granted a stay of proceedings upon his filing a bond. The sureties failed to justify and the court set aside the order for a stay. Code Civil Proc. Cal. § 1176, provides that an appeal by defendant shall not stay proceedings unless the trial court so directs. Defendant moved for leave to file a new undertaking for a stay. *Held*, that a stay of proceedings in an action of forcible entry and detainer, pending an appeal, was not a matter of right but of discretion with the trial court.

In chambers. Proceedings on application to file undertaking on appeal from superior court of the city and county of San Francisco; T. H. REARDEN, Judge.

Moses G. Cobb, for appellant. *Joseph Mee*, for respondent.

SEARLS, C. J. This is a proceeding under an order on the plaintiff and respondent to show cause why the appellant should not be allowed to file a new undertaking on appeal, and why proceedings on the judgment should not be stayed upon filing a satisfactory undertaking. Respondent has appeared, and from the showing it appears that the action is for an unlawful detainer in which respondent recovered a judgment against his tenant, the appellant, for restitution of certain leased premises, and for certain rents, etc. The court below made an order for a stay of proceedings upon filing an undertaking in the sum of $2,000. The bond was filed. Respondent excepted to the sufficiency of the sureties, who, by a mistake as to the place at which they were to appear, failed to appear and justify. The court thereupon set aside the order staying proceedings, and execution issued. The appeal having been perfected, appellant applies to this court for leave to file an undertaking for a stay of execution.

In ordinary cases for the recovery of real estate, if the judgment be for the delivery of possession thereof, the party against whom the judgment is rendered is entitled, on appeal, to a stay of proceedings of right upon filing an undertaking in such sum as the judge of the court may fix. In that class of cases this court has held that where a defective undertaking was filed in the court below, the defect could be cured here by filing a proper undertaking. *Hill* v. *Finnigan*, 54 Cal. 311, 493; *Schacht* v. *Odell*, 52 Cal. 449.

In actions of forcible entry and unlawful detainer, however, a stay of proceedings pending an appeal is not a matter of right. Section 1176, Code Civil Proc., provides as follows: "An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered so directs." As this case now stands there is no order of the court or judge staying proceedings. For me to make the order here would be to override the discretion of the court below, which may have been for good reasons properly exercised.

The order to show cause will, therefore, be discharged except so far as to permit appellant to file an undertaking, on appeal, in the sum of $300, to cover the costs of appeal.

74 Cal. 9

JAHANT *v.* CENTRAL PAC. R. CO. (No. 11,868.)

(*Supreme Court of California.* October 31, 1887.)

RAILROAD COMPANIES—STOCK KILLING—PLEADING AND PROOF.

In an action against a railroad company for damages for killing stock, the complaint alleged that the defendant carelessly and negligently managed and ran its locomotive and cars, and killed the stock, which had casually, and without fault of the owner, strayed upon the track. *Held*, that the evidence of the carelessness of the company should be confined to the running and management of the loco-

motive and cars, and that it was not permissible to show that the stock came through an open gate upon the track, there being no averment that the gate was left open by the negligence of the company, which operated as a proximate cause of the killing.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN. R. PATERSON, Judge.

W. L. Dudley, for appellant. *J. C. Campbell*, for respondent.

FOOTE, C. This is an action for the recovery of damages against the defendant, a railroad company, for the killing of two horses by its locomotive and cars. The cause was tried by a jury, who returned a verdict in favor of the plaintiff, upon which a judgment was duly rendered. From that, and an order denying a new trial, the defendant has appealed. The cause of action, as stated in the complaint, is as follows: "That on or about the twenty-sixth day of September, 1884, the plaintiff was the owner and possessed of certain live stock, to-wit: Two horses, of the value of $350, and which horses, casually, and without the fault of said plaintiff, strayed in and upon the track and ground occupied by the railroad of the said defendant, in Liberty township, county of San Joaquin, state of California. That the said defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its said locomotive and cars that the same ran against and over the said horses of the said plaintiff, and killed and destroyed the same, to the plaintiff's damage, $350." These allegations were denied by the answer. The court, against the objection of the defendant, allowed evidence to be introduced that a certain fence along-side its track was not kept in repair, and that the horses of the plaintiff came through a gate in that fence, which had been left open, out upon the track, and were there killed by the locomotive and cars. It was found by the jury, upon special issues, that the horses did come through that gate, and upon the track, and were there so killed; that the horses when first seen by the engineer were on the track; that at that time the train was running at the rate of 25 miles an hour; that when the train struck, or hit and killed, the horses, it was running 20 miles an hour; that the engineer, as soon as he saw the horses, used all possible means at his command to stop the train.

As it seems to us, under the pleadings, evidence of the carelessness of the defendant should have been confined to such as referred to *its careless and negligent running and management of its locomotive and cars*, by means of which only was it alleged in the complaint, that the horses of the plaintiff were run against, and over, killed, and destroyed. While under this allegation it might have been competent, according to the rule laid down in *McCoy* v. *Railroad Co.*, 40 Cal. 535, to have shown by evidence that no proper fence existed along-side the defendant's track, it was not permissible to show, as was done, that the horses came through an open gate out upon the track, and were killed, without any averment whatever in the complaint that the gate was left open, or allowed to remain open, through carelessness or negligence on the part of the defendant, which operated as a proximate cause of the animals being killed.

It becomes unnecessary to determine any other point made by the appellant, but for the reasons heretofore stated, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

74 Cal. 36

SCHAMMEL *v.* SCHAMMEL. (No. 11,470.)

(*Supreme Court of California.* November 2, 1887.)

DIVORCE—ALIMONY AND ATTORNEY'S FEES—CONFLICTING AFFIDAVITS.

An order for payment of alimony and attorney's fees to a wife pending an action for divorce against her husband, where the affidavits upon which it is based are conflicting, will not be reversed. Following *White* v. *White*, 14 Pac. Rep. 393.

Commissioners' decision. In bank.

Appeal from superior court of the city and county of San Francisco; M. A. EDMONDS, Judge.

Fisher Ames and *Dunne & Davidson*, for appellant. *Jas. C. Cary, J. D. Sullivan*, and *Davis Louderback*, for respondent.

FOOTE, C. This is an appeal from an order granting a wife counsel fees and alimony pending an action for divorce against her husband. The affidavits filed upon the hearing of the motion are conflicting, but it is evident that the trial judge must have arrived at the conclusion that, notwithstanding the defendant's sworn statements to the contrary, he was an unkind, cruel, and abusive husband and father; that his promises to pay $100 a month, at his office, for the support of his wife and her two daughters, were not to be relied on; that his wife was sick and bed-ridden, and could not apply for the proposed allowance; that of his daughters, one had just cause, at the least, to fear the worst kind of abusive language from her father if she went to his office, and that the other daughter was too young a child to be intrusted with such matters. The court must also have come to the conclusion that the defendant had under his control a very considerable estate in the nature of community property, and that his income from rents, salary, and other sources amounted to about $432 per month; that under these circumstances the sum of $125 per month, for the support and maintenance of a sick woman, his wife, pending her action for a divorce, was not more than the defendant should have been ordered to contribute for such purpose. And we cannot say that such conclusions were not warranted by the evidence.

It does not appear that the allowance for attorney's fees was excessive, the very voluminous record in this case illustrating the fact that the defendant was most persistent and determined in resisting his wife's effort to succeed in her cause, and that very considerable labor and time must have attended the efforts of his wife's counsel to obtain for her urgent needs that which was necessary to save her from dependency upon her friends for the means of sustaining life.

Upon the whole matter, under the rule laid down by this court in the case of *White* v. *White*, 14 Pac. Rep. 393, we see nothing which would warrant us in reversing the order of the court below, and it should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

74 Cal. 52

Estate of CAHILL, Deceased. (No. 11,382.)

(*Supreme Court of California.* November 5, 1887.)

1. WILL—CONTEST—SPECIAL QUESTIONS TO JURY—INDEFINITE ANSWERS.

Where, in an action to contest a will on the ground of undue influence, contestant, under a stipulation between the counsel that "the foregoing questions shall be and are the issues of the contest in the matter of the estate of Ellen Cahill, deceased," submitted to the jury the following question: "Did the said Ellen Cahill, at the time of signing the instrument offered for probate, sign or execute the same under undue influence of either James H. Nolan, or of Annie Nolan, or of any other

person?" to which the jury responded, "Yes." *Held*, that the verdict was not too indefinite to warrant a judgment setting aside the will, and the setting aside of the verdict, because too indefinite, was error.

2. INFANCY—ACTION BY—FAILURE TO APPOINT GUARDIAN AD LITEM.
In a contest of a will by a minor, no guardian *ad litem* was appointed until the time of the trial, and no objection had been made previously to the want of such an appointment, nor was objection made at the time. *Held*, that the failure to appoint the guardian did not affect the jurisdiction of the court, and was not good ground for setting aside the verdict.

3. APPEAL—MATTERS APPARENT OF RECORD—REASONS FOR SETTING ASIDE VERDICT.
An agreement that the trial court may have set aside a verdict on its own motion, under Code Civil Proc. Cal. § 662, on the ground that the jury acted "under a misapprehension of the instructions, or under the influence of passion or prejudice," is not well founded, when it appears from the record that the order setting aside the verdict was not made at the time of its rendition, and was made upon the formal written application of a party, and where the printed reasons given by the court for making the order show that it was not on the grounds named.

4. SAME—BILL OF EXCEPTIONS—EVIDENCE.
Where a notice of motion to set aside a verdict states that it is to be made upon the minutes of the court, but contains no specification of the insufficiency of the evidence under Code Civil Proc. Cal. § 659, subd. 4, such motion shall be denied, and an appellant from the order setting aside the verdict is under no obligations to furnish any of the evidence in his bill of exceptions.

Commissioners' decision. Department 2.

Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

M. C. Hassett, for contestant. *Wm. F. Sayers*, for respondent.

HAYNE, C. William P. Cahill, a minor, commenced a contest to set aside the will of Ellen Cahill, deceased, on the ground of undue influence. No guardian *ad litem* was appointed to commence the proceedings, the written grounds of opposition being signed with his own name. The proponent filed an answer, in which no objection was made for the want of a guardian *ad litem*. After the issues were settled,—Milton C. Babb acting as attorney for the contestant,—the matter came up for trial, and then the court, upon petition of the contestant, made an order "that M. C. Hassett be, and he is hereby, appointed guardian *ad litem* of said William P. Cahill, to appear and act for him in the contest of said William P. Cahill to the proposed last will and testament of Ellen Cahill, deceased." As will be observed, this order did not purport to relate back to the commencement of the proceedings. So far as the record shows, no objection on account of there being no guardian *ad litem* at the commencement of the proceedings was made at any stage of the trial. The jury found that the will had been obtained by undue influence. The finding on this subject was as follows: "Did the said Ellen Cahill, at the time of signing the instrument offered for probate, sign or execute the same under undue influence of either James H. Nolan, or of Annie Nolan, or of any other person? *Answer*. Yes." The proponent moved to set aside the verdict, and the court below granted the motion on the ground of there having been no guardian *ad litem* at the commencement of the proceedings, and upon the ground of the indefiniteness of the verdict. In this latter regard the court said in its opinion, which is printed in the brief of counsel: "It is not specified whether the undue influence was exercised by James H. Nolan or Annie Nolan, or of some other person. This verdict is necessarily too indefinite to warrant any judgment whatever." The contestant appeals from the order setting aside the verdict.

1. We do not think that the verdict was too indefinite to warrant a judgment setting aside the will. It affirmed that the testatrix, in making it, was acting under the undue influence of James H. Nolan, or of Annie Nolan, or of some other person. The material point is that there was undue influence. It is not necessary that the undue influence should have been exercised by a

beneficiary under the will. Undue influence by any one, whether he gains by the will or not, is sufficient ground for setting it aside. It is perfectly true that, as an allegation in the statement of the grounds of opposition, it would be too indefinite if objected to; for it would make it necessary to go over too wide a field of evidence, and there would be nothing to apprise the proponent of the particular case to be made against him. It would therefore be ground of demurrer. The issues submitted to the jury should likewise be sufficiently definite to narrow the case within reasonable limits; and, probably, in such a case as this, if objection had been made to the form of the issue, the objection would have been allowed. But there was no such objection. On the contrary, the attorney for the proponent expressly stipulated in writing that "the foregoing questions *shall be and are the issues* of the contest in the matter of the estate of Ellen Cahill, deceased." In the face of such a stipulation as this, the proponent cannot be allowed to object to the form of the issues, unless they are so uncertain as to render it impossible to say what the jury meant by their verdict, which we do not think is the case here.

2. Was the fact that no guardian *ad litem* was appointed for the contestant until the case was called for trial sufficient reason for setting aside the verdict? If this circumstance went to the jurisdiction of the court, and so rendered the proceedings for contest void, there can be no doubt of the correctness of the action of the court below; but if it was a mere irregularity, the proponent should have brought the matter to the attention of the court, and applied for relief as soon as the matter came to his knowledge; he could not go on and take the chances of a verdict in his favor, and keep the objection in reserve. See cases collected in Hayne, New Trial, § 27. The question stated, therefore, resolves itself into this: Did the matter go to the jurisdiction of the court? We think it did not.

The provision of the Civil Code is that "a minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same." Civil Code, § 42. And in the Code of Civil Procedure it is provided that "where an infant or an insane person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending in each case. * * *" Section 372. And directions are given concerning the manner of the appointment. Code Civil Proc. § 373. So far as the mere language of these provisions goes, it would seem that the appointment is to be made after the commencement of the suit. But it has been held that the appointment of the guardian must be alleged in the complaint. *Crawford* v. *Neal*, 56 Cal. 321. In this case it was said that the necessity to show the due appointment of the guardian *ad litem* remains as at common law.

The old equity rule is stated by Story as follows: "An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion, as of his inability to bind himself, and to make himself liable to the costs of the suit. When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to apply to a court of equity, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights, or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant is therefore termed his 'next friend,' (*prochein ami.*)" Story, Eq. Pl. § 57. If the appointment was not made, the defendant could demur or put in a plea in abatement. Id. §§ 494, 725.

The common-law rule is stated by Tidd as follows: "An infant, or person under the age of twenty-one years, not being capable of appointing an attorney, must sue by his *prochein ami* or guardian. * * * An infant *defendant* must in all cases appear and defend by guardian. * * * If he appear by attorney, it is error; though, if an infant *plaintiff* appear by attorney, it is cured by the statute of jeofails." Tidd, Pr. (9th Ed.) 99.

It will be observed that the main reason given by these two learned authors is that the infant cannot appoint an attorney. The appointment of an attorney was one of the acts of an infant which was absolutely void at common law. And our Code provides that "a minor cannot give a delegation of power." Civil Code, § 33. But, as will be remembered, the minor did not appoint an attorney to commence the proceedings here. He commenced them *in propria persona*. It is not necessary, therefore, to consider what would be the result if the contest had been commenced by an attorney for the minor. That is not the case before the court. The consent of the minor himself, in submitting to the jurisdiction of the court, and applying to it for relief, does not seem to us to have been of no effect whatever, or, in other words, absolutely void; for the acts of minors are in general voidable merely, and are absolutely void only in certain cases. If this be so, then the court had jurisdiction of the person and of the subject-matter; and hence its action, however erroneous, was not void.

In the passage above quoted, Tidd makes a distinction between infant plaintiffs and infant defendants. It would seem that this distinction was made by St. 21 Jac. I. c. 13, § 2, which provided that, after verdict for the plaintiff, judgment shall not be stayed or reversed by reason that the plaintiff in ejectment, or other personal action or suit, being an infant under 21 years, did appear by attorney therein. See *Drago* v. *Moso*, 1 Speer, 212; *Smith* v. *Van Houten*, 9 N. J. Law, 382. This difference between action taken by the infant himself, and action taken in hostility to him, may be founded in reason. It was acted on in *Tremper* v. *Barton*, 18 Ohio, 425. It is unnecessary in this case, however, to say what would be the law with reference to infant defendants appearing and defending without a guardian *ad litem*. With reference to plaintiffs, it has been frequently held in this country that the want of a next friend or guardian *ad litem* does not go to the jurisdiction, but is a mere irregularity.

Thus in *Fellows* v. *Niver*, 18 Wend. 563, where a *prochein ami* was appointed after the commencement of the suit, a motion to set aside the proceedings was denied, the court saying: "The only difference between the former statutes and the present is this: Formerly the *prochein ami* was appointed after the issuing of the process, but before a declaration; now, it should be done before process; but now, as formerly, it is a question of *regularity* merely, not, as the defendant's counsel supposes, a question of *jurisdiction*. It is a question of practice, and the irregularity may be waived under the present statutes as well as under the old statutes."

So in *Bartlett* v. *Batts*, 14 Ga. 541, where a next friend was appointed for an infant plaintiff after the commencement of the action, the court refused to set aside the verdict, saying: "It seems very safe to say that a suit commenced and prosecuted by an infant alone is not absolutely void; and, although defective in wanting a next friend, the defect is one which before verdict is amendable, and after verdict is cured."

So in *Hafern* v. *Davis*, 10 Wis. 502, where the plaintiff signed her complaint in her own name, and proceeded without the appointment of a next friend, the court, per DIXON, C. J., said: "All objections not going to the merits of the action or defense seem to be swept out of existence. Section 40 of chapter 125 provides: 'The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of any such error or defect.' This is evidently an error or defect which does not affect the substantial rights of the plaintiff in error." The foregoing cannot be said to be a decision, for the case was reversed on another ground. The *dictum*, however, was approved and followed in *Sabine* v. *Fisher*, 37 Wis. 376. In that case there was no guardian *ad litem* or next friend appointed for the plaintiff. On the trial the defendant moved to dis-

miss on this ground, but the court thereupon appointed a guardian *ad litem*, and denied the motion to dismiss. On appeal the judgment was affirmed, the court, per RYAN, C. J., saying: "There is no error in the leave given to respondent to amend, so as to prosecute the suit by her next friend. Had she proceeded without leave, the judgment could not be reversed on that ground. *Hafern* v. *Davis*, 10 Wis. 501." And the foregoing cases were approved and followed in *Hepp* v. *Huefner*, 61 Wis. 150, 20 N. W. Rep. 923. And to the same effect are other cases: *Young* v. *Young*, 3 N. H. 345; *Blood* v. *Harrington*, 8 Pick. 554; *Schemerhorn* v. *Jenkins*, 7 Johns. 373; *Kidd* v. *Mitchell*, 1 Nott & M. 334; *Smart* v. *Haring*, 14 Hun, 276; *Sims* v. *New York College*, 35 Hun, 344. And compare *Brooke* v. *Clark*, 57 Tex. 112.

We do not regard the case of *Townsend* v. *Tallant*, 33 Cal. 52, as inconsistent with this conclusion. That was a case with reference to a sale of real estate under the direction of the probate court. It may very well be that a special proceeding by an administrator to divest the heir of title to real property is to be differently regarded. Nor do we think that section 1307 of the Code of Civil Procedure affects the question.

3. It is suggested that the court may have set aside the verdict upon its own motion, under section 662 of the Code of Civil Procedure, on the ground that the jury acted "under a misapprehension of the instructions, or under the influence of passion or prejudice." But it is sufficient to say that it appears from the bill of exceptions that the order setting aside the verdict was not made at the time of its rendition, nor was it made upon the court's own motion, but on the formal written application of the proponent. And, furthermore, the opinion of the court shows the grounds on which it acted. It is true that this opinion is not a part of the record. But, when counsel prints a document in his brief, he must not be surprised if, so far as he is concerned, it is treated as properly before the court. *Mott* v. *Reyes*, 45 Cal. 386.

It may be added, although the point is not distinctly made, that the case cannot be treated as one of a motion for new trial granted, or sustainable on the ground of insufficiency of the evidence to support the verdict. The notice of motion states that it was to be made on the minutes of the court, but contains no specification of the insufficiency of the evidence. In such case the statute expressly provides that the motion shall be denied. Code Civil Proc. § 659, subd. 4. This being so, the contestant was not required to insert any evidence in the bill of exceptions settled after the order.

We therefore advise that the order be reversed, and the cause remanded, with directions to the court below to enter judgment upon the verdict in favor of the contestant.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, order reversed, and cause remanded, with direction to the court below to enter judgment upon the verdict in favor of contestant.

73 Cal. 632

Ex parte MCNALLY, on *Habeas Corpus*. (No. 20,336.)

(*Supreme Court of California.* October 29, 1887.)

MUNICIPAL CORPORATION—ORDINANCE IMPOSING LICENSE FOR SALE OF LIQUOR—CONSTITUTIONALITY.

Const. Cal. § 11, art. 11, provides that "any * * * city * * * may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws." Petitioner was convicted of misdemeanor for violating a city ordinance, in refusing to pay a license fee of $200 per year for carrying on his business as saloon keeper. *Held*, that the ordinance was not in violation of that section of the constitution.

Commissioners' decision. In bank.

On *habeas corpus*. Superior court, Nevada county; J. M. WALLING, Judge.

Horace L. Smith, for petitioner. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The petitioner is a person carrying on the business of selling spirituous, malt, or fermented liquors or wines within the corporate limits of the city of Eureka, in this state. He was convicted by a jury of a misdemeanor, for violating an ordinance of said city, in refusing to pay a license to carry on his business, was fined by the court, and is in the custody of the sheriff, according to the sentence of that tribunal for non-payment of his fine, and has sued out a writ of *habeas corpus* to obtain his liberty.

It is claimed on his behalf that the ordinance which imposed the license in question was in violation of some of the provisions of the state constitution, but with this contention we cannot agree. In section 11, art. 11, of that instrument it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." There is no general law which conflicts with the ordinance. There is nothing in it which goes to show that in enacting and enforcing it the city authorities of Eureka exceeded their powers granted by that section of the constitution. The mere fact that the defendant was required to pay a license tax of $50 per quarter, or $200 per year, does not demonstrate it. It does not otherwise appear but what that amount was necessary in order properly to regulate the business of liquor selling, by confining it, perchance, to fewer and more responsible persons, or in some other way tending to the preservation and enforcement of good order, and the general welfare of the inhabitants of that city. Nor is there anything in the ordinance which is oppressive, or unreasonable towards or prohibitory of the business of retailing spirituous liquors. *Ex parte Wolters*, 65 Cal. 270, 3 Pac. Rep. 894; *In re Guerrero*, 69 Cal. 88–95, 10 Pac. Rep. 261, and cases cited.

The writ should be dismissed, and the petitioner remanded to the custody of the sheriff.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the writ is dismissed, and petitioner remanded to the custody of the sheriff.

74 Cal. 46

NEWELL and others *v.* DESMOND. (No. 9,589.

(*Supreme Court of California.* November 3, 1887.)

1. EXECUTION—BONA FIDE PURCHASERS FROM DEBTOR—CHANGE OF POSSESSION.
In an action of replevin brought by a claimant of property which had been levied upon as the property of one Cadman, under a judgment against him in favor of one Sutton, the court charged the jury that if they "should find that the property levied on in the action of *Sutton* v. *Cadman* was not in existence at the time of the alleged transfer by Cadman to the plaintiff, then there could not have been a change of possession as to that property, and the provisions of the Civil Code, § 3440, in reference to a change of possession, would not apply, and the transfer would be valid, even as against creditors, without reference to the question of change of possession." *Held* correct.

2. SAME—CLAIM BY THIRD PARTY—BURDEN OF PROOF.
Where a sheriff levied upon goods in a book store, as the property of one Cadman, and claimant brought an action of replevin against the sheriff, and it appeared that there had previously been a sale of the store by Cadman to claimant, but that Cadman still worked in the store as before, and defendant claimed that

there had been no such change of possession as would give the claimant title against a levying creditor, *held*, that the burden of proof rested upon defendant to show that the goods levied upon had belonged to the judgment debtor.

3. Depositions—Deponent Present in Court.

A deposition taken under Code Civil Proc. Cal. § 2021, subd. 1, may be read although the deponent is present in court; as section 2032 expressly provides "if the deposition be taken under subdivisions 2, 3, and 4 of section 2021, proof must be made at the trial that the witness continues absent or infirm, or is dead." And the only reason for enumerating these subdivisions is to permit the depositions taken under subdivision 1 to be read though the deponent be in court.

In bank. Appeal from superior court, city and county of San Francisco; Jas. G. Maguire, Judge.

This was an action of replevin against a sheriff, to recover goods seized upon execution. One Sutton had obtained a judgment against one Cadman, who had been the owner and manager of a book store, but who, some time previous to this judgment, had sold, in good faith, to one of the plaintiffs, an interest therein. The firm then became Cadman & Fay, Cadman continuing to act in his usual capacity. Shortly after, plaintiff Newell succeeded Cadman, but the new firm continued to employ the latter, and he apparently occupied his usual place in the business. All of the books which were levied upon, except about $40 worth, according to Cadman's uncontradicted testimony, were new stock, placed in the store after Cadman sold out, and after the stock bought from him had been sold. Defendant claimed that there had been no such open and apparent change of possession as would make the sale by Cadman valid against his creditors. The court below instructed the jury that if they "should find that the property levied on in the action of *Sutton* v. *Cadman* was not in existence at the time of the alleged transfer by Cadman to Fay and to Mrs. Newell, then there could not have been a change of possession as to that property, and the provisions of the Civil Code, § 3440, in reference to change of possession, would not apply, and the transfer would be valid, even as against creditors, without reference to the question of change of possession."

Henry E. Highton, Calhoun Benham, and *T. W. Carter*, for appellant. *W. B. Tyler*, for respondent.

Temple, J. We think the court did not err in overruling the objections to the deposition of plaintiff Fay, on the ground that Fay was present in the court when the deposition was read. The deposition was taken at the instance of defendant, under section 2021, Code Civil Proc., subd. 1. It is expressly provided in section 2032, Code Civil Proc.: "If the deposition be taken under subdivisions 2, 3, and 4 of section 2021, proof must be made at the trial that the witness continues absent or infirm, or is dead." Subdivision 5 relates to cases where the oral examination is not required. Subdivision 6 expressly provides that the deposition authorized to be taken by it shall not be used if the presence of the witness can be had. The sole purpose of enumerating the subdivisions at all, in section 2032, was to provide that the deposition authorized by subdivision 1 could be read without showing the absence of the witness.

The verdict of the jury establishes the fact that the sales made by Cadman were *bona fide*. As to the necessity of delivery and a continued change of possession under the circumstances, the law is correctly stated in the instructions given by the court.

There was no evidence on the part of defendant that any of the books levied upon ever belonged to Cadman & Fay. Cadman testified for plaintiff that none of the books taken were on hand when the transfer was made, except one set of the value of $40. The burden of proof on this point was on the defendant. The verdict cannot be disturbed on this ground.

There was evidence which tended strongly to prove actual fraud in both

transfers made by Cadman, but this was left to the jury under proper instructions, and their verdict was for plaintiff.

Order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.; MCKINSTRY, J.; THORNTON, J.

74 Cal. 60

AUZERAIS v. NAGLEE. (No. 8,798.)

(*Supreme Court of California.* November 5, 1887.)

1. ACCOUNT STATED—ACTION ON—BILL OF PARTICULARS.
In an action upon an account stated, defendants demanded a copy of the account mentioned as sued upon, and in reply plaintiff furnished an account in which defendant was charged with a gross amount as a stated account, and interest thereon, and was credited with some payments, but no bill of particulars accompanied the account. Defendant's motion for a further account of the items sued for was refused. *Held*, that this ruling was correct, as the action was upon account stated, and no bill of particulars was necessary.

2. SAME—REFUSAL TO FURNISH BILL OF ITEMS NOT PREJUDICIAL.
Where it appeared that, previous to a demand for a bill of items of the amounts claimed by plaintiff from defendant, plaintiff had furnished such a bill as an original statement of his account against defendant, and defendant, at the time of the demand, had such original accounts in court, he was not prejudiced by a ruling refusing the order to furnish a bill of items.

3. SAME—EVIDENCE TO EXPLAIN LETTER.
A letter written to defendant by plaintiff, who claimed an account stated was introduced by defendant to show that the account was not stated, and read as follows: "We would call your attention to your unsettled account. The balance due is $2,326.35. Please call and settle same, and oblige * * *" *Held*, that it was not error to allow the writer to explain that he used the word "unsettled" in the sense of "unpaid," and not as opposed to an account *stated* or *agreed upon*.

4. SAME—INTEREST.
In California, when it is shown to be the custom of a merchant to charge interest after 30 days upon monthly balances due upon open account, and where such account showing the interest charged regularly is received and understood by the debtor, and the account becomes stated, the debtor is bound to pay the balance due as in the account stated, with interest.

5. LIMITATION OF ACTIONS—ACCOUNT STATED—WHEN STATUTE BEGINS TO RUN.
Where the statute of limitations has not run upon the items in an account at the time of the statement thereof, the statement creates a new cause of action, and the statute only runs thereon from the time of the *account stated*.

6. SAME—ACKNOWLEDGMENT IN WRITING.
Under Code Civil Proc. Cal. § 360, providing that no acknowledgment of an indebtedness is sufficient to remove the bar of the statute of limitations, unless the acknowledgment be in writing, and signed by the person making it, an acknowledgment in the handwriting of the debtor in the form of a receipt, as follows: "Received December 8, 1880, of Henry M. Naglee, $1,000, on account of the within," and signed by the creditor,—is sufficient to remove the bar as to the debtor, Naglee, named therein.[1] TEMPLE and THORNTON, JJ., dissenting.

In bank. Appeal from superior court, Santa Clara county; DAVID BELDEN, Judge.

Wm. Matthews, for appellant. *D. M. Delmas*, for respondent.

SEARLS, C. J. The complaint in this cause contains three counts or causes of action,—one upon an account stated, as of January, 1880, and the others for goods, wares, and merchandise sold and delivered to defendant subsequent to said last mentioned date. The action was brought July 29, 1881. Defendant, in addition to the denials contained in his answer, interposed a plea of the statute of limitations to the first count, claiming the cause of action to be barred by the provision of section 339, Code Civil Proc., (two years.) Plain-

[1] As to what is a sufficient acknowledgment of an indebtedness to remove the bar of the statute, see Jordan v. Jordan, (Tenn.) 3 S. W. Rep. 896, and note.

tiff had a verdict and judgment for $1,531.82, from which, and from an order denying a new trial, defendant appeals.

After service of summons and complaint, the defendant demanded in writing a copy of the account mentioned as sued upon in the first count of the complaint, and, in reply to such demand, plaintiff furnished to defendant an account in which defendant was charged with amount due on stated account, January 1, 1880, $2,674.90, to which interest was added, and from which sundry payments were deducted, etc., but without giving in detail the items of the original account going to make up the amount. Defendant moved the court for a further account, which was refused, upon the ground that in an action on an account stated, no account need be furnished under the law. To this ruling the defendant excepted, and the action of the court is assigned as error.

The first count or cause of action set out in the complaint, and upon which a copy of the account was demanded, is upon an account stated. A stated account is an agreement between both parties that all the items are true; but this agreement may be implied from circumstances, as where merchants reside in different places, and one sends an account to the other, who makes no objection to it within a reasonable time. *Stebbins* v. *Niles*, 25 Miss. 267; 1 Waite, Act. & Def. 191–198. In such cases the action is based upon the agreement, which has all the force of a contract. The original account becomes the consideration for the agreement, and it is not necessary to prove the items of such account, nor can they be inquired into or surcharged except for some fraud, error, or mistake, and such grounds must be according to the weight of authority set forth in the pleadings. *Kronenberger* v. *Binz*, 56 Mo. 121; *Threlked* v. *Dobbins*, 45 Ga. 144; *Sutphen* v. *Cushman*, 35 Ill. 186; *Horan* v. *Long*, 11 Tex. 230; *Philips* v. *Belden*, 2 Edw. Ch. 1; *Hawkins* v. *Long*, 74 N. C. 781; *Kock* v. *Bonitz*, 4 Daily, N. Y. 117; *Slee* v. *Bloom*, 20 Johns. 669.

The balance found due upon a stated account is principal; it cannot be reexamined (except for fraud or mistake) to ascertain the items or their character. *McClelland* v. *West*, 70 Pa. St. 183. The object of a bill of particulars is to apprise a party of the specific demand of his adversary. *People* v. *Monroe*, 4 Wend. 200; *Matthews* v. *Hubbard*, 47 N. Y. 428. This being true, it is difficult to discern how, upon principle, a defendant is entitled, under section 454, Code Civil Proc., to a copy of the original account upon which the contract in an action on a stated account is based. The term "stated account" is but an expression to convey the idea of a contract, having an account for its consideration, and is no more an account than is a promissory note or other contract having a like consideration for its support.

The Code of Civil Procedure (section 454) by its terms makes it unnecessary for a party declaring upon an account to set forth the items in his pleading, but requires him, on demand, to furnish a copy of the account thus pleaded, under penalty of being precluded from giving evidence thereof, in case of refusal. In an action on an account stated, it is not necessary to prove the account, or any of its items, but the proof in such a case is directed to the fact that the parties have accounted together, and agreed upon the balance due, (*insimul computassent*,) and, in an action on the original account, it has been held that a plea of an account stated, if supported, will bar a recovery. *Driggs* v. *Garretson*, 25 N. J. Eq. 178.

In the language of Waite, in his work on Actions and Defenses, (volume 6, p. 430,) an accounting "when accomplished, does not necessarily exclude all inquiry into the rectitude of the account. The parties may still impeach it for fraud or mistake, but, so long as it is not impeached, the agreed statement serves in place of the original account as the foundation of an action. It becomes an original demand, and amounts to an express promise to pay the actual sum stated. The creditor becomes entitled to recover the agreed bal-

ance in an action based upon the fact of its acknowledgment by the debtor upon an adjustment of their respective claims."

The penalty for refusing to furnish an account is that the party refusing to so furnish it shall be precluded from proving it, but it can have no application to a case where, as in an action on an account stated, he is not required to prove the account. We are therefore of opinion the court below did not err in denying defendant's motion for a further account.

Again, as before stated, the object in requiring an account is to enable the opposite party to make a defense to the cause of action based on such account. The defendant in this cause, as appears by the record, was in possession of the original accounts rendered him by the plaintiff, and, on notice of the latter, produced them in court. If, therefore, we concede the court to have been wrong in its ruling, the defendant was not injured thereby, and the judgment should not for that cause be reversed.

It is next urged that the court erred in permitting the witness Pomeroy to explain "what was the meaning of the word 'unsettled,' as used by him in his letter of July 26, 1880." Defendant, on cross-examination of this witness, had presented him with Exhibit Q, being a letter from plaintiff and his grantor to defendant, as follows:

"*Gen. H. M. Naglee:* We would call your attention to your unsettled account, the balance due us being $2,326.35. Please call and settle same, and oblige Yours, very truly, AUZERAIS & POMEROY."

"The firm of Auzerais & Pomeroy having been dissolved, we are anxious to have all our accounts settled, and we will be greatly obliged if you give us above. E. AUZERAIS, Liq. P."

The testimony was further directed to showing that the unsettled account referred to in the letter was the very account which plaintiff had claimed and testified was settled. On redirect examination the witness was permitted to explain that he used the term "unsettled" in the sense of "unpaid," and the term "settle" in the sense of "pay." Bouvier defines the word "settle," "to adjust or ascertain; to pay. Two contracting parties are said to settle an account when they ascertain what is justly due by one to the other. When one pays the balance or debt due by him he is said to settle such debt or balance;" citing *Houston* v. *Stanton*, 11 Ala. (N. S.) 419.

We think there can be little doubt but that the term "settle" has a double meaning, and is used alike to denote an adjustment of a demand and a payment. This being so, it was proper for the author of the letter containing the declaration to explain in which of the two senses he used the expression. In other words, there was an ambiguity upon the face of the instrument which it was competent not to contradict, but to explain. *Chicago* v. *Sheldon*, 9 Wall. 50; *Railroad Co.* v. *Bank*, 19 Wall. 548; *Jenny Lind Co.* v. *Bower*, 11 Cal. 194; *Harnickell* v. *Brown*, 45 N. Y. Sup. Ct. 350; 2 Whart. Ev. §§ 954, 955. There is in this view nothing in conflict with the provisions of sections 1858, 1859, 1861, Code Civil Proc.

It is further urged that the court erred in holding that the cause of action accrued at the date the account was stated between the parties, (if in fact stated,) and that, therefore, the statute did not apply to any item after January 31, 1878, two years before the alleged statement; and that the court also erred in holding that by silence or acquiescence, or concurrence by unwritten words in the correction of the account, the defendant could become liable to pay larger interest than 7 per cent. per annum. An open account already barred by the statute of limitations cannot be relieved from the bar of such statute by an oral statement of such account, for the reason that, under our Code, (Code Civil Proc. § 360,) no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute, unless the same is contained in some writing signed by the party to be charged thereby. Where, however, the demand is not

barred at the date of the account stated, although the statement is verbal, the statute begins to run upon the new cause of action thus brought into existence from the date of the settlement, and new promise arising thereunder, and, if verbal, an action may, under subdivision 1, § 339, Code Civil Proc., be brought within two years after such settlement.

In the language of Angell, (Ang. Lim. § 150:) "For the moment it becomes a *stated* account, it is at an end; and the balance, which is ascertained and admitted to be due, from one party to the other, is immediately subjected to the operation of the statute, as an original and separate demand. * * * When the parties have stated, liquidated, and adjusted their accounts, and thus ascertained the balance, it ceases to be an account, and has lost the peculiar attributes of an account. What was before an implied promise to pay what was reasonable, by such liquidation and stating of account, at once becomes an express promise to pay a sum certain." *McLellan* v. *Crofton*, 6 Greenl. 337. The statute begins to run, in cases of adjustment, when the adjustment is made. *Ex parte Storer*, 2 Ware, 294; *Higgs* v. *Warner*, 14 Ark. 192; *Brackenridge* v. *Baltzell*, 1 Cart. (Ind.) 333. So, too, the balance of an old account, when found and assented to, may become the first item in a new account. It was said by Chief Justice NORTH in *Farrington* v. *Lee*, 1 Mod. 270: "If, after an account stated, upon the balance of it a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new account, it is now *slipped out* of the statute again." *Bank* v. *Knapp*, 3 Pick. 96; Ang. Lim. § 151; *Clarke* v. *Jenkins*, 3 Rich. Eq. 314.

There was also evidence showing that on the eighth day of December, 1880, the defendant paid to plaintiff, upon the account rendered him, the sum of $1,000, which is evidenced by a receipt on the back of the account, in the handwriting of defendant, (except the signature thereto,) as follows:

"Received December 8, 1880, of Henry M. Naglee, $1,000 on account of the within. E. AUZERAIS, Liquidating Partner."

Respondent contends that this part payment, evidenced by a writing, in which the name of Naglee appears under his own hand, is a sufficient signing, under the statute, (section 360, Code Civil Proc.,) to suspend its operation; and in support of his contention cites *Barron* v. *Kennedy*, 17 Cal. 574; *Pena* v. *Vance*, 21 Cal. 142; *Fairbanks* v. *Dawson*, 9 Cal. 89; *Rowe* v. *Thompson*, 15 Abb. Pr. 377; *Holmes* v. *Mackrell*, 3 C. B. (N. S.) 789; *Johnson* v. *Dodgson*, 2 Mees. & W. 653.

The part payment was evidenced by a writing. It was in the handwriting of defendant. His signature was contained therein. The statute does not require the party to *subscribe* his name, and it is sufficient if it be evident from any part of the instrument of acknowledgment that the debtor named in it has given to it his assent; and, as was said in *Rowe* v. *Thompson*, *supra*: "As the legal definition of the word 'signed' is the act whereby a person gives or declares assent by name, sign, or mark, it follows that it is enough, if it appears in the body or upon the margin or elsewhere of the instrument, that such assent has been given. If the attestation appears anywhere upon the face of the writing it is sufficient, and the party thus attesting is bound as effectually as if he had subscribed his name at the foot."

Johnson v. *Dodgson*, *supra*, was a case under the statute of frauds, in which the latter, it appeared, had made out a memorandum in his own handwriting, and required it to be signed by the vendor as follows:

"LEEDS, nineteenth October, 1836.

"Sold John Dodgson: 27 pockets Playsted, (hops,) 1836, Sussex, at 103s.," etc. Signed for JOHNSTON, JOHNSTON & Co.

"D. MOORE."

This was held sufficient to charge Dodgson, as the body of it was in his handwriting and contained his name.

Upon the same principle, we may say here, the body of the instrument showing a part payment is in the handwriting of defendant, who is the party charged, and contains his name. We think the evidence was sufficient to bind defendant.

Next, could the defendant become liable, under the evidence, upon a stated account for a rate of interest in excess of legal interest? It appears from the record that interest at the rate of 1 per cent. per month was charged, and is included in the stated account. There was also a question as to a further sum charged as compound interest, but which was deducted by plaintiff upon protest of defendant, and that question is not necessarily involved.

In *Marye* v. *Strouse*, 6 Sawy. 205, a case in most respects similar to this, HILLYER, J., held that where a statute like our own, which does no more than prohibit a recovery of interest beyond the legal rate, when the contract is not in writing, but does not otherwise make the rate of interest unlawful, interest in excess of that rate may be included in an account stated and recovered. The case proceeds upon the theory that the interest as charged, being known and assented to by the debtor, and not being in violation of any positive law, affords a sufficient consideration for the new promise involved in an account stated.

The custom of merchants in Pittsburgh and Philadelphia to charge interest on their accounts after six months is judicially noticed in the Pennsylvania courts. *Koons* v. *Miller*, 3 Watts & S. 271; *Watt* v. *Hoch*, 25 Pa. St. 411; *Adams* v. *Palmer*, 30 Pa. St. 346. And evidence of usage has rendered charges for interest under such circumstances recoverable at law. *Glass Factory* v. *Reid*, 5 Cow. 611; *Knox* v. *Jones*, 2 Dall. 193.

In *Raymond* v. *Isham*, 8 Vt. 263, it was said: "From the practice which has generally obtained in this state, (Vermont,) from the known usage and custom of Mr. Raymond, (the creditor,) as well as other merchants, to cast interest on their accounts after six months, we think there was an implied contract on the part of Dr. Isham to pay interest after the usual time of credit."

In *McAllister* v. *Reab*, 4 Wend. 483, the court said: "We do not think the charge of interest on any part of the account objectionable. The plaintiff proved that the defendant was one of his customers, and that he always charged interest on his accounts after ninety days."

The uniform custom of a merchant or manufacturer is presumed to be known to those who are in the habit of dealing with him, and in their dealings are supposed to act with reference to that custom. *Meech* v. *Smith*, 7 Wend. 315; *Reab* v. *McAlister*, 8 Wend. 109; *Backus* v. *Minor*, 3 Cal. 231.

Where a banker and his customer have carried on their business for a series of years in a particular way, it will be assumed there is an agreement to that effect, and the principle involved will be held binding in any subsequent disagreement between them. *Mosse* v. *Salt*, 32 Beav. 269; *Clancarty* v. *Latouche*, 1 Ball & B. 420.

These were cases in which only legal interest was charged, but it was allowed upon unliquidated demands where, but for the custom or pursuant to an agreement, no interest could have been recovered. The deduction is that, there being no positive law to the contrary, the payment of interest may be the subject of contract, express or implied, in cases where, but for such contract, no interest could be recovered. In this state we are of opinion that when, as in the present case, it is shown to be the universal custom of a merchant to charge interest after 30 days upon monthly balances due upon open account, and where such account showing the interest charged up regularly is received by the debtor and fully understood by him, and where such account becomes stated, either by the prolonged failure of the debtor to object thereto, or by a settlement and adjustment thereof between the parties, a new contract arises between such parties, and the debtor is bound to pay the

balance found due, and no inquiry is permissible as to the items beyond the defense of the statute of limitations, and that of fraud, error, or mistake. There is no plea of fraud, error, or mistake, and no showing in support of such plea had it been interposed. It follows from these views that the instructions given were correct.

The testimony upon the question of an accounting was conflicting, and the verdict of the jury is conclusive in this court.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

PATERSON, J. I concur. If it be conceded that it was error to permit the witness Pomeroy to explain the meaning of the word "unsettled," still it was harmless. The letter itself shows clearly that the word was used in the sense stated by the witness. The item of interest, like any other item included in the account as stated, could be attacked only upon an allegation showing fraud, error, or mistake.

TEMPLE, J. I dissent. Under our statute a custom which would prove an agreement to pay more than legal interest is against law. I also think that assent to an account stated does not take the account from the operation of the statute of limitations. The cases which hold that the account stated is a new promise, and the statute begins to run from that time, have no force here, where the acknowledgment must be in writing.

THORNTON, J. I dissent. The motion of the defendant for a further and more particular copy of the account sued on was denied by the court below "on the ground that in an action on an account stated no account need be furnished under the law." The statute on this subject is section 454, Code Civil Proc.: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular." The bill of items or particulars furnished on the action was of the most general character, and the defendant followed the usual practice in moving for one more particular. *Providence T. Co.* v. *Prader*, 32 Cal. 638. The account furnished was not a copy of the account sued on as an account stated, but something entirely different. The question to be determined is whether, in an action on an account stated, a defendant is entitled to a bill of particulars, or, as it is sometimes styled, a bill of items. Certainly the demand of defendant comes within the statute, for an account is alleged in the first count of the complaint. I cannot see that it makes any difference as to the right to make the demand that the pleader counts on an account stated, unless it is held that an *account stated* is not an *account*, and I cannot perceive that it can be so held.

In New York, where the statute is the same as regards this point as that of this state, (Code Proc. N. Y. § 158,) it was held by the superior court of New York that the account alleged in a pleading, the refusal to deliver a copy of which by the party alleging it precludes him from giving evidence of it under the Code of Procedure, (section 158,) is some written instrument existing before the commencement of the action, evidence of the existence and contents of which is material to the party alleging it; in other words, an account claimed to have been rendered and acquiesced in; that is, an *account stated*. *Johnson* v. *Mallory*, 2 Rob. (N. Y.) 681, in which cause the point is directly decided. See, also, *Barkley* v. *Railroad Co.*, 27 Hun, 516. In the last case

cited the court said: "In ordinary language, the word 'account' is applied to almost any claim or contract which consists of several items. And there is no necessity for giving any limited meaning to the word as it is used in section 531, Code Civil Proc." For section 531, see Bliss, Ann. Code, N. Y. 396. Section 531 seems to have been enacted in place of section 158, above mentioned, of the New York Code.

In *Brown* v. *Calvert*, 4 Dana, 220, which was an action of *assumpsit*, the declaration containing only the general counts, (of which it may be said a count upon an account stated is one.) the court said: "Whenever the form of the declaration is so general as not to apprise the defendant of the nature, character, and extent of the claim set up against him, he may demand a *bill of particulars*. Such a bill is not only proper, by way of limiting the plaintiff in his proof to the specific demands claimed by him, but is essential to enable the defendant to prepare fully for his defense, and to guard him against surprise. The right is not only sanctioned by authority, but by reason and propriety."

In *Johnson* v. *Mallory*, *supra*, it is said that the provision of the statute above referred to "can only be construed to be intended to point out the mode of pleading an account, as well as to ascertain what account was intended." 2 Rob. (N. Y.) 683.

In *Smith* v. *Hicks*, 5 Wend. 51, it is held that a bill of particulars is sufficiently definite if it apprise the other side of the evidence that is to be offered, so that he cannot mistake as to his preparation to resist the claim. The office of a bill of particulars is to apprise a party of the specific demands of the adverse party when the pleadings are general, and leave uncertain what is particularly demanded, either in the complaint or answer. *People* v. *Monroe*, 4 Wend. 200; *Drake* v. *Thayer*, 5 Rob. (N. Y.) 694. The bill of particulars is considered and construed as an amplification of the pleading to which it relates, and in that sense forming a part of it. *Bowman* v. *Earle*, 3 Duer, 691; *Chrysler* v. *James*, 1 Hill, 214; *Brown* v. *Williams*, 4 Wend. 360, 368; *Starkweather* v. *Kittle*, 17 Wend. 20; *Gay* v. *Cary*, 9 Cow. 44; *Ryckman* v. *Haight*, 15 Johns. 222.

The above cases show that the defendant is entitled to a bill of particulars, when the complaint is general, to enable him to prepare to resist the claim on which he is sued. It should be furnished to enable the defendant to prepare his defense; and if defendant must by his answer attack the items of the account, or any of them, for fraud, error, or mistake, in order to be heard in regard to them, (and such seems to be the law in this state when the pleadings are verified; see *Terry* v. *Sickles*, 13 Cal. 427,) then certainly he ought to have a bill delivered to him to enable him to prepare his answer assailing the items on the grounds mentioned. As to the generality of the complaint, I cannot conceive a count more general than one setting up an account stated.

As to alleging an account in a complaint, the count on an account stated is the only one of the common counts, whether in *debt* or *assumpsit*, in which an account is mentioned. See for the common counts referred to, 2 Chit. Pl. 37–114, 385-387. I have examined the forms of these counts as given by Chitty, and do not find any other count than one on the account stated, in which an account is ever alleged. In the *regulæ generales* of Trinity term (1831) it is provided that a bill of particulars shall be delivered by the plaintiff with every declaration containing counts *in indebitatus assumpsit* or debt on simple contract. See appendix to 1 Chit. Pl. 726, 727. It is highly probable that the sections (158 and 531) of the New York Code of Procedure and section 454 of the Code of Civil Procedure in this state were framed in view of this rule of Trinity term, following what had always been the practice.

The above authorities establish, in my judgment, the true construction of the statute (Code Civil Proc. 454) in force in this state. They show that, when

the complaint counts on an account stated, the defendant is entitled as a matter of right on demand to have furnished him a copy of the account or bill of items or particulars. They show that he is so entitled to enable him—*First*, to ascertain the account on which he is sued, *Johnson* v. *Mallory*, 2 Rob. 683; *second*, to prepare his defense to the claim on which the action is brought against him; *third*, to frame his answer so as to attack the items of it which he desires to assail for fraud, error, or mistake, and thus be enabled to offer evidence in regard to such items. The statute was framed to promote justice between and to secure a full and fair hearing to litigants, and in construing it the rule established by the Code should be followed and regarded. This rule will be found in section 4 of the Code of Civil Procedure, and is in these words: "The Code establishes the law of this state respecting all the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

The construction of section 454 adopted in the prevailing opinion, in my judgment, is narrow and illiberal, defeats the object of the Code provision, and must result in failure to promote justice. This is said with the highest respect for the judgment of the justices who concur in it. I think the motion of the defendant for another and further copy of the account sued on, and alleged in the first count of the complaint, should have been granted, and the court erred in denying it.

In the prevailing opinion an account stated seems to be regarded as a contract, and therefore a defendant is not entitled to a copy of it when an action is brought on it. We know of no rule of law which holds that an account stated is a contract. It is only evidence of a contract,—a contract, too, implied by law. Independent of an express promise to pay the balance, ascertained by it, it can be nothing more than evidence of a contract which the law implies from circumstances.

It is also said in the prevailing opinion that "the penalty for refusing to furnish an account is that the party refusing to so furnish it shall be precluded from proving it; but it can have no application to a case where, as in an action on an account stated, he is not required to prove the account." The plaintiff is required to prove any account on which he sues when the answer of defendant puts its existence in issue. This is true of an account stated as well as any other. And in this case the defendant denied that any account was ever stated, and the plaintiff, in opening his cause, was very careful to prove it. The account furnished is not the account to be proved. The account alleged in the pleading is the one of which proof must be made. And section 454 precludes a party failing to deliver a copy of the account, not from proving the account which he is to deliver, but from giving evidence of the account alleged in the pleadings. As here, an account stated is alleged, and it is that account he is precluded by conduct "*from giving evidence thereof.*" He is not allowed to give any evidence showing that the account counted on was ever stated, or even had an existence. In other words, as regards such account, he must go out of court,—be nonsuited.

But it is said that there should be no reversal because the defendant suffered no injury from the denial of his motion, as he had in his possession and produced on the trial the accounts which had been rendered to him. But this production occurred some time after his motion was denied. The court, when it denied the motion, had no knowledge that any account had been rendered. The defendant was then told that, as the complaint was on an account stated, the law gave him no right to have a copy of any account furnished to him. The court below seems to have taken it for granted that the mere allegation in the complaint that an account had been stated between the parties must be taken as true, and that, under such circumstances, the defendant had no right to the relief asked for, whether an account had been rendered or stated or not. The record shows that defendant's motion was

denied on the thirtieth of September, 1881, and the accounts referred to were produced on a trial which commenced on the nineteenth of December following, 80 days after the denial of the motion. If the defendant had lost or mislaid the account which seems to have been rendered more than a year before suit brought, and he had to assail particular items of the account in his answer, it would have been a hard case upon him to have to plead without having the account to show to his counsel, that he might by answer attack any items objected to. But in fact, as shown above, the defendant had a right to ascertain on what account he was sued, so as to make preparation by pleading and procuring his proof to resist the claim in suit. He had a right to have the account, even if he had it in his possession when making the demand under the statute, identified as the account which he had to meet, so that he might not be put to conjecture what account he had to answer to and furnish evidence against. If the plaintiff had, in reply to his demand, stated in writing that the account alleged in the complaint referred to the account rendered him at such a date, (specifying it,) I think it would have been sufficient unless the defendant had destroyed or lost or mislaid the account rendered. In such case of destruction or loss or mislaying, the defendant ought, on motion, to have had allowed him a copy of the account sued on. But the record furnishes conclusive evidence that the defendant was injured by this ruling.

The defendant offered evidence to impeach the correctness of certain items claimed to be in the account sued on as an account stated. The items mentioned were items of interest, and an account of Naglee & Mills charged to defendant against his objection. The same evidence was also offered to show that certain items sued for were barred by the statute of limitations. To this offer plaintiff objected upon the ground that the defendant had only denied that the account had been stated, and had not attacked the statement for fraud or mistake, and that the testimony was not admissible under the pleadings. The court admitted the evidence as to the defense of the statute of limitations only, and excluded it for all other purposes, thus sustaining the objection of plaintiff with the exception above stated. That the defendant suffered injury we think is clear. He was deprived of the means which the law afforded him of ascertaining what account he was sued on, so that he might in his answer have assailed the items he intended to impeach, and when afterwards he comes to offer his impeaching evidence he is told that his answer is defective in not attacking such items, and his evidence must therefore be excluded. We have no doubt that the court erred to the injury of defendant in denying his motion for the account. And, further, that, having denied this motion, when the defendant offered evidence to impeach items of the account for error or mistake, the court erred in excluding the evidence. No principle of law authorizes a court to deny to a defendant the means of properly setting forth his defense in his answer, and, when he afterwards endeavors to make such defense, to deprive him of it and reject it because he has not properly set it forth.

I concur with what is said by Justice TEMPLE, that, under our statute, a custom which would prove an agreement to pay more than legal interest is against law. I also agree with him that an assent to an account stated does not, under the statute of limitations of this state, take the account from the operation of the statute. The very point, in my opinion, has been adjudged in *Weatherwax* v. *Consumnes V. M. Co.*, 17 Cal. 345. See Wood, Lim. § 280. Nor do I think that the writing relied on, viz.: "Received December 8, 1880, of Henry M. Naglee, one thousand dollars on account of the within,"—was an acknowledgment *signed* by the defendant, as required by the statute. It could not be held to be signed by defendant for the reason that he did not intend to sign anything. Where in an olographic will, commencing with the pronoun "I" and followed by the testator's name, such name has been held a signing of the will, it was so held, because the court was satisfied that it was so intended by

the writer. If anything appears on the face of the writing showing that the testator did not intend his name so written to be his signature, it would not be so held. Here there is nothing showing that the defendant intended his name to be a signature to anything. He never could have supposed that he was signing an acknowledgment of a debt. In fact, in writing the above words, he was doing what he had a right to demand the party to whom he paid the money should do, viz., to furnish him with a written receipt for the money.

For the foregoing reasons I am of opinion that the judgment and order should be reversed.

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CITY AND COUNTY OF SAN FRANCISCO *v.* LIVERPOOL, L. & G. INS. CO. (No. 11,945.)

(*Supreme Court of California.* November 10, 1887.)

1. TAXATION—POWER OF LEGISLATURE TO TAX FOR LOCAL PURPOSES—TAX ON INSURANCE PREMIUMS—FOREIGN COMPANY.
 Const. Cal. art. 11, § 12, provides that "the legislature shall have no power to impose taxes upon counties, cities, or towns, or upon the inhabitants or property thereof, for county, city, town, or municipal purposes; but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Pol. Code Cal. § 616, subd. 1, provides that every agent of a foreign insurance company shall at certain times pay to the treasurer of a county or city a percentage of the premiums received on property insured by him within the county or city, the money to constitute a fireman's relief fund, to be expended by the governing body of the fire department of the city or county. Plaintiff sued the defendant, a foreign insurance corporation, to recover $414.36 under the provisions of this act. *Held*, that the fact that defendant was a foreign corporation did not authorize the legislature to exercise a power denied to it by the constitution, and that a law passed in violation of it would be *ultra vires*, and as void when it operated upon a foreign corporation as on a citizen.

2. SAME—MUNICIPAL PURPOSE—FIREMEN'S RELIEF FUND.
 Held, also, that the object of the fund, if a public one at all, was a municipal purpose.

3. SAME—FOREIGN CORPORATIONS—TAX ON PREMIUMS IN ADDITION TO LICENSE.
 Pol. Code Cal. §§ 622-624, provides certain prescribed conditions under which foreign insurance companies can do business in California. These statutes were in force at the time of the passage of the act (Pol. Code Cal. § 616, subd. 1) imposing a tax on premiums collected, and have not been amended or repealed. *Held*, that when a business is first licensed, and then by a subsequent law subjected to a license in the form of a tax, the last law not intimating that the previous license is withdrawn unless the imposition is paid, the presumption is strong that the exaction is for revenue, and was not intended as a condition.

4. SAME—TAX FOR REVENUE—FOR PURPOSES OF REGULATION.
 When a tax is partly for revenue, and partly imposed under the police power of the state, it must conform to the limitations under the taxing power, except so far as a departure is necessary to make it regulative or prohibitory.

5. SAME—IMPLIED ASSENT TO UNCONSTITUTIONAL ACT.
 When a foreign corporation continues to do business after the passage of an act in relation to it, which is unconstitutional, no implied assent on the part of the corporation can be claimed to the illegal condition imposed by such act.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Stanley, Stoney & Hayes, John Lord Love, and *John Garber*, for plaintiff and respondent. *A. L. Hart* and *E. W. McGraw*, for appellants. *Alexander* and *Isaac Joseph, amici curiæ.*

TEMPLE, J. This action is brought to recover $441.36, with interest, under an act of the legislature entitled "An act to require the payment of certain premiums to counties, and cities and counties, by fire insurance companies not organized under the laws of California, but doing business therein, and providing for the disposition of such premiums." An answer was filed

to the complaint, and thereupon on motion judgment was rendered for the plaintiff on the pleadings, from which defendant appeals.

The act requires every agent of the insurance companies designated, to pay into the hands of the treasurer of any county, or city and county, in the state a sum equal to 1 per centum upon the amount of all premiums which, during the year, or part of the year, ending on the first Monday of September, shall have been received by such agent, or which shall have been agreed to have been paid for any insurance effected, or agreed to be effected, within the limits of such county, or city and county; the money when so paid to constitute a fund known as the "Firemen's Relief Fund," of the county, or city and county, in which the property insured is situated, and to be under the exclusive control of the fire commissioners, or other governing body of the fire departments of such county, or city and county, under such general regulations as the board of supervisors thereof may prescribe. The answer does not deny any of the material allegations of the complaint, but the defendant claims that the exaction is illegal, and that the statute imposing it is unconstitutional and void; that it is violative of various provisions of the constitution, and among them is section 12, art. 11, which reads as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." If this exaction is a tax, and the purpose to which the proceeds are devoted is a county, city, town, or other municipal purpose, it is plain that it is prohibited by this section. Both propositions are denied by respondent. It is claimed that the object of the act is to prescribe a condition upon the performance of which foreign corporations shall be permitted to do business in this state; that the state may discriminate against such corporations in favor of her own citizens or domestic corporations; that as *such* foreign corporations have no rights under the state constitution except such as are expressly guarantied to them *eo nomine as foreign corporations*, that the power of the state to impose conditions is not limited by general provisions of the state constitution, and is absolute unless specifically limited, either in the federal or state constitution; and, in the absence of such limitations, foreign corporations, as such, have no rights which the state cannot touch. This claim is certainly very broad, and is derived from the proposition that corporations have no absolute right to recognition in other states, but do business in such states merely by grace, depending for the enforcement of their contracts upon the assent of those states, which may be given on such terms as they please.

It is of some interest to note here that the power of the legislature to impose conditions is as absolute over domestic as over foreign corporations. There is no natural right in our own citizens to do business in a corporate name. These home corporations act as such purely by grace, and not by right, depending absolutely upon the consent of the state for the enforcement of their contracts, and that assent may be withheld or permitted on such terms as the state shall choose. It may exclude domestic corporations entirely from the state, and, in the absence of express constitutional limitation, permit foreign corporations alone within its borders, or may impose a license tax upon domestic corporations which is not imposed upon foreign corporations. It may amend or repeal its charters at any time, or impose such new terms and conditions to the right to do business as it may see fit. This absolute power over domestic corporations was never denied or questioned, except as to the right to alter or amend the charters, and that right is clear under our constitution. The whole force and effect of the decisions cited from the federal courts is that foreign corporations are not protected by section 2, art. 10, of the federal constitution, and therefore the state may deal with corporations organized in

other states as absolutely as with domestic corporations. When the courts of the United States speak of the power of the state to impose conditions upon foreign corporations, they of course have reference to federal limitations. There is no intimation that such corporations are not, when permitted to do business within a state, entitled to the protection of its laws as fully as citizens. That is not a federal question, but those courts have held that a statute of Iowa which provided that any foreign corporation which should remove a cause from a state court to a federal court should forfeit its right to do business as a corporation within the state was void. *Barron* v. *Burnside*, 121 U. S. 186, 7 Sup. Ct. Rep. 931. In that case the statute made it a misdemeanor for any one to act as agent for any company which had forfeited its right to do business in the state under this act. Barron was convicted under the statute, and his conviction was declared illegal by the supreme court, on the ground that no such condition could be imposed. The effect of this decision is that the permit was valid, but the condition void. Following the logic of this case, the result would seem inevitable that a condition in violation of the state constitution is simply void. Indeed, this would seem too obvious to require much discussion. The fact that the party against whom a suit is brought to collect a tax may be a foreign corporation, may be very material in determining whether the tax is prohibited by the constitution; but it could not authorize the legislature to exercise a power clearly denied to it in the constitution. Such laws are *ultra vires*, and as clearly void when they operate upon a foreign corporation as upon a citizen.

We come now to the inquiry, is the exaction here in question a tax? The statute itself denominates it a tax, and it must be confessed that it has all the characteristics of a tax. It is a charge imposed by the legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution, levied by authority of the state, and, as respondent claims, for public needs. That it has all the attributes of a tax is practically admitted by the respondent, but it is sought by a very subtile process of reasoning to show that, in this particular case, it must not be regarded as a tax. However deftly it is stated, the point in all this specious logic is that, unless it be held something else than a tax, it may be unconstitutional. Laws are not to be declared unconstitutional unless clearly so, and, if two constructions are possible, and according to one the law must be held unconstitutional, and under the other construction it can be sustained, that construction must be adopted which will sustain the law. This principle is not disputed, and it is often of great value, but it must not be pressed so far as to amount to an abdication of its functions on the part of the court, nor a denial of justice to suitors. If we can clearly see that a law is beyond the power of the legislature, we must so declare. It is claimed that this is a sum paid by the corporation for the privilege of acting as such in this state, and therefore not a tax. The plausibility of the claim consists in apparently identifying this case with cases in which it is clear the exaction is a condition, and from which this is made to differ only in degree. If the condition had been that the corporation should pay a fixed sum for the privilege before it was allowed to do business at all, it would, no doubt, be held a condition, and not a tax; so, perhaps, if the license were required to be renewed at stated periods; and it has been held that, when the corporation is required to pay a percentage upon its receipts, and the payment is required to be secured by a bond before the corporation is allowed to do business in the state, this special requirement distinguishes it from ordinary taxation, and stamps its character. *Trustees, etc.*, v. *Roome*, 93 N. Y. 325. So the two classes of cases, one of which is plainly taxation, and the other a sum paid for a permit, may be approximated until it is difficult or impossible to say to which class a given case may belong. These difficulties to discriminate the principles underlying different cases constantly included in different

classes, and to which the same rule of decision cannot be applied, constitute the perpetual debating grounds of the law, and occasion much of the confusion in the decisions. But, as was remarked by Judge MARSHALL, because we cannot easily draw the line does not prove that there is no difference in principle. No one fails to note the contrast between the light of day and the darkness of night, but no one is able to draw the line between daylight and darkness, or note the precise instant when one ends and the other begins. I have said that the act on its face denominates the exaction a tax, and that it is imposed according to the methods of taxation. It is also manifest from the act that the chief reason of the tax is to raise money. No one can read the law without being so impressed. The purpose was to create a fund, and counsel have labored here to show that this fund was for a public, and a highly meritorious and useful, purpose.

We find in the next place that, when the statute was passed, the conditions on which foreign corporations could do business were prescribed, and very full provision had been made on the subject. Sections 622–624, Pol. Code. See, also, St. 1871–72, 826. In the act in question these statutes are not alluded to, and they have never been amended or repealed. There is nothing in the law we are considering to indicate that it was intended as a condition, except when viewed in the light of the rule requiring us to so construe it rather than to declare it void. Now, a business may be licensed, and still be subject to be taxed. A license proper is a permit to do business which could not be done without the license. It is a mere permit. It may be thus licensed, and then subject to a license tax. These licenses may not differ in form, but one is a license proper, and the other is a license tax, imposed for the purpose of revenue. This business being first licensed and then in a subsequent law subjected to a license in the form of a tax, the last law in no way intimating that the previous license is withdrawn unless the imposition is paid, the presumption is very strong that the exaction is for revenue purposes, and was not intended as a condition. It is claimed, however,—*First*, if the exaction be a tax, it is imposed under the police power for the purposes of regulation, and therefore not liable to the objection; and, *second*, if it be such a tax it is a condition, and, even if unconstitutional, the corporation could waive the objection, and did so when, after the passage of the act, it continued to do business in the state.

When the police power is appealed to to justify legislation, there seems to be an impression that all claim of constitutional limitation is at an end; but let us inquire into the matter a little. With reference to the power of taxation, the principle is about this: The framers of the organic law, when they formulated limitations upon this power, had in view the burdens of taxation. They were providing for equality and uniformity only with reference to fair and just distribution of these burdens. It is not to be presumed, however, that they intended to deprive the state of the power of self-preservation, or of accomplishing those acknowledged ends of all government,—the safety and welfare of the people. The requirement of equality applies mainly, if not entirely, to taxes upon property laid upon the *ad valorem* principle. As to taxes upon occupation or business, the requirement is only of uniform operation, and this requirement is satisfied when it is uniform as to the class to which the law applies. Necessarily, to impose this tax, the population must be classified as to occupations, and it is not required that all occupations shall be taxed to justify a tax upon some. Perhaps it would be impossible to accomplish the end the government has in view in imposing a tax purely regulative or prohibitory, if the legislature is bound by the requirement of uniformity. These limitations are applicable only to the power of taxation, and are, therefore, held not to limit other functions of the government where entirely different ends are in view, although it is sought to reach them by a regulation having the form of a tax. I think this tax is purely one for revenue,

but, admitting that the purpose is a mixed one, still it must conform to the limitations upon the taxing power, except in so far as a departure is necessary to make it regulative or prohibitory. It could be made just as effectual as a police regulation without violating the provision of our state constitution under consideration.

As to the proposition that the corporation waived the constitutional objection by continuing to do business after the passage of the act, it is enough, in my opinion, to say that it is a mere *petitio principii* If the condition be void no implied assent can be claimed.

It remains to inquire whether the tax was imposed upon the counties, cities and counties, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purpose. It was quite unnecessary to call attention to the fact that the tax is not upon a county or city as a corporation, and, unless the point had been distinctly made, it would have been thought quite unnecessary to say that it was not the purpose of the section to prohibit such impositions. The constitutional convention cannot be supposed to have thought it necessary to prohibit the legislature from imposing a tax upon a municipal corporation as such, for the use of the municipality. It may also be admitted that the defendant is not an inhabitant of the municipality, within the meaning of this provision, although this is by no means a clear proposition. It is not necessary for the case to decide it. The same may be said of the claim that the imposition is not a tax upon property. In my opinion, the purpose of the section is to relegate to the local boards the whole subject of county and municipal taxes for local purposes, and that the legislature has no power to impose any tax whatever, within those territories, for local purposes. If the purpose of the fund created by the tax is a public purpose at all, it is clearly a municipal purpose. The management and control of the fire departments have always been left to local authorities. The fact that the state at large has an interest in the efficiency of the departments does not render the end any less a municipal one. The people of the state have such an interest in all the police powers granted to these municipalities. And even if the state may exercise a concurrent supervision over a subject, still, so far as actually controlled by the local board, it is a matter of municipal concern. It is claimed by the appellant that the law is in conflict with many other provisions of our constitution, and also that, no provision being made for a suit to collect the tax, this action is without authority. Taking the view I have of the objections here discussed, it is not necessary to pass upon other objections.

I think the judgment should be reversed; and it is so ordered.

We concur: SHARPSTEIN, J.; PATERSON, J.

MCKINSTRY, J. I concur with Justice TEMPLE I. am of opinion also that the statute in question violates sections 31 and 32 of article 4, and section 6 of article 11, of the constitution; further, that the statute did not authorize, nor does it purport to authorize, the commencement and prosecution of the present action, and that the action is not authorized by any other law.

We dissent: SEARLS, C. J.; MCFARLAND, J.

74 Cal. 94

PEOPLE *v.* SCOTT (No. 20,342.)

(*Supreme Court of California.* November 7, 1887.)

BURGLARY—CARRYING PROPERTY INTO ANOTHER COUNTY—PLACE OF TRIAL—INFORMATION.

Although under Penal Code Cal. § 786, providing that "when property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into

another, the jurisdiction of the offense is in either county," a criminal may be tried wherever he carries goods obtained by burglary, yet an information charging the offense of burglary to have been committed in San Bernardino county, where the burglar was found with his goods, cannot be supported by evidence of breaking and entering a house in San Diego county, whence the goods were brought to the former jurisdiction.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

John J. Stephens, for defendant. *Geo. A. Johnson*, Atty. Gen., for respondent.

SEARLS, C. J. The defendant was accused by information in the county of San Bernardino of the crime of burglary, alleged to have been committed in said county. He interposed a plea of not guilty. Upon the trial there was evidence tending to prove the defendant guilty of a burglary committed at Indio, in the county of San Diego, and that the property (a coat and pistol) feloniously taken from a house burglariously entered, was taken by defendant to the county of San Bernardino, where he was arrested, informed against, tried, and convicted. At the trial objections were made by defendant to testimony under the information going to show a burglary committed in the county of San Diego, which objections were overruled by the court, and exceptions taken. These rulings are assigned as error. A motion in arrest of judgment and for a new trial in behalf of defendant was overruled.

Section 786 of the Penal Code provides as follows: "When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county," etc. No question is made that the defendant might have been proceeded against in either county. The real question, however, is one of pleading: Under an indictment or information charging a burglary to have been committed in the county of San Bernardino, could evidence be received of an offense committed in the county of San Diego? In other words, should the information in the case as stated have charged, according to the facts, that the burglary was committed in the county of San Diego, and that the property was brought into the county of San Bernardino? At common law, crimes were considered as altogether local, cognizable and punishable exclusively in the jurisdiction where committed. Story, Confl. Law, § 620, and cases cited. It was said in *Warrender* v. *Warrender*, 9 Bligh, 119: The "*lex loci* must needs govern all criminal jurisdiction, from the nature of the thing, and the purpose of that jurisdiction." At common law it was held that a person indicted in England for robbing a house in Guernsey, and bringing the property to England, could not be convicted either of larceny or of receiving. *Reg.* v. *Debruiel*, 11 Cox, Crim. Cas. 207. In many of the United States it is provided by statutes, and in some where no such statutes exist it has been held, that where property has been feloniously taken in one state, and brought into another, the thief may be punished in the latter. These considerations go to the jurisdiction of the court, and not to the form of charging the facts constituting the offense, and are referred to only for the purpose of showing that, except as provided by statute, crime is regarded as local. This court has repeatedly held that, in cases of larceny, where property has been stolen in one county and taken into another, it is proper to charge the thief with having committed the offense in the latter county; and, where the venue is laid in that county, the facts showing the property to have been taken in the other county need not be averred, but evidence showing that the property was so taken may be admitted. *People* v. *Mellon*, 40 Cal. 654; *People* v. *Murphy*, 51 Cal. 376. These cases are in accord with many which might be cited from other states, in which it is held that, inasmuch as the owner has not parted with his property or right to possession of the thing stolen, the thief who takes it into another county is to be deemed in law to have taken it in such last-mentioned county, and, when

he is charged with the felony in such last county, the facts stated warrant the legal conclusion. This reasoning and the cases cited would be conclusive in favor of the sufficiency of the information here were it for larceny, but it is not larceny, but burglary, with which the defendant is charged. It is true the court of San Bernardino may try a defendant for a burglary committed in San Diego, provided the fruits of the crime have been brought into the former county; yet it cannot be said, in fact or in contemplation of law, that the offense of burglary, essentially a local crime, and which consists in entering a house, room, etc., with intent to commit larceny, was committed in any other county than that in which the house, room, etc., are situated. We think the reasoning of DENIO, C. J., in *Haskins* v. *People*, 16 N. Y. 344, and the distinction there made, indicates the true rule. It is as follows: "The difference between the two cases is this. burglars may be tried out of their proper counties in certain special cases, that is, where the goods burglariously taken are carried into another county by the offenders; but this is by positive law, and not because the burglary was actually committed in the county where the indictment is found, or in judgment of law is considered to have been committed there. The fact must therefore be set out which brings the case within the statute; but in the case of an indictment for a simple larceny found in a county into which the thief has carried the property stolen in another county, the law adjudges that the offense was in truth committed there, and, hence, there is no occasion for a statement in the pleading of what occurred in the other county."

We are of opinion that the information in this case should have charged the facts as they existed, viz., that the burglary was committed in the county of San Diego, and that the property taken was carried into the county of San Bernardino, and, that having failed to do so, the proffered evidence was inadmissible. The judgment should have been arrested, whereupon the court was authorized, if it deemed proper, to recommit the defendant, or admit him to bail to answer a new information or indictment, as provided by sections 1187 and 1188 of the Penal Code.

The judgment and orders appealed from are reversed, and the cause remanded for further proceedings.

We concur: TEMPLE, J.; PATERSON, J.; MCKINSTRY, J.; SHARPSTEIN, J.; THORNTON, J.

2 Cal. Unrep. 768

FRANKEL *v.* DEIDESHEIMER. (No. 11,573.)

(*Supreme Court of California.* June 29, 1887.)

DEED—CONSIDERATION—MARKET VALUE—FRAUD.

Where the evidence was clear and unequivocal that a deed was made on or within a day or two of October 15, 1883, and there was no evidence to show that the property conveyed had at the time a market value in excess of the amount paid, and there was no evidence of fraud, *held*, that a finding of fact to the contrary, based upon presumptions could not be sustained.

In bank. Appeal from superior court, Sierra county.

Freeman, Bates & Rankin, Hundley, Gage & Ford, S. B. Davidson and *Stanley A. Smith*, for appellant. *P. Van Clief*, for respondent.

BY THE COURT. We are of opinion that the evidence is insufficient to justify the findings of fact in the court below in the following particulars, viz.: That the location of the Willow quartz lode was made at the request or for the use or benefit of the defendant, Philipp Deidesheimer; that Deidesheimer conveyed an undivided half of the American quartz lode to Busch on the twenty-first of April, 1884, or at any other time than within a day or two of October 15, 1883; that the deed from Deidesheimer was antedated; that the deed was executed or accepted with the intent or for the purpose of hindering, delaying, or defrauding any creditor of said Deidesheimer; that at the time the deed was executed an undivided half of the American quartz lode was of the apparent or market value of $4,000, or of any sum exceeding $1; that Deidesheimer transferred any interest in the American quartz lode, or in the Young America Consolidated Mining Company, for the purpose of, or with the intent of, hindering, delaying, or defrauding any creditor; that the consideration for the issuance and delivery of stock to Matilda Deidesheimer and Philipp Deidesheimer was that Busch should convey to any corporation an undivided half of the American quartz lode mining claim; that the issuance and delivery of shares of stock to said Matilda Deidesheimer, and the conveyance by Busch to the corporation, were directed, caused, or procured by said Philipp for any purpose, or at all; that said Matilda, without consideration, assigned or transferred to the defendants Julia and Ritza Betts any shares of stock; that such transfer was made for the purpose, or with the intent, thereby to defraud or cheat plaintiff, or that said Julia and Ritza had notice of such purpose or intent.

The evidence that the deed from Deidesheimer to Busch was executed on or within a day or two of October 15, 1883, is clear and unequivocal, and there is no evidence substantially in conflict therewith; the argument to the contrary is based upon presumptions arising out of presumptions. There is no evidence that at the time of the conveyance the property conveyed had a market value in excess of the amount paid by Busch. The evidence shows that, at the time of the location of the Young America claim, Deidesheimer's name was inserted in the notice of location by Busch as an act of friendship; and that as soon as Deidesheimer made an examination of the ground he declared his intention not to abide by the location, and offered to and did execute to Busch a deed of the property; and that not until some months after the delivery of the deed did the claim have any apparent or market value. We find no evidence of any fraud on the part of either of the defendants; on the contrary, the facts displayed by the evidence show that their transactions were in good faith.

Judgment and order reversed, and cause remanded for a new trial.

73 Cal. 273

Fox and another *v.* Stockton C. H. & A. Works. (No. 12,043.)

(*Supreme Court of California.* August 30, 1887.)

Pleading—Denying Genuineness of Written Instrument.

Plaintiffs alleged a joint contract by which defendant was to supply them with two harvesters. Defendant admitted the agreement to supply the harvesters, but claimed that it was several, and filed copies of the several agreements. Plaintiffs offered at the trial oral evidence to prove the contract as set up in their claim. Defendant objected on the ground that the plaintiffs had not, as provided in Code Civil Proc. Cal. § 448, filed an affidavit denying the genuineness and due execution of the written instruments. *Held* that, although the plaintiffs admitted the due execution and genuineness of the two contracts pleaded in the answer, yet as the two contracts made with plaintiffs severally would not prove that there might not have been one made with them jointly, there was no admission that the two were the contracts sued on, and that plaintiffs should have been allowed to prove the contract alleged in their complaint.

Department 2. Appeal from superior court, Stanislaus county; William O'Minor, Judge.

W. E. Turner, *L. J. Maddux*, and *D. S. Terry*, for appellants. *W. L. Dudley* and *W. M. Gibson*, for respondent.

Sharpstein, J. The plaintiffs allege that they are farmers, and jointly interested in the cultivation of land in Stanislaus county; that the defendant, a corporation, in March, 1884, by and through its duly appointed and authorized officers, contracted and agreed with these plaintiffs to manufacture and deliver to them, on or about the ——— day of June, 1884, two 12-foot Shippee combined harvesters, with Shippee & Grattan improvements, at the agreed price of $3,600; and then and there warranted, covenanted, and guarantied that each of said harvesters should do and perform good and satisfactory work in the harvesting, cutting, and saving of grain, and that each of said harvesters should give good satisfaction in the doing and performing of the work for which they had been manufactured, to-wit, the harvesting, cutting, and saving of grain in the harvest fields; that relying upon and in consideration of said representations, covenants, agreements, warranties, and guaranties as aforesaid, made by and on behalf of said defendants to these plaintiffs, said plaintiffs did agree to take, receive, and accept said harvesters with said improvements, and pay therefor the aforesaid sum of $3,600; that on or about the ——— day of June, 1884, said defendant did deliver, in pursuance of said contract, two 12-foot Shippee combined harvesters, with Shippee & Grattan improvements, and these plaintiffs received the same, and thereupon paid to the defendant the aforesaid sum of $3,600; that the plaintiffs took said harvesters to their grain fields, and, with all proper precautions, aids, and management, undertook to work with said harvesters, but they failed to do any work of any value whatever in harvesting, cutting, or saving grain; and that, after ascertaining that said machines would not do the work which they were guarantied by defendant to do, the plaintiffs returned them to the defendant, and demanded of defendant the sum paid for them, and the further sum of $3,000 damages sustained by plaintiffs by reason of the promises aforesaid.

The answer of the defendant admits that it represented to plaintiffs that said machines were of great value in the harvesting of grain; denies that in March, 1884, it contracted to manufacture and deliver to plaintiffs two 12-foot Shippee combined harvesters and Grattan improvements, as alleged in the complaint. Other allegations are denied, which it is unnecessary to enumerate, as the decision of the cause must turn upon the second defense to the action, in which it is alleged that the defendant never entered into any contract or agreement with the plaintiffs jointly, but contracted with each of them separately; that it sold and delivered one machine to Fox, and afterwards another to Tilton; that the contracts of sale and delivery are in writ-

ing, and that copies of them are attached to the answer, and made part thereof. One of the copies attached purports on its face to be an agreement between the defendant and plaintiffs for the manufacture and delivery by the defendant to Fox of one 12-foot Shippee combined harvester, with Shippee & Grattan improvements, for the sum of $1,800, gold coin of the United States. This is followed by other stipulations, which it is unnecessary now to consider. The other copy attached purports to be a contract between the defendant and the plaintiff Tilton, of like import with that between the defendant and plaintiff Fox.

On the trial the plaintiffs were proceeding to prove by oral testimony the contract as alleged in their complaint. The defendant objected on the ground that plaintiffs had not, as provided in section 448, Code Civil Proc., filed an affidavit denying the genuineness and due execution of the written instruments of which copies were contained in the answer. As we construe the questions, objections, and rulings, the court regarded the plaintiffs as occupying the position they would have occupied if they had declared upon or proved a contract or contracts in writing similar to those contained in the answer. This we think to be untenable. The plaintiffs admitted the genuineness and due execution of the instruments as contained in the answer; but did not, as we view it, admit that those were the contracts under which they purchased the machines mentioned in the complaint. The plaintiffs allege a contract made with them jointly. Two contracts made with them severally would not conclusively prove that there might not have been one made with them jointly. The due execution and genuineness of the instruments were admitted, but it was not admitted that those were the contracts sued on. The plaintiffs must be deemed to have denied all the other allegations of the answer. We think they should have been permitted to prove the contract alleged in their complaint, and that the court erred in denying them the right to do so; for which reason the judgment and order denying them a new trial are reversed, and the cause is remanded for a new trial.

We concur: MCFARLAND, J.; THORNTON, J.

74 Cal. 11

WEBBER *v.* CLARKE. (No. 11,923.)

(*Supreme Court of California.* October 31, 1887.)

1. QUIETING TITLE—ADVERSE POSSESSION—PLEADING.
 Adverse possession under color of title was relied on by defendant in an action to quiet title. He, however, did not plead Code Civil Proc. Cal. § 323, which states what facts constitute adverse possession. *Held*, that it was unnecessary to plead it.
2. SAME—PERIOD OF ADVERSE POSSESSION.
 Adverse possession, commencing in May, 1875, under color of title, was relied on by defendant in an action to quiet title. *Held*, that his title by adverse possession became perfected in five years, which need not be next preceding the commencement of the action.
3. SAME—PAYMENT OF TAXES.
 Code Civil Proc. Cal. § 325, requiring the payment of taxes as an element of adverse possession, was passed April 1, 1878, and was not retroactive. Except for the years 1877 and 1883, defendant, who claimed by adverse possession under color of title, and his predecessors, paid all the taxes from 1873 to 1884. *Held*, that the non-payment for 1877 was immaterial, and the non-payment for 1883 unimportant.
4. SAME—UNINCLOSED LANDS—THOROUGHFARE FOR STOCK.
 In an action to quiet title, defendant claimed the land under color of title and adverse possession. Plaintiff claimed that the track in controversy was a kind of thoroughfare for stock going to the mountains. *Held*, that this fact would not destroy defendant's right.
5. SAME—CONTINUOUS POSSESSION—POSSESSION DURING GRAZING SEASON.
 Uninclosed land was taken possession of by defendant under color of title. He pastured his sheep upon it during the grazing season, which lasted from February to July. During the remainder of the year the land was not pasturable, and there was no one on it. *Held*, that this constituted continuous and adverse possession.

6. SAME—COLOR OF TITLE—TAX DEED.
Defendant entered and took possession under a tax-title deed, not void on its face, and believing that he had acquired an interest under the deed. *Held*, that it made no difference that his grantor had neither title nor possession.

7. SAME.
Defendant claimed under a sheriff's tax deed, executed on February 27, 1874, after a sale under a judgment of a district court, "duly made and given" on January 9, 1872, and also by adverse possession for the period required by the statute of limitations. *Held*, that the sheriff's deed, in due form, under a judgment regular on its face, constituted color of title, which, in connection with the possession shown, was a defense to the action.[1]

8. SAME—CONSTRUCTIVE POSSESSION, EXTENT OF.
A tract of uninclosed, uncultivated grazing land was taken possession of by defendant, on which he herded his sheep. He claimed under a tax-title deed. *Held*, that he had constructive possession of the whole tract described in the document.[2]

9. APPEAL—FILING BRIEFS—POINTS—WAIVER OF ERRORS.
Code Civil Proc. Cal. c. 7, art. 2, § 129, (Sup. Ct. rule 2, sub. 4,) provides that "ten days before the calling of a cause for argument, the appellant shall file with the clerk, and serve upon the other party, his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made. Five days before the calling of the case for argument, the respondent shall file and serve his points and authorities; and when the case is called for argument, the appellant may file and serve a reply to respondent's points." In his opening brief, appellant alleged numerous errors in the admission and rejection of evidence, but argued none of them. In respondent's brief, attention was called to the fact that all the errors specified in the statement were waived by appellant's brief. The appellant replied with argument upon 17 assignments of error. *Held*, that the technical errors alleged were waived. Appellant should have made the points he relied on in his opening brief.

Commissioners' decision. Department 2.

Appeal from superior court, Tulare county; WM. W. CROSS, Judge.

Wiggington, Creed & Hawes, (*Geo. W. Lewis*, of counsel,) for appellant. *Atwell & Bradley*, for respondent.

HAYNE, C. The action is described by the appellant as "an action to quiet the title to a parcel of land described in the complaint and of ejectment for said lands." The plaintiff claims under a school-land patent from the state, dated May 25, 1875, which was issued upon a certificate of purchase, dated March 18, 1870. The defendant claims under a sheriff's deed, executed on February 27, 1874, after a sale under a judgment of a district court, "duly made and given" on January 9, 1872, and by adverse possession for the period required by the statute of limitations. The court below gave judgment for the defendant, and the plaintiff appeals.

1. Numerous errors in the admission and rejection of evidence are alleged. None of these are argued in the appellant's opening brief. The appellant's counsel there say: "There are many technical objections that exist as to the regularity of the tax proceedings sufficient to invalidate them; but we preferred to demonstrate upon principle and authority the invalidity of defendant's claim." That is all that is said with respect to the alleged errors in relation to "the regularity of the tax proceedings." As to errors in relation to other matters not a word is said. In the respondent's brief attention is drawn

[1] Color is not every pretense or claim of title, but consists in a writing or conveyance of some kind purporting to convey the land under which the claim of title is asserted. Armijo v. Armijo, (N. M.) 13 Pac. Rep. 92. Any instrument purporting upon its face to convey title to the grantee is sufficient to constitute color of title. Swift v. Mulkey, (Or.) 12 Pac. Rep. 76, and note. See Weineg v. Holcomb, (Iowa,) 34 N. W. Rep. 787.

[2] When a party has a deed for a tract of land, actual possession of a part will in law constitute possession of the whole not in the adverse possession of another. Fisher v. Bennehoff, (Ill.) 13 N. E. Rep. 150. In general, as to what must be the character of the occupancy to constitute adverse possession, see Babson v. Tainter, (Me.) 10 Atl. Rep. 63; Iron Works v. Wadhams, (Mass.) 9 N. E. Rep. 1; Murphy v. Doyle, (Minn.) 33 N. W. Rep. 220; Hancock v. Burton, (Cal.) 14 Pac. Rep. 392; Scott v. Woodruff, (Ark.) 4 S. W. Rep. 908.

to the fact that all the errors specified in the statement are waived by appellant's brief. And the appellant comes back with argument upon 17 assignments of error. There was no oral argument; and, by the terms of the order submitting the case on briefs, the respondent had no reply. We think that under subdivision 4 of rule 2 the appellant must make the points he relies on in his opening brief, and that he cannot reserve them for his reply. To permit that would be unfair to the respondent, and would increase the labors of the court. And while the court is undoubtedly at liberty to decide the case upon any points that its proper disposition may seem to require, whether taken by counsel or not, we think that, under the circumstances of this case, the technical errors alleged must be considered as waived. For that reason we do not notice them. See, generally, *Hihn* v. *Courtis*, 31 Cal. 404.

2. It is argued for the appellant, with much earnestness and ability, that the levy of the tax, upon which the judgment of the district court was founded, was void, for the reason that a tax cannot be imposed upon school lands before all the payments upon the certificate of purchase are made. But we do not think it necessary to pass upon that question. Whether the tax was void, and whether the judgment therefor was conclusive upon appellant, as a judgment *in rem*, or not, it was regular upon its face; and a sheriff's deed thereunder, in due form, constituted, to say the least, color of title, which, in connection with the possession shown, was a defense to the action.

Upon the question of possession the findings were as follows: "The purchaser, P. Byrd, during all the period from February 27, 1874, down to the twentieth day of May, 1879, * * * claimed the land by virtue of such deed, and rented the same to J. S. Williams, on the condition that the said Williams should exclude all other persons therefrom, and use and occupy the same to the exclusion of everybody. And the said Williams, during all that time, a period of more than five years, did publicly and openly, notoriously, and peaceably, and uninterruptedly occupy and possess said land, and all of it, to the exclusion of plaintiff and the whole world; and the plaintiff, her ancestors, grantors, or predecessors, were not, nor were any of them, seized or possessed of said land at any time within five years before this action was brought. * * * On the twentieth day of May, 1879, said P. Byrd sold and conveyed for a good and sufficient consideration, all the land aforesaid to J. S. Williams, who continued publicly, peaceably, openly, and notoriously in the possession thereof, to the exclusion of the plaintiff and the whole world, and paid the taxes thereon down to the twelfth day of November, 1880, claiming the same as his property under the sheriff's deed aforesaid to Byrd, and the conveyance from Byrd to him. On the twelfth day of November, 1880, said J. S. Williams, by his deed of conveyance, conveyed the land aforesaid to C. W. Clarke, the defendant herein, who went into possession thereof at once, under a claim of title founded upon said conveyances, and said defendant has ever since continued to, and does now, occupy and hold possession of said land under a claim of right and ownership, based upon said conveyances, peaceably, openly, notoriously, continuously, uninterruptedly, and adversely to the whole world, and paid all the taxes levied or assessed upon the land from the twelfth day of November, 1880, down to the time this action was brought, except in 1883, when the taxes were paid by some person unknown to defendant. The land described in the complaint constitutes but one parcel, and had been continuously occupied and used by defendant and his grantors, for more than five years before this action was brought, for the pasturage of their stock." It is argued that these findings are not supported by the evidence.

The tract in controversy is the east half of section 16, tp. 16 S., R. 23 E., Mount Diablo base and meridian. It was not inclosed or cultivated, and no one resided upon it. The surrounding country "was an open, uninclosed, uncultivated, unimproved country all around there." The nearest "improvements" were half a mile distant, and the nearest sheep camp about a mile

off. There is some conflict in the evidence, but, if the defendant's witnesses are to be believed, (and, in view of the findings, we must assume that they are,) the defendant and his grantors herded their sheep upon the land during the grazing season of each year; that is to say, from February to July. During the rest of the year the land was "not pasturable for sheep," and appears (during such time) to have been entirely unoccupied. The argument for the appellant is that such pasturage does not constitute a sufficient possession, and particularly that it was not continuous. And these are the questions to be resolved.

"By actual possession," said FIELD, C. J., in a leading case, "is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." *Coryell* v. *Cain*, 16 Cal. 573. And see *Brumagim* v. *Bradshaw*, 39 Cal. 44. Where, however, there is such subjection to the will and dominion of the claimant, manifested in some appropriate manner, residence upon the property is not essential, (*Barstow* v. *Newman*, 34 Cal. 91; *Goodrich* v. *Van Landigham*, 46 Cal. 601; *Kelly* v. *Mack*, 49 Cal. 524;) nor, in such case, is an inclosure necessary, (*Hicks* v. *Coleman*, 25 Cal. 132; *McCreery* v. *Everding*, 44 Cal. 252; *Sheldon* v. *Mull*, 67 Cal. 300, 7 Pac. Rep. 710. In the case of grazing land, in a grazing country, herding sheep upon it would seem to be an "appropriate use, according to the particular locality and quality of the property." Accordingly, we find that in two cases pasturage of cattle within an inclosure was held to be sufficient possession against intruders, (*Southmayd* v. *Henley*, 45 Cal. 102; *Pierce* v. *Stuart*, Id. 280;) and in *Sheldon* v. *Mull*, 67 Cal. 300 and 301, 7 Pac. Rep. 710, it was held that pasturage, without an inclosure, was sufficient; the cattle being confined to the land by herders.

There must, of course, be some definite boundaries to the possession. But it has been held in a long line of decisions that, where a party enters under color of title, and has actual possession of a part of the whole tract, he has constructive possession of the whole tract described in the document. *Hicks* v. *Coleman*, 25 Cal. 122; *Hoag* v. *Pierce*, 28 Cal. 191; *McKee* v. *Greene*, 31 Cal. 420; *Ayres* v. *Bensley*, 32 Cal. 631; *Russell* v. *Harris*, 38 Cal. 426; *Donahue* v. *Gallavan*, 43 Cal. 573; *Spect* v. *Hagar*, 65 Cal. 443, 4 Pac. Rep. 419. And it makes no difference that the grantor had neither title nor possession, (*Walsh* v. *Hill*, 38 Cal. 487, 488,) provided the document was not void on its face, and the party entering under it believed in good faith that he acquired an interest under it, (*Walsh* v. *Hill*, *supra*; *Cannon* v. *Lumber Co.*, 38 Cal. 674; *Wolfskill* v. *Malajowich*, 39 Cal. 281.) A sheriff's deed, under a judgment regular on its face, is color of title within the meaning of the above rule. *Russell* v. *Harris*, 38 Cal. 427; *Packard* v. *Moss*, 68 Cal. 127, 8 Pac. Rep. 818; and compare *Jones* v. *Gillis*, 45 Cal. 542, 543, and *Gregory* v. *Haynes*, 13 Cal. 595.

The rules established by the foregoing decisions have been embodied to a great extent in the Code of Civil Procedure. Section 322 embodies the rule as to entry upon a part of a tract under color of title; and section 323, in relation to what constitutes adverse possession, is as follows: "Sec. 323. For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in the following cases: *First*, where it has been usually cultivated or improved; *second*, where it has been protected by a substantial inclosure; *third*, where, although not inclosed, it has been used for the supply of fuel, or for fencing timber for the purpose of husbandry, *or for pasturage*, or for the ordinary use of the occupant; *fourth*, where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have

been occupied for the same length of time as the part improved and cultivated."

The appellant seems to suppose that this section cannot be considered because it was not pleaded. But as was said in *Hagely* v. *Hagely*, 68 Cal. 352, 9 Pac. Rep. 305, the proper course is to plead the section establishing the period of limitation, omitting all reference to explanatory sections. It will be observed that the section provides in terms that pasturage of land, without an inclosure, may constitute an adverse possession. There can, therefore, be no further doubt upon this branch of the appellant's case. The question is whether the pasturage must continue throughout the whole year. As stated above, the defendant's pasturage was only during the grazing season, that is, from February to July,—the land during the balance of the year being "not pasturable." We think, however, that this was sufficient, there being no one on the land meanwhile. It is a settled rule with reference to cases of this character that it is sufficient if, in the language of FIELD, C. J., in *Coryell* v. *Cain*, above quoted, the dominion and control is "by appropriate use according to the particular locality and quality of the property." In this regard CROCKETT, J., delivering the opinion in *Brumagim* v. *Bradshaw*, 39 Cal. 46, said: "The general principle which underlies all this class of cases is that the acts of dominion must be adapted to the particular land, its condition, locality, and appropriate use. The philosophy of the rule is that, by such acts, the party proclaims to the public that he asserts an exclusive ownership over the land, and the acts which he performs are in harmony with his claim of title." See, also, *English* v. *Johnson*, 17 Cal. 116, 117.

Now, we think that pasturing during the pasturing season is "appropriate use according to the particular locality and quality of the property." To pasture the land when it was not "pasturable" would not only be not an appropriate use, but an impracticable one. In the case of cultivation, there is an interval of several months between the harvesting of one crop and the preparation of the soil for another. And there would be just as much sense in holding that the interval destroyed the continuity of the possession in the one case as in the other. To so hold would be, in effect, to hold for all practical purposes that adverse possession could not be acquired by pasturage; for obedience will be paid to nature's laws rather than to man's, and the thing supposed to be necessary would never be done. It is sufficient that the use is in accordance with the usual course of husbandry in the locality. We are of opinion, therefore, that the defendant's evidence tended to make out a case of adverse possession. It must be admitted that the plaintiff's evidence in rebuttal was strong. But the question of credibility of the witnesses was for the court below, and, under the well-settled rule, its conclusions as to the facts will not, under the circumstances, be disturbed.

The fact, if it be a fact, that the tract in controversy "used to be a kind of thoroughfare for stock going to the mountains," does not destroy the defendant's right. Even if there was a right of way in the public for such purpose, it would not be inconsistent with the defendant's possession. *San Francisco* v. *Calderwood*, 31 Cal. 589.

The case of *Thompson* v. *Pioche*, 44 Cal. 508, cited by counsel, does not militate against the conclusions we have reached.

It is proper to add, to prevent misconception, that in what we have said we have reference solely to the case before the court, viz., a use of land by one entering under color of title. It might be plausibly argued that, where the use is by one claiming title "not founded upon a written instrument, judgment, or decree," section 325 of the Code of Civil Procedure would operate to prevent mere pasturage from being a sufficient adverse possession. As to that we express no opinion.

3. It is urged that the defendant cannot make out a case of adverse possession, because neither he nor his predecessors paid all the taxes. The facts

are that they paid the taxes from 1873 to 1884, except for the years 1877 and 1883. The non-payment for 1877 is immaterial, for the reason that section 325, which requires the payment of taxes as an element of adverse possession, was not passed until 1878, and is not retroactive. *Sharp* v. *Blankenship*, 59 Cal. 288; *Railroad Co.* v. *Shackelford*, 63 Cal. 261; *Johnson* v. *Brown*, Id. 392. Nor is the non-payment for 1883 important. Taking the adverse possession to have commenced on May 24, 1875, the date of the issuance of the patent, the defendant acquired a title at the expiration of five years, viz., in May, 1880. The five years of adverse possession need not be next preceding the commencement of the action. *Cannon* v. *Stockmon*, 36 Cal. 540.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: FOOTE, C.; BELCHER, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

74 Cal. 38

Ex parte KOHLER, on *Habeas Corpus*. (No. 20,330.)

(*Supreme Court of California.* November 3, 1887.)

1. CONSTITUTIONAL LAW—TITLES OF ACT—LAW AGAINST ADULTERATION OF WINE.
The California act approved March 7, 1887, (St. 1887, p. 46,) entitled "An act to prohibit the sophistication and adulteration of wine, and to prevent fraud in the manufacture and sale thereof," is not repugnant to Const. Cal. art. 4, § 24, which provides that "every act shall embrace but one subject, which subject shall be expressed in its title."

2. SAME—RESTRICTION UPON SALE OF WINE—DUE PROCESS OF LAW.
Neither is the act unconstitutional because so unreasonable in its restriction upon the sale of wines as to deprive the citizen of his property and liberty without due process of law.

3. INTOXICATING LIQUORS—PROVISION FOR BRANDING WINES—VIOLATION NOT CRIMINAL.
Section 8 of the above act, providing that "it is desired and required that all and every grower, manufacturer, trader, holder, or bottler of California when selling, or putting up for sale any California wine, * * * shall plainly stencil, brand, or have printed where it will be plainly seen,—*First*, 'Pure California Wine;' and *secondly*, his name or the firm's name, as the case may be, both on label of bottle or package," etc.,—is merely directory, and no punishment can be inflicted for selling pure California wine without such label or brand, or the label furnished in lieu thereof by the state.

In bank. Application for writ of *habeas corpus*.

Conviction had in police judge's court, San Francisco; JAS. LAWLOR, Judge.

Morrow & Stratton, for petitioner. *Edward B. Stonehill*, Dist. Atty., for the People. *M. M. Estee, amicus curiæ*, for the People. *John T. Doyle, amicus curiæ.*

PATERSON, J. The petitioner was convicted in the police court of the city and county of San Francisco of the crime of misdemeanor, committed in violation of the provisions of an act of the legislature of the state of California, entitled, "An act to prohibit the sophistication and adulteration of wine, and to prevent fraud in the manufacture and sale thereof," approved March 7, 1887. St. 1887, p. 46.

The salient provisions of the act are as follows: Section 1 defines pure wine for the purposes of the act. Section 2 prohibits the using of deleterious substitutes in the fermentation, preservation, and fortification of pure wines. Section 3 prohibits the use of materials injurious to consumers for the promotion of fermentation. Section 4 declares it to be unlawful to sell under the name of wine any substance other than pure wine, as defined by the act. Sec-

tion 5 makes an exception in the case of pure champagne and sparkling wine, so as to permit the use of sugar in sweetening the same. Section 7 provides for the printing and furnishing of labels by the comptroller of the state, setting forth that the wine covered by such labels is pure California wine. Section 8 reads as follows: "Sec. 8. It is desired and required that all and every grower, manufacturer, trader, handler, or bottler of California wine, when selling or putting up for sale any California wine, or when shipping California wine to parties to whom sold, shall plainly stencil, brand, or have printed where it will be easily seen—*First*, 'Pure California Wine;' and, *secondly*, his name or the firm's name, as the case may be, both on label of bottle or package in which wine is sold and sent; or he may in lieu thereof, if he so prefers and elects, affix the label which has been provided for in section 7. It shall be unlawful to affix any such stamp or label as above provided to any vessel containing any substance other than pure wine, as herein defined, or to prepare or use on any vessel containing any liquid, any imitation or counterfeit of such stamp, or any paper in the similitude or resemblance thereof, or any paper of such form and appearance as to be calculated to mislead or deceive any unwary person, or cause him to suppose the contents of such vessel to be pure wine. It shall be unlawful for any person or persons other than the ones for whom such stamps were procured to in any way use such stamps, or to have possession of the same. A violation of any of the provisions of this section shall be a misdemeanor, and punishable by a fine of not less than fifty dollars," etc.

The complaint charged "that said Henry Kohler, being a dealer and bottler of California wines, did sell to the prosecuting witness, one Jaspar, a bottle of California wine, which bottle, when so sold, did not have plainly or at all stamped thereon the words 'Pure California Wine,' nor did it have in lieu thereof the stamp as furnished by the comptroller of state."

Several questions are presented involving the construction of the act referred to and its constitutionality. It is claimed by petitioner that the act is not mandatory in requiring a pure-wine stamp to be placed upon pure California wine. The complaint did not charge petitioner with the sale of sophisticated or adulterated wine; it accused him merely of selling a bottle of California wine without having thereon a pure-wine stamp. It is claimed by counsel for the people that, under the act referred to, dealers in wine are prohibited from selling *pure wine* without the stamp designated by the act. Petitioner contends that while the pure-wine stamp *may be* used, there is no penalty prescribed for a failure to use it. The act is not objectionable upon the ground claimed by the petitioner that it embraces more than one subject, contrary to the requirements of article 4, section 24 of the constitution, which provides that "every act shall embrace but one subject, which subject shall be expressed in its title." However numerous the provisions of an act may be, if they can be fairly considered as falling within the subject-matter of legislation, or as proper methods for the attainment of the end sought by the act, there is no conflict with the constitutional provision above quoted. In any event, it is only where there is a clear violation of the constitution that the court is justified in declaring it unconstitutional. The great object to be attained by the "Act to prohibit the sophistication and adulteration of wine, and to prevent fraud in the manufacture and sale thereof" must have been to secure the manufacture and sale of none but pure California wine. The first section defines pure wine; the second section prohibits the use of deleterious substitutes; the fourth section prohibits the sale of any but pure wine, and every penalty affixed is for the purpose of protecting those who make and sell pure wine, and for punishing those who make and sell impure wine. Manifestly the provisions of the act all fall within the subject named in its title, and are necessary and logical methods for the attainment of the end desired by the legislature. The act, therefore, is not repugnant to article 4, § 24, *supra*.

Now, is the act unconstitutional because so unreasonable in its restriction upon the sale of wines as to deprive the petitioner of his property and liberty without due process of law? The power of the legislature to impose such regulations for the conservation of the health of its citizens has been so often discussed and affirmed here that it is useless to reopen the question. The manufacture and sale of liquors of all kinds, the sale of pure milk, the inspection and sale of meats, and the control of laundries and slaughter-houses are all subject to regulation. Whatever construction may be placed upon the act, it is difficult to see how a compliance with the law would injure an honest dealer in California wine.

A more difficult question is that which refers to the proper construction of section 8. Is it mandatory in requiring a pure-wine stamp to be placed upon *pure* California wine? Is a failure to place such stamp upon *pure* California wine "a violation of any of the provisions of this section?" All legislation directed against the adulteration and simulation of articles of food and drink is aimed at a common object—the preservation of the public health. The court will take judicial notice of the evils preceding such legislation, and the mischiefs intended to be prevented thereby, the character and importance of the interests of the state which may be affected thereby, and the usual course of business. A knowledge of these matters is often necessary to a full and fair understanding of the force and effect of the law, and is a valuable help in ascertaining its true intent and meaning. The growth of the wine-growing interests of this state is a matter of world-wide publicity. It is a well-known fact that California is the only state in the Union where the grape suitable for wine-making is cultivated in vineyards, and that her wines are rapidly growing in favor, and rivaling in quality the table wines of foreign countries. With the progress and success of this industry there has grown up and increased the manufacture and sale of spurious wines, which are not only injurious to health, but detrimental to the wine industry. Several attempts have been made in congress to prevent the trade in this cheap and unwholesome stuff, but without material effect. Finally, in 1886–87, when the evil had attained so great a magnitude as to attract public attention, the Grape-growers and Wine-makers' Association of California presented a bill to the legislature of this state, which, after being amended, was passed, containing the provisions above stated. The primary objects of the act were, doubtless, to prevent the sale of spurious wine under the designation of "California Wine," and to promote the public health. But there were other objects to be obtained incidentally. The wine-grower who produced good wine would not have to suffer the effect of a blending by the trade of his article of superior merit with an inferior one. It was evidently through the efforts of wine-growers who aimed at a high degree of excellence in wine-making that the first clause of section 8 was inserted. Some expression on the part of the legislature of the state was desired as authority for affixing a badge to their productions, by which the consumer could feel sure of the purity of the wine, and the identity of the producer. That the words "desired and required" were intended to express rather a legislative wish and permission than a mandate, is indicated, too, in the discordancy of the natural meanings of the words themselves. As words of legislative command, they are singularly inappropriate and inconsistent. It is difficult to understand how it can be made a penal offense to violate simply a legislative *desire*. The word "desired" cannot be ignored in the construction of the act any more than the word "required," and the former is at least as forcible in its expression of a request as the latter is in its expression of a command.

The act in all other provisions containing mandates and prohibitions is positive and forcible in its language. Thus it is noticeable that the same section further along provides: "It shall be unlawful to affix any such stamp," etc., and again, "It shall be unlawful for any person or persons other than

the ones for whom such stamps were procured to use," etc. Other sections of the act use the same language—words which are ordinarily employed in expressing the mandates and prohibitions of penal statutes. We do not think it was intended that the sale of wines admitted to be pure should be circumscribed, limited, or restricted. Such legislation is unusual. We know of no similar statute where anything more has been attempted than—*First*, to prohibit the adulteration and sophistication of food and drink, and *second*, if permitted, to compel the appropriate stamping and designation of such food and drink. The New York pure-wine law, approved in June, 1887, defines pure wines, half-wines, and made wines; prohibits the sale of adulterated wines, and requires the stamping of half-wines and made wines; but it does not in any manner attempt to regulate the sale of pure wines. If the legislature had intended to compel the use of stamps and labels on pure wine, it could easily have stated that the failure, neglect, or refusal so to use them was unlawful, and there would have been no ambiguity in its language. The fact that it is carefully stated in the act what shall be unlawful in other respects is strong evidence that the first clause of section 8 was not intended to be obligatory. It is always to be presumed that the legislature will express its intention in clear and explicit terms in prescribing the obligations for a violation of which a penalty is affixed. In cases of this kind the limitations and restrictions should be plain and free from doubt. *Hill* v. *Decatur*, 22 Ga. 203.

It is a general rule that statutes affixing penalties should be strictly construed, and all doubts resolved in favor of the accused. *People* v. *Tisdale*, 57 Cal. 107. When measured by the mischief contemplated by the legislature, an additional reason is presented for giving to section 8 a permissive scope, rather than a mandatory one, so far as the stamping of pure wines is concerned. The act defines pure wine, prohibits adulteration and deterioration, and prohibits the sale of impure wine. The comptroller is authorized to furnish labels, and penalties are provided for the use thereof on other than pure wines. This seems to be the natural scope of the act, and all that is necessarily indicated in its title. There can be no fraud in the sale of pure wine. The title is a part of the act, and must declare its object; and in all cases where the legislative intent is ambiguous, judicial reference may be had to the title of the act to assist in determining its meaning. *Weed* v. *Maynard*, 52 Cal. 459; *Barnes* v. *Jones*, 51 Cal. 303.

We think, therefore, that the affixing of labels on pure wine is not obligatory, and that the proper construction of section 8, wherein it declares that a violation of any of its provisions is a misdemeanor, is to impose a penalty for a violation of only those provisions which are therein specifically declared to be unlawful. It results that the complaint states no offense, and the petitioner must be discharged.

So ordered.

We concur: TEMPLE, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCFARLAND, J.

74 Cal. 85

TRIPP *v.* DUANE and others. (No. 9,490.)

(*Supreme Court of California.* November 5, 1887.)

1. QUIETING TITLE—DETERMINING TITLE NOT IN ISSUE—WHO MAY COMPLAIN.
 When the only question at issue between parties is the title to 33-96 of a certain piece of land, and a decree is entered quieting the title in favor of plaintiff, and against defendant, of only such 33-96, defendant has no ground for complaint because the decree, as to other defendants who do not appeal, seems to quiet the title of plaintiff to the whole piece of land.
2. SAME — CONVEYANCE BY CO-TENANT — EQUITABLE LIEN OF THIRD PARTY FOR ADVANCEMENTS—WAIVER BY TAKING TRUST DEED.
 It appeared that one Ellis made a conveyance of 33-96 of a tract of land to plaintiff's grantors, which Ellis had not yet paid for. Afterwards he and his co-

tenants made a deed of trust to one P. as a security for $8,000 advanced by P. to the state as purchase money for such land. The deed of trust provided that the land might be sold by the trustee upon public notice for a specified time. Afterwards P., in his individual capacity, conveyed to M., who conveyed to D., one of the cotenants of Ellis. Both of these conveyances were without consideration. Subsequently P. gave the required notice of sale, and, as trustee, sold the land to plaintiff. In an action by plaintiff to quiet his title to the 33-96 of the land as against D., *held* that, by taking the deed of trust as security, P. had waived his equitable lien for the advancement of $8,000, and it was not error to decree the title in plaintiff without requiring him to pay his proportion of the $8,000.

3. SAME—PURCHASE FROM TRUSTEE AFTER COMMENCEMENT OF ACTION.

And although a supplemental complaint showing the sale, after the beginning of plaintiff's action, by P. as trustee to plaintiff, was not admitted, as against D., yet, without evidence of the sale, plaintiff was under no obligations, so far as D. was concerned, to pay any part of the $8,000 before his title to 33-96 should be quieted as against D.; and even though a deposition by P. showing the sale, and payment by plaintiff to him of the purchase money, after this action was begun, were considered, such deposition, as against D., would be merely immaterial.

In bank. Appeal from superior court, city and county of San Francisco; J. G. MAGUIRE, Judge.

This was an action to quiet title. The facts are sufficiently stated in the opinion, except the text of the document therein referred to as folios 109 to 113, which is as follows:

"We, Geo. W. Ellis, Creed Haymond, and C. P. Duane, hereby grant, bargain, sell, and convey unto Wm. H. Patterson all the estate, title, and interest which we either and all of us now have, or may hereafter acquire, of, in, and to the land described, and intended to be described, in a certain so-called pre-emption claim or pre-emption notice, record whereof is contained in the land records of the city and county of San Francisco, in Liber B of Miscellaneous Deeds, page 665; and also all the lands described in two certain deeds made by the tide-land commissioners to G. W. Ellis, and bearing date November 24, 1875. This conveyance is in trust to secure the payment of $4,000 due to said Patterson from the said Ellis, $2,000 due from the said Haymond to said Patterson, and $2,000 from the said Duane to the said Patterson, and payable in U. S. gold coin, with interest at the rate of one and one-half per cent. per month, and payable on or before 60 days from the date thereof. The said Patterson to have full possession and control of said land, and the absolute power of disposition of said land for the purposes of the trust, if such payments are not made at or before 60 days from the date hereof. Such disposition is to be made upon one week's notice in any daily paper published in the city and county of San Francisco. Upon the payment of the whole of said sum of $8,000, and interest, the said Patterson is to reconvey said land; or upon the payment by the said Ellis of the sum of $4,000, and interest, he will reconvey one-half of said property to said Ellis, or upon the payment of $2,000, and interest, by said Haymond, he will reconvey to said Haymond ¼ thereof, or upon the payment of $2,000, and interest, by said Duane, to reconvey ¼ of said property to said Duane.

"Witness our hands and seals this thirtieth day of November, 1875.

"GEO. W. ELLIS. [Seal.]
"CREED HAYMOND, [Seal.]
"C. P. DUANE. [Seal.]
"WM. H. PATTERSON.' [Seal.]

George W. Tyler and *E. D. Wheeler*, for appellant. *Philip A. Galpin*, for respondent.

SEARLS, C. J. This is an action by plaintiff to quiet his title to 33-96 of the real estate described in the complaint. In 1853, George W. Ellis filed in the recorder's office of the city and county of San Francisco a pre-emption claim on 160 acres of salt marsh and tide land belonging to the state of California. Between that time and October 21, 1875, said Ellis executed, to different parties, bargain and sale deeds of undivided portions of said claim,

amounting in the aggregate to 33-96 of the whole claim; and the grantees of said undivided interest conveyed, by good and sufficient deeds, the same to plaintiff, prior to October 21, 1875, which deeds were all recorded prior to that date. On the twenty-fourth of November, 1875, the state of California made its deed to Ellis of the lands described in the complaint; the same being portions only of the land described in Ellis' pre-emption claim. Plaintiff claims title to 33-96 of the land described in the complaint by reason of said pre-emption claim of Ellis, and the deed from the state to Ellis, of date November 24, 1875.

When the deed from the state to Ellis was ready for delivery, Ellis had no money, and $8,000 had to be paid to the state before the deed would be delivered, and thereupon defendant Ellis applied to W. H. Patterson to advance the $8,000 to the state for the purchase money of the land, and take the land as security for its repayment. Thereupon Ellis, Duane, and Haymond executed to Patterson the paper found at folios 109 to 113, both inclusive, and Patterson paid the $8,000 purchase money, received the deed from the state to Ellis, and had the same recorded. The $8,000 not having been paid in 60 days, as provided in the instrument, nor any part thereof, W. H. Patterson deeded to Morrissey, and Morrissey to Duane, "all the right, title, and interest which said Patterson derived in said land by virtue of the deed of Ellis *et al.* to him of date November 30, 1875," without advertising such sale for 60 days, so as to free said real estate from the trust under which Patterson held the land, which said deeds were immediately recorded. At the commencement of this suit, neither the plaintiff nor Ellis had paid Patterson or Duane any portion of said $8,000, the purchase money of said land so paid by said Patterson to the state, and plaintiff sought in his complaint to quiet his title to 33-96 of said land, without paying or offering to pay to Patterson or to Duane any portion of the said purchase money.

The paper from Ellis, Duane, and Haymond to Patterson, as above mentioned, was a conveyance to the latter of all the estate of the former in the land in question, in trust to secure the payment of the $8,000, with interest, and payable in 60 days from November 30, 1875, the date thereof, and, if not paid, Patterson was authorized to sell the property after one week's notice in any daily paper published in the city and county of San Francisco. The conveyance by Patterson to Morrissey was made after the expiration of the 60 days, but without the notice prescribed, was without consideration, and was executed by Patterson in his own name, and not as a trustee. The deed from Morrissey to Duane was also without consideration.

After the defendant Duane had filed his amended answer in the case, the interest of Patterson in the trust deed was duly sold as provided for in that instrument, and was purchased by the plaintiff herein, who thereupon applied to the court for leave to file a supplemental complaint setting up those facts, which was refused by the court as to Duane, and granted as to the other defendants. Upon the trial of this case, the plaintiff offered the deposition of W. H. Patterson in evidence, to prove the facts contained in the supplemental complaint he had filed. Defendant Duane objected, upon the ground that all these matters thus sought to be proved occurred after the joining of issue in this case, and therefore the testimony was incompetent, irrelevant, and immaterial, and that no supplemental complaint had been filed, so far as Duane was concerned. The court did not admit the testimony at the time, but reserved its ruling. Before the court decided the case, it read and considered the deposition of Patterson, which had not been admitted in evidence or read, and based in part its finding and decree thereon, and ruled and decided that defendant Duane had no right, title, or interest in the land claimed by plaintiff in his original complaint, viz., 33-96 of the premises described, and quieted plaintiff's title thereto, and to the whole of it, as against the other defendants.

Defendant Duane alone appeals from an order denying a new trial, and

makes the following points: *First*, the court erred in quieting the plaintiff's title to the whole of the real estate described in the complaint, when he only sues to quiet his title to 33-96 of the same; *second*, the court erred in ruling that plaintiff was entitled to maintain this action without paying or offering to pay 33-96 of the purchase money of the land paid by Patterson, and in ruling that defendant Duane had no title or interest in the land; *third*, the court erred in reading and considering the evidence not admitted at the trial, and basing its findings and decree thereon.

The answer to the first point is that, as against appellant Duane, the court did not quiet the plaintiff's title to but 33-96 of the premises. This is what plaintiff demanded against said defendant in his complaint. The court found as a fact that "the plaintiff, at the commencement of this action, was seized in fee of 33-96 of said title to said premises." As a conclusion of law it was found: "(1) That, at the commencement of this action, the plaintiff was seized of 36-96 of the premises described in the complaint, and is entitled to the relief prayed for in his complaint against the defendants Charles P. Duane and H H. Judson, as far as 33-96 is concerned."

The decree follows the findings, and decrees "that, at the commencement of this action, the plaintiff was, and now is, seized in fee of 33-96 of the premises described in the complaint; * * * that the defendants Charles P. Duane and H. H. Judson have, nor have either of them, any right, title, or claim thereto, and that the title of the said plaintiff thereto be, and the same is, quieted, as against the claim of each of said defendants; and each of said defendants is * * * restrained from bringing any action * * * against said plaintiff * * * in regard to his title or possession of said 33-96 of said premises." When the court decrees that defendants Duane and Judson have no title thereto, it must, by every rational rule of construction, be held to apply to the 33-96 part decreed to belong to plaintiff. The title to the remaining 63-96 of the tract of land was not in any way in issue as between plaintiff and Duane, and this action does not settle, or, as we construe it, purport to settle, it. The fact that, as against the other defendants between whom and plaintiff the merits of the supplemental complaint were considered, the findings and decree went beyond the 33-96, cannot alter the *status* of the case as to plaintiff and Duane.

The next error assigned is based upon the action of the court in quieting the title of plaintiff to 33-96 of the property without requiring him to pay 33-96 of the sum of $8,000, and interest, advanced by Patterson to pay for the land, and procure the title from the state.

It may be stated generally that where one person pays the consideration money for the purchase of land, and the conveyance is made to another, the latter holds the title in trust for the person who pays the consideration. 2 Story, Eq. § 1201; *Hidden* v. *Jordan*, 21 Cal. 99; *Bayles* v. *Baxter*, 22 Cal. 575; *Millard* v. *Hathaway*, 27 Cal. 119; Civil Code, § 353. The trust thus raised is implied by law, is a resulting trust, and may be proved by parol. *Roberts* v. *Ware*, 40 Cal. 637. These implied or resulting trusts cannot prejudice the rights of purchasers or incumbrancers of real property for value, and without notice of the trust. Civil Code, § 856. In *Leggett* v. *Dubois*, 5 Paige, 117, it was said: "A resulting trust is the mere creature of equity, as a resulting use is of law; and it cannot therefore arise where there is an express trust declared by the parties, and evidenced by a written declaration of such express trust." So, too, a vendor of real estate has a lien on the land sold for the purchase money, unless he has taken security for his payment, though he has executed the conveyance. *Salmon* v. *Hoffman*, 2 Cal. 138; *Hill* v. *Grigsby*, 32 Cal. 55; *Baum* v. *Grigsby*, 21 Cal. 172; *Sparks* v. *Hess*, 15 Cal. 186; *Williams* v. *Young*, 21 Cal. 227. But this lien, which arises in equity, is waived by taking a mortgage to secure the purchase money. The silent lien of the vendor is extinguished whenever he manifests an intention to abandon or not

to look to it; and in *Hunt* v. *Waterman*, 12 Cal, 301, it was said this intention is manifested by taking other and independent security upon the same land, or a portion of it, or upon other land. See, also, *Camden* v. *Vail*, 23 Cal. 633, and *Remington* v. *Higgins*, 54 Cal. 620. We refer to the doctrine and cases in relation to the lien of vendors of real estate, because they depend upon the same principle, raise the same implied trust, and are subject to most of the same rules, with like trusts arising from the advancement of the purchase money for land, where the deed is taken in the name of another.

The case, then, stands in this wise: Ellis had conveyed to others, by deeds of bargain and sale, purporting to convey the legal title, under whom plaintiff held by like conveyances, 33-96 of the land, and the conveyances were duly recorded. The legal title was as yet in the state, but would pass by operation of law from Ellis to Tripp, to the extent of 33-96, whenever procured by the former. Under these circumstances, Patterson advanced $8,000 to Ellis to pay to the state the purchase price of the land, and it was so paid, and the patent issued to Ellis. Had Patterson stopped here, equity would have raised an implied trust in his favor to the extent of the money advanced, and as against the interest of the owners to the extent of the benefits received. But this would have been an equitable lien raised by operation of law, and could be waived by taking a deed of trust from Ellis, Duane, and Haymond for their interest in the land as security for the money advanced. Patterson must be presumed to have waived his implied lien upon that portion of the land previously conveyed by Ellis as aforesaid, and, there appearing nothing in the record to rebut this presumption of waiver, the implied equitable lien does not exist, and Patterson must be remitted to the relief afforded by his deed of trust.

It follows that, as there was no lien upon the 33-96 interest in the land held by Tripp, he was under no obligation, legal or equitable, to pay any portion of the $8,000 as a condition to the quieting of his title to the 33-96 of the land.

The deposition of Patterson was admissible in evidence in favor of plaintiff and against the other defendants than Duane. As against them, there were issues, no doubt, under his supplemental complaint, in which he claimed, or appears, to have succeeded to the rights of Patterson. The deposition was to the effect that, since suit brought, Tripp had paid Patterson the $8,000, and interest, and thereupon the court so found, all of which, as against the other defendants, was entirely proper. It is apparent that the court was of opinion that, as against the 33-96 interest held by Tripp, and decreed to him, no payment of the $8,000 was necessary. Indeed, the bill of exceptions expressly states that "the only points relied upon by defendant Duane on this motion was the error of the court in granting the relief prayed for in the complaint to plaintiff, without his paying, or offering to pay, 33-96 of the purchase money paid to the state by Patterson for the title to the property, either to Patterson or his assign, and the error of the court in considering evidence not admitted upon the trial." It does not appear affirmatively, from the bill of exceptions, that the testimony of Patterson was used as against Duane; but, if it be conceded that it was, it was simply immaterial testimony. We are of opinion he was not bound to pay the $8,000, or any part of it, and proof that he did so cannot weaken his right.

Holding, then, as we do, that any interest which Duane may have in the remaining 63-96 of the premises in question is not affected by the proceedings or decree in this action, and that, as to the 33-96 thereof, the title was properly quieted in plaintiff, Tripp, the order appealed from is affirmed.

We concur: TEMPLE, J.; MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; THORNTON, J.

74 Cal. 81

PEOPLE *v.* GUITIERREZ. (No. 20,347.)

(*Supreme Court of California.* November 5, 1887.)

LARCENY—POSSESSION OF STOLEN GOODS—PRESUMPTION—INSTRUCTIONS.

An instruction "that if the defendant was in recent possession of the stolen goods the law raises the presumption that he is the thief, and this possession, if not competently explained by the defendant, is conclusive evidence of his guilt," is plainly erroneous, and although this was followed by instructions on behalf of the defendant that "the possession of stolen property, although a circumstance in determining the guilt of the defendant, is not alone sufficient to convict;" and that "the possession of stolen articles soon after the missing of the same is an insufficient circumstance upon which to convict the defendant," yet these instructions would not correct the previous error, as the mind of the jury would be left in doubt which was the correct rule of law.[1]

In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Baker & Blair, for defendant. *Geo. A. Johnson,* Atty. Gen., for respondent.

TEMPLE, J. The exceptions to the information do not seem to be well founded. The procedure was in accordance with the case of *People* v. *Lewis,* 64 Cal. 401, 1 Pac. Rep. 490, and with recent decisions of this court. *Ex parte Young Ah Gow,* 15 Pac. Rep. 76.

The court instructed the jury, at the request of the prosecution, as follows: "The jury is instructed that, if the defendant was in recent possession of the stolen goods, the law raises the presumption that he is the thief; and this possession, if not competently explained by the defendant, is conclusive evidence of his guilt." This instruction is plainly erroneous. The effect of testimony is a question for the jury and not for the court, although this court has held of this precise testimony—inconsistently with the general rule, perhaps—that it is not sufficient to justify a verdict of guilty. Then, beside assuming that the goods were stolen, the instruction states that the defendant must explain the recent possession, ignoring the proposition that the evidence of the prosecution itself may afford such explanation in whole or in part.

The instructions given at the request of the defense, however, were as follows: "(1) The possession of stolen property, although a circumstance in determining the guilt of the defendant, is not alone sufficient to convict. (2) The possession of stolen articles soon after the missing of the same is an insufficient circumstance upon which to convict the defendant." These instructions are clearly in conflict with that given at the request of the prosecution. The point was material, and read together, the jury would still be left in doubt as to the law. If we suppose the jury took the instructions given at the request of the defendant as the correct statement of the law, still it leaves that portion of the instruction given at the instance of the prosecution to stand which is not in conflict with that asked for by the defense to stand. The effect of this would be to instruct the jury that the recent possession of stolen goods raises a presumption of guilt, although not sufficient to convict. This is still a charge as to the value and effect of evidence.

We see no material error in the other instructions of the court.

Judgment reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCKINSTRY, J.

[1] As to the weight to be assigned to the fact of the possession of stolen goods recently after the theft, see State v. Kirkpatrick, (Iowa,) 34 N. W. Rep. 301, and note; People v. Flynn, (Cal.) 15 Pac. Rep. 102; Bean v. White, (Tex.) 5 S. W. Rep. 525.

74 Cal. 98

Estate of STEWART. (No. 11,214.)

(*Supreme Court of California.* November 7, 1887.)

1. WILL—DISPOSITION OF COMMUNITY PROPERTY.
A devise to a wife of "one-half of all my estate," followed by a specific bequest of $3,000 for immediate support, where the estate was worth nearly half a million, and the devisor had been an active, energetic business man, accustomed to use and handle the property as his own, and the whole tenor of the will, in minor details, indicated the testator's intent to dispose of the whole, *held*, to pass one-half of the whole estate held as community property of the husband and wife.

2. SAME—ACCEPTANCE BY WIDOW.
Where the widow of a testator filed a written acceptance of the terms of the will, she thereby confirmed the disposition of the community property made in the will, and indicated her election to abide by its provisions.

McFARLAND, THORNTON, and SHARPSTEIN, JJ., dissenting.

In bank. Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

The testator, Frank Stewart, died from an accident received two days before his demise, between which time and his death he made the will in controversy, the material portions of which are as follows: "*First.* After all my just debts are paid, I give and bequeath to my beloved wife, Bettie Stewart, one-half of all my estate; the south-east quarter ($\frac{1}{4}$) of block No. 113, east of Center street, in the city of Stockton, including my present residence, and all of the balance of the east half of said block No. 113, except one hundred feet of the north half of said block fronting on Hunter street, by 150 feet on Flora street; also all the household and kitchen furniture, to be taken by her at ten thousand dollars, if she choose to accept such property at that price, to be included in the one-half of my estate; also give and bequeath to her in cash the sum of three thousand dollars, to be paid to her from the first sales of property, and at once; also give and bequeath to my beloved adopted daughter, Bessie Stewart Payne, twenty shares of stock of the Stockton Building & Loan Association. [Here follow several specific legacies.] *Seventh.* The remainder of my estate to be distributed equally between my brother and sisters, in four parts, that is to say, to Wm. M. Stewart, Amanda Brown Harris, and Lou V. Moore, and the living heirs of my deceased sister, Betty Ann Winn,—the heirs to be counted as one of the inheritors,—and the four to have share and share alike. * * *

"In witness whereof, I have hereunto set my hand and seal this twenty-sixth day of July, 1883. FRANK STEWART." [Seal.]

The widow of deceased, after his death, filed the following acceptance of his will:

"*To the Hon. the Superior Court of said County of San Joaquin:* I, Bettie Stewart, the surviving wife of Frank Stewart, deceased, respectfully represent that in and by the last will of said deceased, duly admitted to probate by this court on the twenty-second day of August, 1883, the said deceased gives and bequeaths to me one-half of all his estate; the south-east quarter of block 113, east of Center street, in the city of Stockton, in said county, including his late residence, and all of the balance of the east half of said block No. 113, except 100 feet of the north half of said block fronting on Hunter street, by 150 feet on Flora street; also all the household and kitchen furniture, to be taken by me at $10,000, if I should choose to accept said property at that price, to be included in the one-half of the estate of said deceased; that I hereby make known my election, and accept the said real and personal property under the terms of said will for the said sum of $10,000, to be included in the one-half of said estate.

"*Dated April* 28, 1885. Mrs. BETTIE STEWART."

In distributing the estate, the court decreed to the widow of deceased one-half of the estate, and $3,000 for her immediate support. The distribution of

the estate was contested on the ground that deceased was only disposing of his half of the property held in common with his wife, and that she was entitled to three-fourths of the whole estate, as deceased left no descendants.

Aug. Muenter, for appellant. *S. L. Carter* and *D. S. Terry*, for residuary legatees and respondents. *W. L. Dudley*, for executors.

By the Court. There is no merit in the motion to dismiss the appeal herein. It is therefore denied.

No citation of authorities is required to show that a will is to be construed according to the intention of the testator. Such is the rule prescribed by the Code. It is elementary. It has always been a cardinal canon. As said in *Morrison* v. *Bowman*, 29 Cal. 337, the intention of the testator is to be kept in view as the pole star in the construction or interpretation of the will. The language of every clause in the will before us bears evidence of the fact that the testator intended to deal with the whole of the community property; and all the provisions of the will, taken together, afford most convincing proof of the fact that he believed he was dealing with the whole of the community property when he used the words "all my estate." He speaks of the home place as "my residence," and deals with the household and kitchen furniture as his own, regardless of any claim or right in his wife. He disposes of certain shares of stock as if no one but himself had any interest therein. He refers to a certain stock of grain, and the business in connection therewith, as "my [his] grain business," when he must have known (if he was dealing with a half interest only) that his wife would take the other half by operation of law, and with his executors would have the right to control and manage the same after his death, and provides that Major Batte shall wind up the business, and fixes his compensation at $2,000 therefor. The estate is worth nearly half a million dollars. According to the contention of appellant, the widow, by operation of law and the provisions of this will, will take three-fourths of the whole estate. It is singular, indeed, if the testator knew that his wife was to receive under the law and the first clause of the will over $300,000 in bank stock and lands, that he should have been so anxious to have sales of property made at once in order that she might be paid $3,000 upon which to live. It is not at all likely that a husband who loved his wife so much that he desired her to have three-fourths of this great estate, would ask her to pay $10,000 for one-half of his half interest in a piece of property, the whole of which, appellant admits, was worth only about $14,000, and that, too, for the property which had been the home of himself and his beloved wife, and the sanctuary of his household gods. Furthermore, if the testator intended the debts to be paid out of his estate, he knew that, if the specific legacy of $3,000 should be paid to his wife, twenty shares of stock and $35,000 in cash to his adopted daughter, Bessie, $2,500 to one nephew, and the same amount to another, $1,000 to Katie, the niece of his wife, $5,000 to the Stockton Free Library, $2,000 to Batte, and that his wife would, by operation of law and the terms of his will, receive three-fourths of the whole of the estate, there would be nothing left after the payment of the costs and expenses of administration, for his sister and brothers. It is admitted that he was a careful business man of more than ordinary ability, and of course he knew the value, character, and extent of his property.

When read together, the provisions of the will are the best expression—short of a direct statement to that effect—that he was dealing with the whole of the community property under the phrase "all my estate." Every clause in the will bears a clear and indisputable badge of that intention. He dealt with the property just as he had been accustomed to deal with it through a long, active, and successful business life; just as he had in accumulating and disposing of the property during his life-time, without consulting his wife, or asking her to join with him in any conveyance. He uses the phrase "my es-

tate" in the sense that he had been accustomed to use it all his life. It *was* his estate. He could dispose of it absolutely without the consent of his wife during his life, and he thought undoubtedly that he could do so, and that he was doing so, by his will.

It is to be regretted that the presumption which prevails in New York and other states, where the right of dower exists, was ever applied to the construction of wills in this state. In those states, in order to cut off the right of dower, the wife must join in the conveyance. With us there is no estate in dower, (section 173, Civil Code;) and the husband is taught, through a long and active business life, to regard the community property as his own, to speak of it as his own, and to dispose of it as his own. It is true that the presumption referred to as applicable in other states has been adopted here, and it is perhaps well that we should adhere to it; but, where the intention of the testator is so clearly expressed as it is in the will before us, that presumption must give way. So long as our laws recognize the right of the husband to dispose of his property by will, the courts should strive to carry out the real intention of the testator, and for that purpose give greater weight to the natural and ordinary meaning of the language used in the will than to mere presumptions of law, which are intended as aids for the construction of wills in doubtful cases only. "The widow, having accepted the devises and bequests provided for her by the will, thereby made her election and confirmed the disposition made by her husband of the common property." *Noe* v. *Splivalo*, 54 Cal. 209; *Morrison* v. *Bowman*, *supra*.

The decree and order are affirmed.

McFARLAND, THORNTON, and SHARPSTEIN, JJ., dissenting.

74 Cal. 104

WADSWORTH *v.* WADSWORTH. (No. 12,393.)

(*Supreme Court of California.* November 8, 1887.)

APPEAL—TIME OF FILING UNDERTAKING—EXTENSION—TRANSCRIPT.

Code Civil Proc. Cal. § 940, provides that an appeal is ineffectual unless an undertaking is filed within five days after service of notice of appeal. Section 1054 provides that the time for filing undertakings may be extended, not to exceed 30 days, by the court or judge. Plaintiff filed her notice of appeal August 18, 1887. August 23d the time for filing an undertaking was extended 20 days, and on September 12th again extended 10 days. It was filed September 22d. *Held*, that the undertaking was filed in time, and, as the appeal was not perfected until the undertaking was filed, the period of 40 days for filing the transcript in the supreme court had not expired when the motion to dismiss the appeal was made.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

W. C. Burnett, for appellant. *W. B. Tyler*, for respondent.

SEARLS, C. J. Motion to dismiss an appeal. It appears that plaintiff filed her notice of appeal to this court on the eighteenth day of August, 1887. On the twenty-third day of August an order of the judge of the court below was made and filed, extending the time of plaintiff to file an undertaking on appeal 20 days, and on the twelfth day of September a similar order was made and filed, extending the time for a further term of 10 days. An undertaking was filed September 22, 1887, which was in due time provided, the court below or a judge thereof having authority to extend the time for filing such undertaking by said orders. Section 940 of the Code of Civil Procedure provides that "the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal an undertaking be filed," etc. This section, standing alone, would be conclusive; but it is, we think, subject to the provision of section 1054 of the same Code, which provides that the time for doing certain things, among which are the filing of undertakings, may be ex-

tended, not exceeding 30 days, by the court or a judge thereof upon good cause shown. It follows that the undertaking was filed in time, and as the appeal was not perfected until the undertaking was filed, the period of 40 days for filing the transcript in this court had not expired when the motion to dismiss was made.

The motion to dismiss upon the grounds, (1) that the transcript was not filed in time; and (2) that the undertaking on appeal was not filed within five days after service and filing of the notice of appeal, is denied.

We concur: McFARLAND, J.; TEMPLE, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

74 Cal. 106

McMANN *v.* SUPERIOR COURT OF SAN FRANCISCO. (No. 12,329.)

(*Supreme Court of California.* November 8, 1887.)

1. JUDGMENT—COSTS—REMITTITUR FROM SUPREME COURT—DURATION—WHEN STATUTE BEGINS TO RUN.

 Code Civil Proc. Cal. § 958, provides that, when the clerk receives a *remittitur* he shall attach it to the judgment roll, and enter minute of the judgment of the supreme court on the docket against the original entry. Section 1034 provides that the cost bill must be filed within 30 days after the filing of the *remittitur*, and that thereafter execution may issue as upon a judgment. On May 3, 1882, judgment was rendered in the supreme court for costs accruing there. The *remittitur* was filed in the court below May 9, 1882. The cost bill was filed May 10, 1882. Execution was issued May 10, 1887. *Held*, that the statute limiting the duration of judgments to five years began to run from the time of making the entry in the docket. There was, therefore, no authority for issuing the execution, and the court did not err in recalling it.

2. SHERIFF—FUNDS COLLECTED UNDER EXECUTION IMPROPERLY ISSUED—POWER OF COURT TO COMPEL RETURN OF.

 The petitioner, as sheriff, had collected money on an execution improperly issued. The court ordered the money returned, and the sheriff applies for a writ of review for the purpose of having the order vacated. *Held*, that the sheriff being an officer of the court, it has power to control his conduct when acting under color of its authority, and has power to order him to refund the money collected under a process improperly issued.

In bank. Application for writ of review, superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

J. P. Foulds, for petitioner. *Edward P. Cole*, opposing.

TEMPLE, J. This is an application for a writ of review, in which it is sought to have an order vacated which required the petitioner, as sheriff, to refund certain moneys collected upon an execution, which, it is claimed, was void, for the reason that the judgment upon which it was issued had ceased to be operative, because it had been entered more than five years. The execution was for costs which accrued in the supreme court. The judgment was rendered here May 3, 1882. The *remittitur* was issued May 6, 1882, and was filed in the court below May 9, 1882. The cost bill was filed May 10, 1882. Execution was issued May 10, 1887.

The sections of the Code bearing upon the subject are section 958, Code Civil Proc., which provides that, when the appeal is from a judgment, the clerk, on receipt of the *remittitur*, must attach it to the judgment roll, and enter a minute of the judgment of the supreme court on the docket against the original entry, and section 1034, Code Civil Proc., which provides that the party to whom costs are awarded must file his cost bill within 30 days after the *remittitur* is filed, and thereafter he may have an execution therefor as upon a judgment. Execution may be issued upon a judgment at any time within five years after its rendition, and it is contended that the language, "he may have an execution therefor as upon a judgment," not only directs the mode and manner of issuing execution, but also makes applicable the

limitation as to time. It is obvious, however, that the sole purpose of the language used was to give the party entitled to the costs an execution therefor.

The case of *Kerns* v. *Graves*, 26 Cal. 156, is analogous to the case at bar. A judgment had been obtained before a justice of the peace, and a transcript filed in the office of the county clerk. The statute provided, as in section 899, Code Civil Proc., that execution might be issued by the county clerk "as upon judgments recovered in the higher courts." This court held that execution could only issue within five years after the judgment rendered by the justice of the peace, and that the execution was still upon and by virtue of the judgment rendered by the justice.

In making the entries required by section 958, the clerk of the superior court acts by authority of this court. No action is required on the part of the superior court to authorize the entries or the issuance of the execution. The execution issues pursuant to the judgment rendered in this court, which is thus docketed and made the judgment of the superior court. It becomes the judgment in that court as soon as the *remittitur* is filed and the entries made. This view was taken in the case of *Marysville* v. *Buchanan*, 3 Cal. 212, approved in *McMillan* v. *Richards*, 12 Cal. 467. In the first-mentioned case it is said: "The present appeal is from an order of the district court, refusing to set aside an order of the judge in chambers staying proceedings upon an execution for costs, issued by the clerk of the district court upon a *remittitur* from this court filed with him, and from an order of the district court quashing said execution. * * * By statute (Pr. Act, 358,) the *remittitur* from this court is transmitted to the clerk of the court below, and by him it is attached to the judgment roll and a minute of the judgment of this court is entered on the docket against the original entry. The judgment of the court, [this court,] then, stands as the judgment of the district court. If the judgment of this court orders a new trial, the clerk of the district court will proceed to place the cause on the calendar. If it award costs, he will, on application of the party in whose favor it is given, issue execution for the same. In either case he acts, not by authority of the district court, but of this court."

The statute commencing to run from the entry made in the docket, there was no authority for issuing the execution, and the court did not err in recalling it. *White* v. *Clark*, 8 Cal. 513. Nor do we think the power of the court to order the sheriff to refund the money can be doubted. He was acting as an officer of the court and under color of its process. Thus acting, he demanded and received moneys illegally. The money was paid to him in his official capacity as an officer of the court, and because of the process improperly issued. Certainly, the court must have the power to control the conduct of its officers, when acting under color of its authority or of its process. Section 1286, Code Civil Proc.

We think the writ should be denied. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

74 Cal. 110

PEOPLE *ex rel.* LYNCH *v.* MARTZ. (No. 12,178.)

(*Supreme Court of California.* November 10, 1887.)

PUBLIC LANDS—LAND IN LIEU OF SCHOOL LAND—FORFEITURE.

In a suit brought to cancel a patent issued by the state on an application to purchase 320 acres of state land, in lieu of school land, made in 1880, plaintiff claimed that the same land had been sold to his grantor, upon his application made in 1869; that the land was a part of the grant for school purposes; and that the application was approved, and a certificate of location issued to his grantor. The grantor, however, did not present his certificate, or make any payment on his location, until after he had by law forfeited his rights to the land. In 1872 the legislature passed

an act for the relief of purchasers of state lands, providing that when application had been made to purchase lands, and the whole or part of the purchase money paid, and a certificate of purchase or a patent had been issued, the title to the land vested in the purchaser, or his assigns, upon full payment therefor: provided, that no other application had been made for the purchase of the same land prior to the issuance of the certificate of purchase: and provided, that the act should not apply to school lands, except to the amount of 320 acres to one purchaser. The complaint did not allude to this act, nor claim relief by it from the forfeiture suffered by the plaintiff's grantor, nor did it allege that plaintiff's grantor had not already had the benefit of the act to the extent of 320 acres of school land. *Held*, that a general demurrer to the complaint should have been sustained.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

H. C. Rolfe, for appellant. *Curtis, Otis & Conner*, for respondent.

TEMPLE, J. This is a suit brought to cancel a patent issued on an application to purchase 320 acres of land, in lieu of school lands granted to the state, made in May, 1880. Plaintiff claims that the same land had been previously sold to John Mullen, assignor of the relator, upon his application made in 1869, under the provisions of the act of March, 1868, (St. 1867–68, p. 507.) The land having been accepted by the register of the United States land-office in part satisfaction of the grant for school purposes, the surveyor general of the state approved the location, and issued to Mullen a certificate of location on the twenty-first day of August, 1869. Mullen did not present his certificate, or make any payment thereon, to the county treasurer, until October 15th following, which was 55 days after he received the certificate of location. The statute required the purchaser to make this payment within 50 days after the approval of the surveyor general. Section 23, Act March 28, 1868. In *Eckart* v. *Campbell*, 39 Cal. 256, this court, in construing this statute, held that the failure of an applicant to make this payment within 50 days was conclusive evidence that the applicant had abandoned his privilege; in other words, that the requirement was a condition precedent, failing in which, the applicant forfeited his rights.

The legislature, however, passed, March 27, 1872, an act entitled "An act for the relief of purchasers of state lands," the first section of which reads as follows: "When application has been made to purchase lands from this state, and payment made to the treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said land is hereby vested in said applicant, or his assigns, upon his making full payment therefor: provided, that no other application has been made for the purchase of the same lands prior to the issuance of said certificate of purchase: provided, further, that this act shall not apply to school lands, except to the amount of 320 acres to any one purchaser." St. 1871–72, p. 587. The complaint contains no allusion to this act, and, of course, does not show that Mullen had not already been the beneficiary of the act to the extent of 320 acres. A general demurrer was interposed, in which one of the grounds was that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, the defendant declining to answer, judgment was entered for plaintiff, from which this appeal is taken.

We think it was incumbent upon the plaintiff to show affirmatively that he was entitled to the benefit of the act. There was no presumption of law upon the subject. The demurrer, therefore, should have been sustained. Judgment reversed, and cause remanded, with directions to sustain the demurrer.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; MCKINSTRY, J.; PATERSON, J.

74 Cal. 151

PHILLIPS and another *v.* GOLDTREE and others. (No. 9,504.)

(*Supreme Court of California.* November 12, 1887.)

PARTNERSHIP—FICTITIOUS NAME—ACTION BY—PLEADING—FAILURE TO FILE CERTIFICATE.

Where, in an action by partners doing business under a fictitious name, the complaint is perfect in all other respects, there is no failure to state facts sufficient to show a cause of action merely because it contains no statement that a certificate of partnership had been filed, as provided by Civil Code Cal. §§ 2466, 2468, attaching a legal incapacity to maintain an action upon any contracts made or transactions had in the partnership name to a failure to file such a certificate; and an objection that no such certificate has been filed must therefore be taken by answer; otherwise, under Code Civil Proc. Cal. § 434, it is waived. Affirming 13 Pac. Rep. 313.

In bank.

W. J. & E. Graves, *J. M. Wilcox*, and *Edward P. Cole*, for appellants. *J. R. Brandon*, for respondents.

BY THE COURT. This case was heard and decided by department 2. 13 Pac. Rep. 313. On petition of defendants, a hearing in bank was ordered. For reasons given in the department opinion the judgment is affirmed.

74 Cal. 141

MAYNARD *v.* POLHEMUS. (No. 9,565.)

(*Supreme Court of California.* November 12, 1887.)

COVENANT—TO SELL ONLY TO GRANTOR—NOT BINDING ON HEIRS—RESTRAINT OF ALIENATION.

In September, 1882, N. sold to C. a tract of land; the deed containing the provision that, if C. should ever sell the land, it should be sold to N. at the purchase price. C. held possession until 1862, when he died, leaving, by will, the land to R., who remained in possession until her death in 1879. In 1864, N. conveyed to defendant all his interest in the land. In an action by the administrator of R. to quiet title, *held*, that the proviso in the deed was a personal covenant, invalid as a restraint of alienation, and not binding on the heirs and assigns of C.

Department 1. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Cope & Boyd, for appellant. *A. H. Loughborough*, for respondents.

PATERSON, J. This is an action in which the administrator and heirs of Bridget McD. Rice are seeking to have quieted their title to a tract of land in San Mateo county. The complaint alleges that Nicholas De Peyster, in September, 1852, granted and conveyed the land in controversy to one Cooper. The deed contained the following clause: "To have and to hold the aforesaid premises unto the said John B. Cooper, his heirs, and to his and their sole use forever; with the sole provision that if the said Cooper should ever sell any of the aforesaid property, it shall be sold to the said De Peyster at the aforesaid price." Cooper went into possession under this deed in 1857, and from that time until his death held the same. He died in November, 1862. By his will, duly admitted to probate, he devised the land to Bridget McD. Rice, who held possession of the premises until her death, which occurred in July, 1879. The plaintiff Maynard was appointed administrator of the estate in February, 1880. Improvements to the value of about $3,500 have been put upon the land by said Cooper and Rice, and the land itself has greatly increased in value. Defendant claims under a deed from De Peyster, executed on the thirty-first day of March, 1864, and his claim is founded solely upon the provision contained in the deed and quoted above.

The complaint set forth the facts, demurrer was filed by the defendants, which was overruled, and the defendant declining to answer, judgment went for plaintiff as prayed for. Appellant claims that this provision in the deed

to Cooper is valid, and that the right to enforce it passed by De Peyster's deed of March, 1864, to the defendant.

If the proviso referred to be construed as a covenant, it was merely personal, and not binding, upon the heirs or assigns of Cooper. It does not appear that De Peyster attempted to bind the heirs of Cooper by any covenant. All claim on behalf of De Peyster and his grantees under the proviso ceased upon the death of Cooper. At common law it was necessary, in order to make the heir responsible, that he be expressly named in the covenant of his ancestor. *McDonald* v. *McElroy*, 60 Cal. 496. If it be doubtful whether a clause such as that quoted above be a covenant or a condition, the court should declare it to be a covenant. Chancellor Kent, speaking of a similar provision, said: "It is very questionable whether such a condition would be good at this day." 4 Kent, Comm. 131. Regarded as a condition, it is unreasonable and contrary to the policy of the law, because in restraint of alienation. *Murray* v. *Green*, 64 Cal. 363; Civil Code, §§ 711, 715. Judgment affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

74 Cal. 148

ST. ORES *v.* MCGLASHEN. (No. 9,875.)

(*Supreme Court of California.* November 12, 1887.)

1. DAMAGES—EXEMPLARY—MALICE—PREPONDERANCE OF EVIDENCE.
 In an action for damages for assault and battery, defendant asked the court to instruct the jury that, before they could give exemplary damages, they should be satisfied beyond a reasonable doubt that the alleged assault was maliciously committed. *Held*, that a preponderance of evidence is all that is necessary to warrant a finding of exemplary damages in civil cases.
2. SAME—ASSAULT—MALICE—INTOXICATION.
 In an action for damages for an assault, defendant asked the court to instruct the jury that if they believed the defendant to have been so intoxicated that he did not know what he was doing, and was therefore incapable of forming an intent, they should not assess exemplary damages. *Held*, that the instruction was properly refused, as restricting the question of malice to too narrow limits.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Graves, Turner & Graves, for appellant. *F. Adams* and *V. A. Gregg*, for respondent.

SEARLS, C. J. This is an action to recover damages for an assault and battery, committed by defendant. Plaintiff had a verdict and judgment for $1,100 and costs. The appeal is from the judgment, and from an order denying a new trial.

The seventh instruction asked by defendant, and refused by the court, enunciated the proposition that, before the jury could give exemplary damages against the defendant, they should be satisfied beyond a reasonable doubt that the alleged assault and battery committed by the defendant (if any) upon the plaintiff, was maliciously committed by said defendant. The instruction does not embody the law as applicable to civil cases. A preponderance of evidence is all that is necessary to warrant a finding in such cases, and the rule that prevails in criminal cases, and which requires evidence to satisfy the mind beyond a reasonable doubt, has no place here. It follows that the instruction was properly refused.

The only other instruction refused, which it is claimed should have been given, is the third. This instruction states, in substance, that, while intoxication is in itself no excuse or defense for the commission of a wrong, yet this goes only to the justification of the wrong; "but when it is alleged, as it is here alleged, for the purpose of inflaming the damages sought to be recovered against the defendant for that wrong, and to make them not only com-

pensatory, but vindicatory," etc., then and in such a case, if the jury believed from the testimony that defendant was so intoxicated that he did not know what he was doing, and was therefore incapable of forming any intent whatever, they should not assess exemplary damages, but confine their verdict to actual damage.

The complaint does not charge or show that defendant was intoxicated, and the statement shows affirmatively that the testimony as to intoxication was introduced by defendant. No instructions on the subject were, so far as appears, offered or given on behalf of plaintiff. The statement in defendant's instruction, therefore, that intoxication of the defendant was alleged for the purpose of inflaming the damages, involved an assumption of facts not warranted by the record; and the instruction was properly refused for that cause, if for no other. "The fact that a tort was committed while a defendant was intoxicated, is no excuse whatever. This has been held in actions for slander. It is conceivable, however, that the amount of the recovery might be considerably affected by showing that the wrong was committed under such conditions that no one would have been likely to attach importance to the utterances." Cooley, Torts, 114; *McKee* v. *Ingalls*, 4 Scam. 30; *Reed* v. *Harper*, 25 Iowa, 87. In the last case cited, the court refused to instruct the jury "that, if they believed from the evidence that the defendant was so intoxicated at the time he spoke the words (it being an action for slander) that he did not know what he was about, the plaintiff could not recover." The court refused to so charge, but instructed the jury that it was their duty to consider all the facts and circumstances attending and surrounding the speaking of the words; and its action in that behalf was upheld.

In cases of tort, exemplary damages are not confined to cases in which malice on the part of defendant appears. Section 3294 of the Civil Code provides that "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." It will be observed that malice is but one of several causes for which exemplary damages may be given, yet the instruction as asked would make it the sole cause, and its absence conclusive of plaintiff's right to recover exemplary damages. Many of the statements contained in the instruction are correct as propositions of law; but the clause which would make the question turn upon the absence of intentional malice restricts the question to too narrow limits, and the instruction was properly refused.

The case as presented by the evidence shows a wanton attack by defendant upon an aged cripple, and the perpetration of personal injuries fully warranting the verdict, independent of all question of exemplary damages. The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.; McKINSTRY, J.; THORNTON, J.

74 Cal. 144

Estate of SHILLABER. (No. 11,484.)

(*Supreme Court of California.* November 12, 1887.)

1. WILL—DIRECTION AS TO DISPOSITION OF PROPERTY—REFERENCE TO LETTERS SUBSEQUENTLY WRITTEN.

A will written entirely by the testatrix contained this clause: "I give and bequeath to my said executor my silverware, jewelry, paintings, organ, clothing of every description, carriage, library, *bas relievos*, bronzes, statuary, excepting my three large pieces, viz., 'Delilah,' 'Saul,' and 'Lost Pleiad,' and request him to dispose of the same in the manner specified in my letter to him of this date." At the time of making the will the letter had not been written, but was afterwards dictated by the testatrix. *Held* that, under the evidence and the language of the will, the letter was properly excluded from probate as a part of the will.

2. SAME—BEQUESTS VOID FOR UNCERTAINTY—ADMISSION TO PROBATE.
Certain bequests were made in a will, to be disposed of in the manner specified in a letter written to the executor by the testatrix. *Held*, that though the bequests in that part of the will might be void for uncertainty, they being but a small part of the estate, the will was properly admitted to probate.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

McAllister & Bergin, for appellant. *Wm. Hoff Cook*, for respondent.

PATERSON, J. The document which was admitted to probate in this proceeding is wholly in the handwriting of Mrs. Shillaber, deceased. The third clause of the will reads as follows: "I give and bequeath to my said executor my silverware, jewelry, paintings, organ, clothing of every description, carriage, library, *bas relievos*, bronzes, statuary, excepting my three large pieces, viz., 'Delilah,' 'Saul,' and 'Lost Pleiad,' and request him to dispose of the same in the manner specified in my letter to him of this date." After the execution of this will she dictated a letter to Carroll Cook, Esq., named in her will as executor thereof. This letter is in the handwriting of Mr. Cook, but is signed by the deceased. It commenced as follows: "SAN FRANCISCO, Cal., September 8, 1884. *To Carroll Cook, Esq., San Francisco, Cal.*—MY DEAR NEPHEW: In my will, which I have this day executed, I have left certain personal property to you, to be disposed of by you as I should by letter direct. I desire the following disposition made thereof, viz.," etc. (Here follow directions for the disposition of the articles above named.)

The court found—and the finding is supported by evidence—that the letter was dictated and signed after the execution of the will. Upon the objection that the letter was not in existence at the time of the execution of the will, it was excluded, and the document, which is wholly in the handwriting of Mrs. Shillaber, was admitted to probate. It is claimed by appellant that the two documents were designed to constitute one instrument; that they are such in law, and as they are not wholly in the handwriting of the deceased, they do not constitute a valid olographic will.

All the authorities to which our attention has been called agree that any paper may be referred to, and may be a part of a will, if such paper be in existence at the time of the execution thereof. If the will be duly executed and attested, the paper referred to, whether attested or not, will become a part of the will, if it be already in existence, and is clearly described and identified. The identification must be by a description given of the paper in the will. In the case at bar the letter referred to was not in existence at the time of the execution of the will. It has been held that "a reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that, where there is a reference to any written document, described as *then existing*, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is whether the evidence is sufficient for the purpose." *Allen* v. *Maddock*, 11 Moore, P. C. 454. We think that, under the evidence and the language of the will, the letter was properly excluded.

It is claimed that without the letter the will is incomplete, for only through the letter can the beneficiaries therein named make title to the bequests provided for them. We think, however, that the will, being effective in other parts, was properly admitted to probate, although the bequests named in the third article above quoted be void for uncertainty. *George* v. *George*, 47 N. H. 45; *Brown* v. *Burdett*, 21 Ch. Div. 667. The property named in the third article is evidently but a small part of the estate. It is all personal property, and intestacy as to any portion of the estate should be avoided if possible. Our Code provides that, "of two modes of interpreting a will, that is to be

preferred which will prevent a total intestacy." It is not clear that the will without the letter is incomplete. It has been held that as to personal property a document like this letter, although not entitled to probate as a part of the will, is sufficient to enable the beneficiaries named in it to proceed in a court of equity, after the property is distributed to the executor under a clause of the will similar to that quoted above, to compel the executor to execute the trust in accordance with the directions contained in the letter. *In re Fleetwood*, 15 Ch. Div. 594.

Judgment and order affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

74 Cal. 125

In re Estate of ZEILE. (No. 11,956.)

(*Supreme Court of California.* November 12, 1887.)

WILL—CODICIL—CUMULATIVE LEGACIES—ADVANCEMENTS.

Decedent, a resident of San Francisco, left a will made May 19, 1883, which bequeathed to certain relatives residing in Germany, a proportionate share of the proceeds of 1,000 shares of bank stock. The will contained the proviso that any advancements the testator might personally make to the legatees, should be in whole or partial satisfaction of their respective legacies. Decedent went to Germany, and ordered that large sums of money be sent him there. In August, 1883, decedent made a codicil, in which he bequeathed to his relatives in Germany proportionate shares of the money he then had. In this codicil the testator ratified his former will, directing that it remain unchanged, and confirming the bequests he had made. *Held*, that the legacies bequeathed in the codicil were cumulative, and not to be regarded as advancements, within the meaning of the proviso in the former will.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

J. B. Reinstein, (*J. M. Seawell*, of counsel,) for appellant. *Seldon S. & George T. Wright*, *Joseph P. Kelly*, and *Sawyer & Burnett*, (*S. Heydenfeldt*, of counsel,) for respondents.

MCKINSTRY, J. Deceased died at Monte Carlo, Monaco, April 26, 1884, being then a resident of San Francisco, and leaving property in that city and county. He left a will, executed and published in this state on the nineteenth of May, 1883, which was duly probated in San Francisco, a portion whereof reads: "*Item* 6. I give and bequeath unto my relatives residing in Germany, one thousand (1,000) shares of the stock of the Bank of California, the same to be sold by my executors at or as soon after my decease as is practicable, for its reasonable value, and the proceeds to be divided as follows, to-wit: To my sister Mathilde, one-fourth, ($\frac{1}{4}$;) to the children, residing in Germany, of my brother David, one-fourth, ($\frac{1}{4}$,) share and share alike; to the children of my dead sister, Mrs. Maier, one-fourth, ($\frac{1}{4}$,) share and share alike; to the children of my dead sister, Mrs. Froescher, one-fourth, ($\frac{1}{4}$,) share and share alike. And I hereby declare that any advancements that I may hereafter personally make to the above-mentioned legatees, or to either of them, shall be deemed a partial satisfaction of said legacy, equal in amount to the sum so advanced, and I direct that an equal amount shall be deducted from the proceeds of the sale of bank stock, and added to my residuary estate."

Subsequent to the execution of the will in California, decedent left for Europe, and at Rottweil, Wurtemberg, on the seventeenth of August, 1883, made a supplemental will or codicil, portions whereof read:

"(I.) I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same.

"(II.) However, I have already made arrangements to have a sum of money sent from California to a bank in Germany or Wurtemberg, of which I shall dispose in favor of other relatives. The following sums of money shall be

paid: (1) To my sister, Mathilde Zeile, unmarried, at Reutlingen, sixty thousand (60,000) marks. To my brother, David Zeile, of the town of Weil, fifty thousand (50,000) marks. (3) To the wife of the tanner Hummel, at Reutlingen, whose first name at this moment I do not remember, daughter of my deceased sister, whose name I do not just now recall, formerly widow of the baker Maier, of Tubingen, seventy-five thousand (75,000) marks. (4) To the children of my deceased sister Gottlobin, formerly wife of the tanner Froescher of Reutlingen, to-wit: (*a*) To the son, who is tanner in the upper country, and is married, whose first name is at this instant unknown to me, twenty-five thousand (25,000) marks. (*b*) To her daughter Pauline, now living, widow of the architect Fuchs at Reutlingen, that is, to each of the children of this marriage, minors, whose names are at this instant unknown to me, twenty thousand (20,000) marks; with proviso that the income is to go to the children, and that there shall be a guardianship of the estate until they become of age or marry. (*c*) To her daughter Mathilde, now living, wife of the manufacturer Haux, at Reutlingen, that is to the children born and to be born of this marriage, (there are four children at present,) jointly (50,000) fifty thousand marks; with the proviso that the income goes to the children; that there shall be a guardianship of the estate until they arrive at the age of majority, or until they marry, and that at that point of time they are to receive their shares; that in case of the possibility of other children being born, the guardian's court will have to determine how such shall be paid over, and also with the further proviso that, if one of these children should die during the age of minority, the share of such child shall go to his brothers and sisters. The children living shall hold in trust for the children born hereafter.

"(III.) All the personal property of any kind, as well as money which I shall leave in Germany at my decease, beyond that of which I have disposed in the foregoing paragraph, shall go to the four branches named in the foregoing paragraph, in such manner that only those mentioned in the foregoing paragraph shall be entitled, and that those of each branch are to share with each other in the proportion of the sums given them in the foregoing paragraph.

"(IV.) If, unexpectedly, the funds in Germany should be insufficient for the purpose of paying the sums in paragraph 2, then the heirs of the estate in California shall supply the deficiency.

* * * * * * * *

"(VII.) All bequests which I have made or which I shall make by this last testamentary disposition be expressly confirmed, whether these bequests are given to relatives, strangers, or for charitable purposes and institutions. Likewise, any testamentary papers written or subscribed by me shall have the same effect as if they were here incorporated."

On application for distribution of the proceeds of the bank stock, which had been sold by the executors by order of the court, the superior court found that no part of such proceeds had been paid to Mathilde Zeile, sister of testator, or to Marie M. Hummel, daughter of testator's sister Mrs. Maier, or to Karl Froescher, son of the sister of testator, Mrs. Froescher. Also that the sum bequeathed to Marie M. Hummel (appellant) by the Rottweil will or codicil was more than her share of the proceeds of the bank stock. And the court held that the sums of money bequeathed by the Rottweil will or codicil to the persons mentioned in item 6 of the California will were intended by the testator to be, and were, "advancements," within the meaning of the term as used in item 6, and should be deducted from the legacies given to the same persons in that item. The superior court treated the legacies given by item 6 of the California will as "specific legacies," and no question has been made by either party as to the correctness of that ruling. The thousand shares of bank stock were to be sold by the executors, and the proceeds divided among the legatees named. The

dividends collected by the executors were incidents to the stock, and were, of course, to be distributed in like proportions with the proceeds of sale. The will did not merely provide that sums of money should be distributed to the legatees, payable primarily out of the fund arising from the sale. The legacies were not merely demonstrative. They were specific. If the shares of stock had become worthless, the legatees would have been entitled to nothing.

There is no question of *ademption*, in the strict sense, here. The specific thing has never been taken away. The bank stock continued to be a portion of testator's property until his death, and was a part of his estate afterwards. But the first question, as applied to this appeal, is, what was the specific legacy left to Marie M. Hummel? The legacy to her was not of one-eighth of the proceeds of the 1,000 shares of bank stock absolutely; but of one-eighth, less the amount of any "advancements" the testator might "personally make" to her after the execution of the California will. Whatever the nature of the "advancements," they were to be personal acts of Frederick Zeile in his life-time. It would seem plain, also, that, whether or not the execution of a will containing provisions like those last above recited was intended by the testator, when the California will was made, to constitute an "advancement" to appellant of an amount equal to the legacy to her named in such an instrument, must depend upon the language of the California will, and the effect of oral testimony, if any, properly admissible to explain the intent of the testator when the California will was made. Whether the legacy to appellant in the first instrument was satisfied by a bequest in the subsequent instrument, (intended as a substitute for that legacy,) is a different question. The California will was republished at Rottweil, and all its provisions reaffirmed and ratified.

Unless the term "advancements" of itself included a legacy mentioned in a subsequent codicil, or the language of the second instrument, in connection with that of the first, or of such language with oral testimony, properly admitted to explain the first instrument, shows the testator intended the second legacy to be in substitution or satisfaction for the legacy in the California will, the second legacy must be held to be cumulative. It is well settled, except where the two legacies are for the same sum, and both testamentary instruments express the same motive for the gift, that, where a testator gives a legacy of quantity, *simpliciter*, and also a second legacy of quantity to the same legatee, the second legacy is regarded as cumulative, and not as substitutionary, unless the language of the second will or codicil shows an intent to the contrary.

Whether the testator meant, when he used the word "advancement," that any legacy he might give in a subsequent will or codicil to one of the persons named in item 6 should be deemed an advancement, is to be determined by reference to the language of the California will, and the evidence showing the circumstances surrounding the deceased when he made that will. Whether, when he provided a legacy for appellant in the Rottweil will, he intended the same as a substitute for the legacy left her in the California will, and not as cumulative, is to be determined by reference to the language of the Rottweil will, or of the Rottweil and California wills together, in the light of the testator's then surroundings, and of events (so far as evidence of such was admissible) which preceded its execution.

Prior to our Codes, the term "advancements," was applied to gifts by a parent, in his life-time, to a child, of the whole or a part of what it is supposed the child would inherit from the parent; sometimes also to such gifts by one standing *in loco parentis*. By the Civil Code the term is extended so as to include like gifts by an ancestor to a child "or other lineal descendant." Civil Code, § 1395.

It may be conceded, as claimed by respondents, the word is not employed in item 6 as in the provisions of the Civil Code. It by no means follows, how-

ever, that the testator intended the word to embrace any legacy to one of the same persons, which he might give by a subsequent testamentary instrument, not revocatory of the will in which the word is found. Webster gives as definitions of "advancement:" "The payment of money in advance; money paid in advance." A payment in advance implies a payment *beforehand*,—before an equivalent is received, or before the happening of an event in the contemplation of the parties to a contract. When used in a will, unless another event is mentioned prior to which the advance is to be made, or the context otherwise indicates a different meaning, the words, "payments in advance to be applied in satisfaction of a legacy," import payments prior to the happening of the event on which the will is to take effect, to-wit, the death of the testator.

Counsel for respondents cite Professor Pomeroy's work on Equity Jurisprudence as authority for the proposition that the legacy to appellant in the Rottweil will was an "advancement" within the meaning of the word as used in the California will. The learned writer, speaking of the effect of a legacy in a will made *after* a settlement on a child, says: "The settlement or agreement to give a portion may sometimes contain a provision to this effect: that, if the parent should afterwards, during his life-time, make an advancement to the donee, such advancement should be a complete or partial satisfaction of the portion. If, instead of making a technical advancement, the parent should afterwards, by his will, leave a legacy or a residue, the legacy given under such circumstances is held to be a compliance with the provision, and to operate as a satisfaction in full or in part of the portion." 1 Eq. Jur. § 567. He cites in a note *Onslow* v. *Michell*, 18 Ves. 490; *Noel* v. *Lord Walsingham*, 2 Sim. & S. 99; *Fazakerley* v. *Gillibrand*, 6 Sim. 591; *Papillon* v. *Papillon*, 11 Sim. 642. We have not had access to the Irish report, but it would seem the English cases, although they appear to do so, when examined and fully explained, do not support the text. See *Cooper* v. *Cooper*, 8 Ch. App. 825, 826. However this may be, Mr. Pomeroy shows very clearly in another place that the doctrine of presumptions applicable with respect to the dealings of a *parent* as to a *child* has no place in cases like the present. 1 Eq. Jur. § 548.

Lord ROMILLY, M. R., said: "It is of paramount importance to consider in all cases * * whether the doctrine of presumption against double portions, or the doctrine of construction of instruments, applies." "If the original gift was to a stranger, the doctrine of satisfaction becomes applicable according to the words of the original donor." *Cooper* v. *Cooper*, 8 Ch. App. 819, note.

In the case before us, the testator might have used language to indicate that by "advancement" he meant not only a gift of money or property prior to his death, but also a subsequent bequest to a legatee named in the California will. But in the absence of such language there is no *presumption* that he used the word in a sense differing both from its technical and proper signification. As it was not employed as a technical term, the presumption is he employed it in the sense approved in general literature and by common usage. The language in immediate connection with "advancements" strengthens rather than weakens the hypothesis that the testator intended a gift in his life-time. "Any advancements that I may hereafter *personally* make," etc.

It is true, a subsequent codicil would be made by him, and made by him in his life-time. But the words, while apt and appropriate in respect to gifts consummated in his life-time, are such as would not ordinarily or "naturally" be resorted to when the testator was speaking of gifts to take effect only on his death. In the latter case, the substance of the thing to be conferred would not be delivered by the testator personally, but by his executors after his decease.

The testimony of the witness called by the parties contesting the application of appellant and others, (respondents,) did not establish or tend to estab-

lish that the word "advancements" was used to designate or include any subsequent legacy to appellant. The witness said: "I was about two months in drafting said will, as the doctor [testator] made frequent changes, and I had to rewrite it. It took him a long time to make up his mind about some of his property. When he came to the matter of these German heirs, he seemed already prepared. The 1,000 shares of the capital stock of the Bank of California he designed for them, and he proceeded to divide it up just as it is written in the will,—four families, each one-quarter. After I had written it and read it to him, he remarked that when he arrived in Germany he intended to give some money to such of his relatives there as might need it, to distribute some money among them, and whatever that amount might be to either of them must come out of their share of the proceeds of the bank stock. It was under that instruction that that clause was framed. The will was not signed when completed. He kept it a couple of days examining it, but made no remarks to me that I remember. He made the statement about the German heirs. He seemed to be prepared and settled it as above stated. Before the will was executed, he wanted Judge Heydenfeldt to read the will. He came and read it. Judge Heydenfelt said it was all right. I am under the impression the doctor used the word 'distribute' in reference to the German heirs. He said: 'Distribute some money among these people.'"

The statement of decedent to witness that, "*when he arrived in Germany*," he intended "to give" or "distribute" some money to or among such of his relatives there as might need it, accords, at least as well with a purpose to make presents to such relatives personally, as with an intention to make different and substitutionary testamentary provision for such of them as he had named in his will. It is significant that in terms he expressed no intention of providing for his relatives in Germany by supplemental will or codicil. There is no suggestion in the testimony of Taft that deceased entertained such intention. It cannot be derived from the word "distribute," a word appropriately applicable to an allotment or division of money among the German relatives by the testator in his life-time. Our conclusion is that, when the California will was made and published, the deceased intended that the legacies mentioned in item 6 should be reduced only by actual payments made by himself personally; that is, in his life-time.

The evidence shows that the decedent took with him when he left for Europe about $35,000, and that he afterwards wrote for, and there was sent him by his agent, the witness Taft, $125,000. Decedent wrote for the last sum at Nice, December 22, 1883, but in his letter, stated that he had already directed his agent to send him "every two or three months all the cash on hand." The court below found that Taft, testator's agent, sent the $125,000 from San Francisco on the sixteenth day of January, 1884, and that on the twenty-third of the same month he sent another sum of $5,000. When the California will was made and published, the testator intended that any sum of money he might personally give to the persons named in item 6 should be deducted from the legacy to such persons. His language proves, at least, that he then contemplated the probability of such advances. Neither the fact that the decedent caused very large sums of money to be placed in Europe, nor his letter of December 22, 1883, indicates any change of his original purpose to make gifts or advances personally to some of those mentioned in item 6. Can we say his intention was changed or modified prior to the making of the Rottweil will?

"Although two bequests may be made to the same person, and although these bequests may differ in their amounts, incidents, and forms, * * * still the special language used by the testator in making the second gift, or the language *found in other parts* of the will, may sufficiently show his intention to give the second legacy for or in satisfaction of the prior one. * * * It is impossible to lay down any general rule governing such cases; each case

must stand upon its own circumstances. The question is, then, simply one of interpretation in order to ascertain the real intent of the testator. But, in arriving at this intent, the court will, if necessary, look at all parts of the will. The court may also be called upon to interpret the testamentary language, rather than to apply any rule of presumption, when the second instrument, *e. g.*, the codicil, *expressly refers to the former one.* The terms of the second instrument,—perhaps codicil,—may be such, *when all taken together,* as to show an intent that the second gift was to be in substitution or in satisfaction, and not cumulative." 1 Pom. Eq. Jur. § 548.

Paragraph 1 of the Rottweil will reads: "I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same." And in paragraph 7 the testator confirms all bequests which he had already made, and declares that any testamentary papers subscribed by him shall have the same effect "as if they were here incorporated." The two instruments are therefore to be read as one writing, the whole expressing the intent of the testator at the date of the Rottweil will so far as his intent appears from the writing, with regard to the disposition of his property.

There may be some significance in the circumstance that, after a large amount of money had been sent to him, which he might, perhaps, have given to or distributed among his relations "personally," the testator did not make such personal donations, but proceeded to prepare a codicil wherein he inserted bequests to some of the persons named in item 6. This fact, however, if it can be considered at all, should have little weight in any inquiry, the purpose of which is to ascertain whether the testator, then at Rottweil, intended that the term "advancements" should include the second legacies. The suggestion is but conjectural, that he may have meant what his language does not imply. It is as easy to suppose the testator changed his mind and decided to give to some of those named in item 6 further and cumulative bequests out of the moneys sent to Europe, as that he determined such further bequests should be treated as "advancements."

We may conjecture that, finding himself growing more ill, his decease, perhaps imminent, and believing that he would not be able "personally" to distribute the moneys, he concluded to make the "advancements" by new bequests. On the other hand, we may conjecture that, returning after long absence to companionship with some of his earlier friends, to whom he was connected by the ties of kindred, his surroundings recalling in his old age the home of his childhood, and all its endearing associations, he may have decided to make provision for some of his relatives in addition to that made by the California will. But all such surmises are more or less fanciful, since they are not based upon the language of the instruments, and are built on presumptions, rather than evidence,—presumptions of facts from which different inferences may be drawn, as prominence is given to some or the other of them.

By paragraph 7 of the Rottweil will the California will is to be treated as "incorporated" in the former. Item 6 of the California will contains the provision: "Any advancement that I may hereafter personally make [to the legatees named in the item] shall be deemed a partial satisfaction," etc. Not only did the testator fail to declare, in express terms in the Rottweil will, that the legacies therein given to those named in item 6, should satisfy, in whole or in part, the former bequests, but it may be said he reaffirmed his desire that those bequests should be reduced only by advancements he might "*hereafter* personally make." The force of this suggestion is, however, by no means conclusive. When it is said that the two instruments are to be read as one, it is not to be assumed that literal effect is to be given to every clause of both. This may not be possible without violating the reasonable rules of interpretation applicable to every writing. If it satisfactorily appear from

other portions of the wills that the Rottweil legacies were intended to satisfy, fully or *pro tanto*, those given in item 6, the provision in that item as to advancements may be disregarded; or the language used at Rottweil, read with the first will, may show that, whatever its meaning disconnected from the Rottweil will, the testator at the time the Rottweil will was made, intended the word "advancements" to cover the Rottweil legacies.

In paragraph 1 of the will or codicil made at Rottweil the testator declares: "I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same." The bank stock was part of the estate in California, and, so far as appears on the face of the instrument, the whole purport and intent of the Rottweil will was to make disposition of the moneys he had arranged to have sent to "Germany or Wurtemberg."

In paragraph 2, immediately after ratifying the disposition of the California will, the testator says: "However, I have already made arrangements to have a sum of money sent from California to a bank in Germany or Wurtemberg, of which I shall dispose in favor of other relatives. The following sums of money shall be paid." He then proceeds to bequeath sums to relatives residing in Germany, some of whom were given legacies by item 6 from his "estate in California," and some of whom were not mentioned in the California will.

We find nothing to indicate that the legacies given to such of the donees as were mentioned in item 6 were not to be additional or cumulative, unless it be in the expression, "of which I shall dispose in favor of *other relatives*." Now, the sums given by the testamentary instrument executed at Rottweil to Mathilde Zeile, testator's sister, and to his niece, the appellant, were given absolutely. Whether they were intended as "advancements" or not, the right to them, subject to administration, vested unconditionally on the death of Frederick Zeile, except so far as the rights of those named in item 6 of the California will might be limited by the happening of the unexpected contingency spoken of in paragraph 4 of the Rottweil will. Whenever the second legacy is regarded as substitutionary, and not as cumulative, the satisfaction of the prior legacy, to the extent of the second, is absolute. The former legacy, to that extent, creating no right in the legatee, there is no claim of an election between the two on his part.

When, therefore, the testator proposed to dispose of the moneys sent to Europe to "other relatives," he could not have intended to exclude from his bounty those to whom it was expressly extended. Yet some of those to whom legacies were given by the Rottweil will were not named in item 6 of the California will. Those were the *other* relatives, and the clause can only be read as intended to give legacies, from the sums sent to Europe, as well as to those to whom donations were made by item 6 as to the "other relatives" mentioned.

In paragraph 4 of the Rottweil instrument the testator provided for an event which he regarded as possible, although not probable, and which never came to pass. If, unexpectedly, the funds in Germany should be insufficient to pay the sums in paragraph 2, the heirs of the estate in California were to make up the deficiency. In paragraph 5 he applied the word "heirs" to legatees. But if, in paragraph 4, he intended to include in the word "heirs" all the devisees and legatees named in the California will, there is nothing in the language which indicates his purpose that the bequests in paragraph 2, or the residuary interests given by the Rottweil instrument, should be "advancements" in satisfaction of the legacies of the item 6 of the California will.

Starting, then, with the presumption that the second legacy to appellant was intended to be cumulative, unless the language used by the testator shows it was to be in substitution, does the language of the testator overcome this presumption? As we have attempted to show the term "advance-

ments" does not of itself, either in its technical or in any popular sense, cover a subsequent legacy; and, after a careful examination of the language of the two instruments published at Rottweil, we have been unable to discover therein an intention upon the part of the testator that the word should bear such peculiar signification as that its scope should include the Rottweil legacies, or any intention that those legacies should satisfy, in whole or in part, the bequests of the proceeds of the bank stock.

Judgment and order reversed, and a new trial granted to appellant Marie M. Hummel.

We concur: TEMPLE, J.; PATERSON, J.

In re Estate of ZEILE. (No. 11,980.)

(*Supreme Court of California.* November 12, 1887.)

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Edmund Tanzy, (*J. M. Seawell*, of counsel,) for appellant. *Seldon S. & George T. Wright*, *Joseph P. Kelly*, and *Sawyer & Burnell*, (*S. Heydenfeldt*, of counsel,) for respondents.

BY THE COURT. On the authority of *In re Estate of Zeile*, *ante*, 455, (No. 11,956, filed this day,) ordered, the portion of the judgment appealed from is reversed, the order denying a new trial reversed, and a new trial granted to Karl Froescher.

In re Estate of ZEILE. (No. 11,979.)

(*Supreme Court of California.* November 12, 1887.)

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

M. S. Eisner, (*J. M. Seawell*, of counsel,) for appellant. *Seldon S. & George T. Wright*, *Joseph P. Kelly*, and *Sawyer & Burnell*, (*S. Heydenfeldt*, of counsel,) for respondents.

BY THE COURT. On the authority of *In re Estate of Zeile*, *ante*, 455, (No. 11,956, filed this day,) it is ordered, the portion of the judgment of the superior court appealed from is reversed, and the order denying a new trial is reversed, and cause remanded for a new trial as to appellant Mathilde Zeile.

74 Cal. 180

In re Estate of CROZIER, Deceased. (No. 12,022.)

(*Supreme Court of California.* November 29, 1887.)

WILL—CONTEST—EVIDENCE—NEW TRIAL.

In an action to revoke the probate of a will on the ground of unsoundness of mind of the testator, the contestant offered in evidence a part of the great register of the county to show that the age of the testator was not what he had stated it to be in the will. The evidence was admitted over the objection of the defendant. *Held*, that this was error, and, under the rule that all error is presumed to work injury, it is sufficient ground for granting a motion for new trial.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; W. S. BUCKLEY, Judge.

James A. Louttit, for contestant. *J. C. Campbell*, (*S. D. Woods*, *A. L. Levinsky*, and *D. S. Terry*, of counsel,) for respondent.

BELCHER, C. C. James Crozier died on the seventh day of November, 1881, in the city of Stockton. He left a will made the day before his death, in which the respondent, William C. Daggett, was named as sole legatee and executor. The will was admitted to probate, and in due time Jane Crozier, the mother of decedent, commenced this proceeding to have the probate of the will revoked upon the ground that at the time of its execution the decedent was of unsound mind. The case was tried before a jury and the findings upon the special issues submitted were in favor of the contestant. The respondent then moved for a new trial upon the ground that the evidence did not justify the verdict, and for errors in law occurring at the trial and excepted to by him. After argument, the court granted the motion, as appears from the record, "on the ground of errors which occurred during the trial, and not for insufficiency of or conflict in the evidence," and the appeal is from that order. It does not appear what the supposed errors were which induced the court to grant the new trial, nor is it important that we should know. If any errors, prejudicial to the respondent, were committed, the order appealed from can-

not be reversed by this court. *Thompson* v. *Felton*, 54 Cal. 554; *McCarthy* v. *Loupe*, 62 Cal. 300.

Counsel for both sides have presented very elaborate briefs in which the testimony is reviewed, and the numerous rulings of the court are discussed. It is unnecessary to speak of many of these rulings. Most of them were undoubtedly correct, but we cannot say that of all of them. For example: In the will, the age of the testator is stated to be 65 years. Cutting, who drew the will, testified that Crozier told him that was his age, but did not tell him when he was born. Without objection the respondent introduced in evidence a copy of the great register of San Joaquin county, which showed the age of Crozier to have been 63 on the twelfth day of April, 1879, the date of his registration. In rebuttal the contestant offered in evidence a part of the great register of the same county, which reads as follows: "1,165. Crozier, James; age, fifty-two; country of nativity, Scotland; occupation, gardener; local residence, O'Neil; proved fifteen years' residence and loss of certificate; date of registration, February 14, 1867; sworn; register number, 3,232." This offer was objected to by the respondent on the ground that the offered evidence was immaterial and irrelevant, and not in rebuttal, but the objection was overruled and the evidence admitted. We think this ruling erroneous. The evident purpose of introducing the evidence was to throw doubt on the validity of the will, and, so far as we can see, it may have had its desired effect. There was no evidence to show when Crozier was born, but the argument in support of the ruling is, in substance, that he must have known and sworn to his age when he was registered in 1867; that as he is shown by the entry to have been 52 years old then, he must have been about 67 years old when he died; and that as he stated his age to be 65 and not 67 when he made his will on the day before he died, that fact tended to show weakness or unsoundness of mind, and was rightly submitted to the jury, "so that they might properly determine whether at that time he had mental capacity sufficient to dispose of his property, remember the claims of those dependent upon him, and the nature of the business he was then transacting." The argument is evidently unsound both in its logic and law. Crozier may have made an affidavit showing his age, and the other facts entitling him to registration, but he did not make the entries upon the register and may never have seen them. They were therefore irrelevant, and, in our opinion, wholly inadmissible for any purpose.

But it is said that the error, assuming that the ruling was erroneous, was an immaterial one, and a new trial should not have been granted on account of it. The rule is that every error is presumed to work injury to the party against whom it is committed, unless it clearly appears that no injury could have resulted. Here we cannot say that the respondent was not prejudiced by the erroneously admitted evidence. There were several other rulings upon the admission of evidence, and particularly upon the admission of certain testimony of the experts, the correctness of which was doubtful, but we do not think it necessary to speak of them particularly.

It follows that the order appealed from should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

74 Cal. 164

Ex parte DIMMIG, on *Habeas Corpus*. (No. 20,367.)

(*Supreme Court of California.* November 22, 1887.)

CRIMINAL PRACTICE—ISSUE OF WARRANT—JURISDICTION OF MAGISTRATE.

Penal Code Cal. §§ 811–813, provides that when an information is laid before a magistrate of a crime committed, he must take the depositions of the informant

and his witnesses, if any; that the depositions must set forth facts tending to prove the guilt of the accused; and that, if the magistrate is satisfied therefrom of the commission of the offense, and that there is reasonable ground for believing the accused guilty, the magistrate must issue a warrant of arrest. *Held* that, under these provisions, a magistrate has no jurisdiction to issue such warrant without evidence of such guilt, and that an affidavit alone, in the form of an information, containing no evidence, is not sufficient to support such warrant.

In bank. On *habeas corpus*.

Proceedings in police judge's court of San Francisco; HORNBLOWER, Judge.

John D'Arcy, *H. B. Miller*, and *Otto Tum Suden*, for petitioner. *Joseph Kirk*, for the People.

BY THE COURT. Sections 811, 812, and 813 of the Penal Code are as follows:

"811. When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

"812. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense, and the guilt of the defendant.

"813. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest."

Under these provisions a magistrate has no jurisdiction to issue a warrant of arrest without some evidence tending to show the guilt of the party named in the warrant. The original information may be sufficient, though made only upon information and belief, if followed by the deposition of the complainant or some other witness, stating facts tending to show the guilt of the party charged. Of course, where there was some evidence upon which the magistrate acted, we would not interfere. It may be also true that the original information might be treated as a deposition, and in such view, if it contained positive evidence of facts tending to show guilt, it might be sufficient as a basis for the issuance of a warrant. But a mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime. *Swart* v. *Kimball*, 43 Mich. 443, 5 N. W. Rep. 635; *Blodgett* v. *Race*, 18 Hun, 132; *In re Balcom*, 12 Neb. 316, 11 N. W. Rep. 312; *Ex parte Burford*, 3 Cranch, 448; *People* v. *Smith*, 1 Cal. 9; *People* v. *Heffron*, 53 Mich. 529, 19 N. W. Rep. 170; *Ex parte Haynes*, 18 Wend. 612; *Loder* v. *Phelps*, 13 Wend. 46; *People* v. *Barnes*, 66 Cal. 594, 6 Pac. Rep. 698.

Such being the case here, the petitioner is discharged.

74 Cal. 175

GARFIELD *v.* WILSON and another. (No. 11,925.)

(*Supreme Court of California.* November 29, 1887.)

1. PUBLIC LANDS—SWAMP LANDS—RIGHT TO PURCHASE.

Plaintiff and defendants were contestants for the purchase of a tract of swamp land. Plaintiff offered a certified copy of his application, which purported to have been sworn to by him before a commissioner of the United States circuit court for California. The commissioner was not authorized to administer the oath. *Held*, that plaintiff's application was null and void.

2. SAME—RIGHT TO CONTEST PURCHASE.

Plaintiff and defendants made applications for the purchase of the same swamp land, and the contest was referred to the superior court of Tulare county. On the trial, plaintiff failed to establish any right to purchase the land. *Held*, that he could still contest the right of the defendants to purchase the land.

3. SAME—TRIAL—ISSUES AND FINDINGS.

Plaintiff and defendants were applicants for the purchase of the same tract of swamp land, and defendants alleged that the land had been segregated to the state by the United States for more than six months before their applications were filed. The only proof before the court was a map of the township in which the land was situated approved by the United States surveyor general on October 14, 1884. Their applications were filed in May and June, 1884, and they commenced suit on October 1, 1885. The finding of the court was that the land had been segregated for more than six months before the commencement of the action. *Held*, that the finding did not meet the issue, and was insufficient.

Commissioners' decision. Department 2.

Appeal from superior court, Tulare county; WM. W. CROSS, Judge.

Chas. E. Wilson and *C. A. Webb*, for appellant. *Lambertson & Taylor*, for respondents.

BELCHER, C. C. This action was commenced to determine a contest between the parties as to the right to purchase from the state a certain section of swamp and overflowed land in Tulare county. The defendant Wilson filed in the office of the surveyor general of the state his application to purchase the north half of the section, on the fifteenth day of May, 1884. The defendant Turner filed his application to purchase the south half of the section on the fourth day of June, 1884. The plaintiff filed his application to purchase the whole section on the twelfth day of June, 1885, and, on demand made by him, the contest was referred to the superior court of Tulare county for adjudication.

At the trial the plaintiff, to show his right to purchase the land, offered in evidence a certified copy of his application, which purported to have been sworn to by him before a commissioner of the United States circuit court for California. This was objected to by counsel for defendants, on the ground that it was not sworn to before an officer authorized to administer oaths, and the objection was sustained, the plaintiff reserving an exception.

It is admitted that the ruling was proper in view of the decision of this court in *Winder* v. *Hendricks*, 56 Cal. 464, but we are asked to reconsider that case and to now hold that a commissioner of the United States circuit court is competent to administer oaths under the laws of this state. Without following the argument of counsel on this point, it is enough to say that, in our opinion, the conclusions reached in the case referred to were correct, and should be reaffirmed here. It follows, therefore, that judgment was properly entered in the court below, that the plaintiff's application was null and void, and he had acquired no right to purchase the land in question from the state.

But though the plaintiff had no right to purchase the land, and even if he had not sought to purchase it, he could still contest the right of the defendants to purchase it. *Tyler* v. *Houghton*, 25 Cal. 26; *Thompson* v. *True*, 48 Cal. 605. And when the contest was referred to the court below for adjudication, that court acquired jurisdiction to hear the case, and it became its duty to determine as to the rights of each of the parties.

The question then remains, did the defendants show themselves entitled to purchase the land? In cases of this kind the settled rule is that each party must make out his own case, and to that end must allege and prove that the land is subject to sale by the state, and that he has complied with all the requirements of the statute authorizing its purchase. *Lane* v. *Pferduer*, 56 Cal. 122; *Dillon* v. *Salonde*, 68 Cal. 267, 9 Pac. Rep. 162; *Gilson* v. *Robinson*, 68 Cal. 539, 10 Pac. Rep. 193; *Plummer* v. *Woodruff*, 11 Pac. Rep. 871. And if neither party makes the necessary showing, then judgment should be entered that neither of them is entitled to make the purchase. *Mosely* v. *Torrence*, 12 Pac. Rep. 430.

In his answer to the complaint each defendant alleged that the land which he sought to purchase was swamp and overflowed land, which was granted

to the state by the act of congress of September 28, 1850, and had been segregated as swamp and overflowed land by authority of the United States for more than six months when his application was filed. These averments raised material issues, for, under the provisions of the Code, since 1874, no application to purchase swamp land has been authorized until after the land has been segregated as such by authority of the United States. Pol. Code, §§ 3441, 3443, 3445.

When the defendants offered in evidence their applications to purchase the land, they were objected to by the plaintiff, on the ground, among others, that it was not shown that, at the time when the affidavits and applications were made and filed, the land had been segregated to the state by authority of the United States, and the objections were overruled. No proof was offered by the defendants to show that the land had deen segregated as swamp and overflowed land, and none was before the court, except a certified copy of the plat of the township in which the land is situated, which was introduced by the plaintiff. That plat was approved by the United States surveyor general on the fourteenth day of October, 1884, and under the decisions of this court that date must be treated as the date of the survey. *Finney* v. *Berger*, 50 Cal. 248; *Medley* v. *Robertson*, 55 Cal. 396. Running across the plat, from a point on the north line of section 4 to the south-west corner of section 25, is a line marked "Shore Line of Tulare Lake, in 1855," and west of that line, and nearly parallel with it, is another line marked "Shore Line, in 1880." On the margin of the plat are entries showing the number of acres in the "area of public land surveyed in 1854," and of swamp land surveyed in 1880 and 1884. But there was nothing to show that any map or plat of the township, or of any part of it, except the one introduced by the plaintiff, was ever approved or made. The section in controversy lies west of the "Shore Line, in 1880;" and, conceding that the defendants could use the plaintiff's plat, still we are unable to see any evidence that that section was segregated as swamp land before the fourteenth of October, 1884, when the plat was approved.

The court found that all the land in controversy was swamp and overflowed land, and was granted to the state by the act of congress of September 28, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits." It further found that the said land had been segregated to the state of California as swamp and overflowed land for more than six months prior to the commencement of the action. The action was commenced on the first day of October, 1885, and six months prior to that date would be April 1, 1885. As the defendants' applications were filed in May and June, 1884, the finding evidently did not meet the issues, and was insufficient.

In our opinion, therefore, the judgment against the plaintiff, and the order denying him a new trial, should be affirmed; and the judgment in favor of the defendants should be reversed, and as to them, the cause should be remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment against the plaintiff, and the order denying him a new trial, are affirmed; and the judgment in favor of defendants is reversed, and as to them the cause is remanded for a new trial.

74 Cal. 156

PFEIFFER *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. (No. 11,772.)

(*Supreme Court of California.* November 18, 1887.)

1. TENANCY IN COMMON—RIGHTS OF CO-TENANTS—CONVEYANCE BY CO-TENANT—RESERVATION OF EASEMENT.

Plaintiff and defendants and others were tenants in common in a certain tract of land. In 1870 defendants conveyed their undivided interest, but reserved the right

to use the water on a certain portion of the land. In 1875 the land was partitioned, and to plaintiff was assigned that portion of the land on which was the water. *Held*, that the defendants, as tenants in common, could not by reservation in their deed create an easement or servitude on the common land as against their co-tenant.

2. PARTITION—BY JUDICIAL PROCEEDINGS—PARTIES—GRANTEE FROM A CO-TENANT OF AN EASEMENT.

Defendants and others were tenants in common of a certain tract of land. Defendants conveyed away their undivided interest, reserving a right to use water. A co-tenant also granted them the right to take water from a portion of the tract occupied by him. *Held*, that neither the reservation nor the grant gave the defendants such an interest in the land as entitled them to be made parties to an action for partition.

In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

L. E. Bulkely, for appellant. *Mastic, Belcher & Mastic*, for Laura Pfeiffer. *Flournoy, Mhoon & Flournoy*, for respondents. *Jarboe, Harrison & Goodfellow, amici curiæ.*

MCFARLAND, J. This is an action to quiet title to a certain piece of land; to enjoin defendant from diverting any water from said land; and to recover damages for past diversion of such water. The action was tried in the court below without a jury, and judgment went for defendant. Plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

The material facts in the case—omitting certain deraignments of title and other matters which need not be recited here—are these:

1. In 1865 plaintiff became the owner in fee of a certain undivided interest in "2,900 acres or thereabouts" of mountain or hill land in Alameda county, California. This land was a part of the Rancho San Antonio, granted by the Mexican government in 1823 to Louis Peralta, and confirmed to his sons and grantees by a patent of the United States government, dated February 10, 1877. Plaintiff continued to be the owner of said undivided interest until the year 1875, when a certain partition suit entitled *Le Roy* v. *Gwinn et al.* was instituted in the proper district court for the purpose of terminating the co-tenancy of the various owners of undivided interests in said land, and apportioning it among said owners in severalty. A judgment was rendered in said partition suit on the twenty-first of August, 1875, by which the particular land described in the complaint in this present action, and which is designated as "Plot O," was set off in severalty to plaintiff. She was put into possession of said plot O by the sheriff, and has been in possession ever since, except so far as her possession has been interrupted by defendant as hereinafter stated.

2. On August 10, 1864, Owen Simmons and wife, being also the owners in fee of an undivided interest in said 2,900 acres of land, conveyed the same to the College of California, a corporation, who remained the owner thereof until June 1, 1870, when it conveyed said undivided interest to the defendant herein, the regents of the University of California. At the time of said conveyance by Simmons and wife to the College of California, said Simmons was in the actual occupancy of that part of said land described in the complaint, which contains the springs of water about which this litigation has arisen, although he was only an owner, as tenant in common with others, of an undivided interest in the whole tract of 2,900 acres, which fact was well known to the college. After the conveyance to the college, the latter remained in occupancy of said piece of land until its conveyance to the defendant on June 1, 1870. This particular part of the land was wet and springy. It has several springs on it, which usually sunk into the ground within short distances from their sources. In 1866 the college commenced to clear out two of said springs; and within a year or two, by excavations, etc., it developed a stream of water, which by means of flumes, pipes, reservoirs, etc., it con-

verted and conveyed entirely away from said undivided lands onto other lands held by said college in severalty. The college, and its successor, the defendant, continued to so divert and convey said water from 1866 until after the judgment in said partition suit in 1875, without any interference or complaint by any of their co-tenants. In developing this water, and in erecting works for its diversion, the college and the defendant expended about $17,000. After the judgment in partition, which set off this piece of land in severalty to plaintiff, she protested against any further diversion of the water by defendant, demanded payment for it, etc. She commenced this action within a day of the expiration of five years after the issuance of the patent.

3. On the twenty-eighth day of November, 1870, the defendant executed to Mary E. Brayton a conveyance of all its interest in said undivided tract of 2,900 acres of mountain. Said conveyance also describes three other tracts of land not involved in this controversy, and has in it the following clause: "Excepting and reserving out of and from this conveyance, and out of the premises firstly, secondly, and fourthly above described, the right of the water arising upon or flowing across the same, so far as it shall be needed for the University of California, and the right to enter upon said land for the purpose of constructing and laying the necessary pipes, and making the same available, the same to be exercised in such manner as not to interfere with the use and occupation of the land for cultivation, and to do no damage to the crops thereon." Mary E. Brayton afterwards conveyed to H. G. Livermore, who was made a party to said partition suit, and had set off to him, a certain part of said 2,900 acres, designated as "Plot H." The word "fourthly" in said clause of reservation refers to said undivided interest in said 2,900 acres.

4. There is another fact which must be here stated, because, while it has no direct reference to the land or water described in the complaint, it has a bearing on the question: Who were necessary parties to the partition suit? Z. B. Heywood, being the owner of an undivided interest in said tract of 2,900 acres, and having entered upon the occupancy of a certain part of it called "Ramsey Ranch," on the fourth day of September, 1860, executed a deed to the president and board of trustees of the College of California, by which he gives, grants, bargains, sells, and quitclaims to them "the exclusive right in perpetuity to enter upon my land known as the 'Ramsey Ranch,' being a portion of the Rancho San Antonio in the county of Alameda, California, and thereon to collect and take away, with the reservations hereinafter mentioned, the waters of the various springs which open into and along the gulch and ravine, and its branches that debouch at or near the point where the present road crosses the boundary line between sections 83 and 84, as laid down in Kellersberger's map; and also of the said springs above said ravine that rise to the southward of and run past and near my present farm-house, and for the purposes aforesaid to take, hold, use, occupy, and clear up so much of said land as may be proper and necessary for collecting said waters in basins or reservoirs, or for flooding by dams, and for canals and conduits, and the laying of pipes; and the right at all times to enter upon so much of said lands as their convenience may require for all the purposes aforesaid, and for repairs or viewing the same, and the right to protect said waters from waste or damage by such works, and in such manner as they may judge best." The reservations referred to are not material. Heywood remained owner of said undivided interest until the commencement of said partition suit; was made a party thereto; and had set off to him in severalty a part of said 2,900 acres designated as "Plot P," said plot P including the said Ramsey ranch. On the twenty-sixth day of November, 1869, the said president and board of trustees of the College of California conveyed to "the state of California, represented by the regents of the University of California," all the rights and property (if any) which were conveyed to the former by said deed of September 4, 1860, executed by said Heywood as aforesaid. Neither

the state of California nor the defendant was made a party to said partition suit.

5. The defendant continued to divert water from said plot O, from the time plaintiff became several owner thereof until the trial of this present action, and to convey the same to its university lands, which never were part of said 2,900 acres of mountain land. The court below finds that for three years and ten months immediately preceding the trial, the defendant so diverted and used 10,000 gallons per day, in addition to water sold by it to others, for which it received $4,804; but it is not found how much plaintiff was injured by such diversion. It appears from the findings that defendant has taken the water from only two springs on said land, and that there are several other springs on the land which seem not to have been developed or used in any way by plaintiff.

Upon these facts the court below rendered judgment for defendant upon the sole ground—as stated in the first finding—that by the reservation in said deed from the defendant to Mary E. Brayton, and by said deed of the College of California to the state of California, represented by the regents of the University of California, conveying to the latter the rights conveyed to the former by said Z. B. Heywood as aforesaid, the defendant and the state of California acquired and retained such interests in said 2,900 acres of land as made them necessary parties to said suit for partition; and that, not having been made such parties, the judgment in said suit setting off said plot O in severalty to plaintiff was and is void as against the defendant.

In taking this view of the case we think that the court below erred. It is not necessary to discuss the question whether, if respondent had been the sole owner of the land at the time of its deed to Mrs. Brayton, the reservation would have left in respondent a mere personal privilege or right in gross, or an interest in the land itself capable of partition. At the time of the execution of said deed, respondent was the owner of only an undivided interest in the land as tenant in common with the appellant and others; and, as such tenant in common, it had no power to convey to a stranger, or to reserve to itself, after parting with the fee, the right to divert water entirely away from said land. A tenant in common cannot create an easement or servitude upon the common land. In Goddard, on the Law of Easements, on pages 93 and 94, the result of the authorities on the subject is correctly stated as follows: "So the grantor must be the *sole* owner of the fee. One joint owner or tenant in common cannot create an easement in the common estate as against his cotenant—though probably he would be himself estopped to dispute a grant thus made. For the same reason one tenant in common cannot, when conveying his own interest in the common property, create *by reservation* a personal and separate easement over the same for the benefit of his adjoining separate property." In *Boston F. Co.* v. *Condit*, 19 N. J. Eq. 394, it was held that "a grantee of the right to dig ores from one tenant in common cannot call for a partition of the premises." See, also, 3 Kent, Comm. (11th Ed.) 554; Freem. Co-Tenancy, § 198; *Adam* v. *Iron Co.*, 7 Cush. 361; *Marshall* v. *Trumbull*, 28 Conn. 183.

We do not understand counsel for respondent as denying this to be the rule clearly established by the general authorities, and they cite no cases to the contrary. But they argue that, logically, the rule ought to be different in this state on account of certain decisions made by this court (about another matter) in *Stark* v. *Barrett*, 15 Cal. 361; *Gates* v. *Salmon*, 35 Cal. 576, and some other cases which follow them. It was quite customary at one time for individual tenants in common of large Mexican grants to convey, or to undertake to convey, their interests in particular parts of the common land by metes and bounds, called "special locations;" and the decisions last above referred to simply held—*First*, that the grants of such special locations were good as against naked trespassers; and, *second*, that they were not absolutely

void as against the co-tenants of the grantor, but were taken subject to the co-tenants' right of partition of the whole tract, and might be lost to the grantee when such partition took place. These decisions are admitted to have been in conflict with many authorities of high standing, and were based no doubt, to some extent, on equitable considerations growing out of particular circumstances; and they should not be pushed further than the limits of their express terms. But there were no questions about *easements* in those cases. Whatever interest the grantor undertook to convey was *all* his interest or estate in the *whole* land described in the conveyance. There was no attempt to create or reserve a right to dig for minerals in the land, or to cut wood on it, or to take water from it, or to have a way over it,—no attempt to divide up the very *body* of the land and distribute it around. There is nothing, therefore, in those decisions that alters the well-established rule as above stated, which determines the main point in the case at bar.

Of course, the deed from Heywood to the College of California, and the deed from the latter to the respondent, or the state of California, are upon the same footing with the "reservation" in the deed from respondent to Brayton. Neither the respondent nor the state of California had an estate or interest in the land, and neither was a necessary party to the suit for partition.

The defenses founded on appropriation, acquiescence, estoppel, and the statute of limitations were not maintained. The findings on those issues, as we understand it, were all in favor of appellant, and respondent has not appealed.

Our conclusion is that upon the findings judgment should have been rendered for appellant according to the prayer of her complaint, except as to damages, about which there is no finding. But as appellant now waives all claims for damages, there appears to be no necessity for a new trial. The judgment is therefore reversed, and the superior court is directed to enter judgment for plaintiff according to the prayer of the complaint, without damages.

We concur: SEARLS, C. J.; THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.

74 Cal. 167

MOORE and others *v.* BOYD and others. (No. 9,792.)

(*Supreme Court of California.* November 29, 1887.)

1. CORPORATIONS—ACTIONS TO ENFORCE STOCKHOLDER'S LIABILITY—LIMITATION.
 The liability of a stockholder for a debt of a corporation is a liability "created by law," referred to in Code Civil Proc. Cal. § 359, which enacts that an action to enforce a liability created by law must be brought within three years after the "discovery * * * of the facts upon which * * * the liability was created."
2. SAME—WHEN STATUTE BEGINS TO RUN.
 Defendants were sued as stockholders for an indebtedness contracted by a company. Code Civil Proc. Cal. § 559, limits the time for bringing such an action to three years "after the discovery by the aggrieved party of the facts upon which * * * the liability was created." *Held*, that if the plaintiffs desired to rely on the stockholders it was incumbent upon them to examine the books of the company to discover how the stock stood, and that, as the books of the company were open to inspection by the plaintiffs, they would be charged with that knowledge which could have been ascertained by such inquiry, and that the time commenced to run when the debt was incurred.
3. SAME—ESTOPPEL TO DENY OWNERSHIP OF STOCK.
 The defendants were sued for an indebtedness contracted by a corporation in which they were shareholders. One of the defendants had stated in a letter to a third party that he owned 11,000 shares of stock in the company. *Held*, that the admission not being made to the plaintiffs, but to a third person, did not operate as an estoppel to prevent said defendant from denying the ownership.

Commissioners' decision. Department 1

Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

James A. Wagner, for appellants. *McAllister & Bergin*, for respondents.

HAYNE, C. This is an action against certain stockholders of the South Mountain Consolidated Mining Company, a corporation having a capital stock of 100,000 shares, upon an indebtedness of the company to plaintiffs of $46,953.50, incurred by the company during the months of July and August, 1875. The defendant Lent is alleged to have owned at that time 33,145 shares; the defendant Boyd, 11,000 shares; and the defendant Willis, "a large number of shares." The court below gave judgment for the defendants, and the plaintiffs appeal.

As the positions of the defendants are somewhat different, we will consider them separately.

1. The defendant Willis disposed of all the stock in which he had any actual interest before the months of July and August, 1875. Other stock, however, stood in his name, "as trustee," upon the books of the company. In 1874, 30,000 shares belonging to the company were placed in the name of "William Willis, Trustee." These shares were disposed of under the direction of the president in the acquisition of outstanding titles to the mine. As we gather from the evidence, no change was made in the way this stock stood upon the books of the company. Before July, 1875, about 60,000 other shares belonging to one Minear were placed in the name of "William Willis, Trustee," as collateral security for a debt of the company, for which Willis had made himself responsible. These shares stood upon the books of the company in this way during the months of July and August, 1875. But before that time the greater part had been sold to outside parties, and the proceeds applied to the reduction of the debt for which it was security. Most of the remainder was sold during said months of July and August. Whenever the stock was sold, Willis simply indorsed the certificates in blank, and delivered them to the purchasers, leaving the stock to stand upon the books of the company in the name of "William Willis, Trustee." As a matter of course, after this, he did not know what became of the stock, or who owned it,—the certificate being transferable by delivery "in the ordinary course of business, just like a 20-dollar piece."

The position of appellants' counsel is that this made Willis liable as a stockholder. The argument is that after the stock pledged was sold he no longer held it as collateral security; that its being on the books in his name enabled him to vote it, and control the company; and that the mere addition of the word "trustee" to his name, without stating for whom he was trustee, amounts to nothing, under the decisions in *Brewster* v. *Sime*, 42 Cal. 142, and *Thompson* v. *Toland*, 48 Cal. 113. In other words, that he appeared upon the books of the company to be a stockholder, and that this made him liable. We do not find it necessary to examine the validity of this argument. The condition of affairs above described existed at the time the indebtedness was contracted. And, if we assume in favor of the appellants that it made Willis liable as a stockholder, it made him liable in July and August, 1875; and the claim against him is barred by the statute of limitations.

Section 359 of the Code of Civil Procedure is as follows:

"Sec. 359. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce *a liability created by law;* but such actions must be brought within three years after the discovery by the aggrieved party of *the facts upon which* the penalty or forfeiture attached, or *the liability was created.*"

The liability of a stockholder for the debt of the corporation is a liability "created by law," (*Green* v. *Beckman*, 59 Cal. 545;) and therefore the above section applies to it. More than three years having elapsed before the action was brought, the claim was barred by limitation unless there was no "discovery * * * of the facts upon which * * * the liability was created." What were such facts? Manifestly the existence of the indebtedness of the corporation, and the fact that the defendants owned a certain proportion of the stock. Now, the plaintiffs, having advanced money directly to the corporation, could not have been ignorant of the indebtedness arising therefrom. The inquiry, therefore, is reduced to this: Were they ignorant of the fact that during the months of July and August, 1875, the stock stood upon the books of the company in the name of "William Willis, Trustee?"

For the purposes of the statute of limitations, if the means of knowledge exist, and the circumstances are such as to put a man of ordinary prudence on inquiry, it will be held that there was knowledge of what could have been

readily ascertained by such inquiry. This rule is applied both in equity (*New Albany* v. *Burke*, 11 Wall. 107; *Bank* v. *Carpenter*, 101 U. S. 567) and at law, (*Bailey* v. *Glover*, 21 Wall 349; *Wood* v. *Carpenter*, 101 U. S. 141.) In the present case the plaintiffs could have discovered how the stock stood upon the books of the company by looking at the books; and we think that it was incumbent upon persons advancing money to the corporation, and relying upon the stockholders for payment, to have done so. It is not shown that they made any effort to do so; and therefore they cannot claim the benefit of the exemption made by the section above quoted as to the running of the statute. If, therefore, there was any liability upon Willis from the way the stock stood upon the books of the company, it is barred by limitation.

2. The defendant Boyd never had any stock in his name upon the books of the company, either as trustee or otherwise, except the five shares put in his name to qualify him to act as director. He admits being interested in some of the stock at one time; but he disposed of it before July, 1875. The court finds that, "in the months of July and August, 1875, said defendants did not, nor did any of them, own any other or more of the capital stock of said South Mountain Consolidated Mining Company than the five shares thereof standing in their names as aforesaid." This finding is as broad as the issue; and no objection is taken to its sufficiency in point of form. And it responds to the questions presented by the evidence. Was the evidence sufficient to support it?

As an original proposition we should have had much difficulty in coming to the conclusion that this defendant did not own 11,000 shares of the stock at the time the indebtedness was incurred; for in a letter to a third party, dated September 28, 1875, he said: "I am compelled to pay assessments on over eleven thousand shares of my own stock;" and the letter displays much indignation over the conduct of one Townsend, who was supposed to have depressed the value of the stock in the market. But Boyd denied that he owned any stock, and explained his letter by saying that the company owed him money, which he expected to get out of the sum raised from the assessment; and that he wrote the letter in the expectation that it would be shown to other stockholders, and would encourage them to pay the assessment on their stock. This explanation seems open to doubt. But the court below heard and saw the witness, and therefore had a better opportunity for arriving at a conclusion than is afforded by a record; and under the well-settled rule its conclusion as to the fact will not be disturbed.

It is contended, however, that the letter referred to operated as an estoppel upon the writer, and prevented him from denying that he was a stockholder. But the admission was not made to the plaintiffs, or any of them, and therefore did not operate as an estoppel. *Reynolds* v. *Lounsbury*, 6 Hill, 536. To hold that an estoppel exists under these circumstances would be to make every admission an estoppel.

The foregoing disposes of the claim as to the defendant Boyd, and it is unnecessary to consider the question of the statute of limitations as to him.

3. The defendant Lent never had any stock in his name upon the books of the company except the five shares necessary to qualify him as a director. He admits having been interested in a large number of shares, but testifies that he disposed of them before the months of July and August, 1875. We see nothing in the evidence to cast doubt upon the finding above quoted, that he owned no stock at the time the indebtedness was incurred. He says, however, that a large part of this stock was given away or disposed of in a way he does not distinctly remember. His testimony is as follows: "I cannot remember at this time what disposition I made of it, but I am positive it was all sold at about the sum I gave for it. In the first place, in organizing a company, the first men that come in are newspaper men who want to know what is this company,—want me to carry some stock. Another will want me to carry some stock, and I think every share of that stock went in that

way; but I cannot remember. * * * I cannot remember now the disposition of my 500 shares. I think I gave it out at different periods as presents to persons around the office or some one else. I think I gave it to somebody or other. I don't know who it was, but after we got through with the 3,500 shares, I know that Boyd, Willis, and myself said: 'We will give this away.' Willis said: 'I am going to give my mother mine.' Boyd said: 'I will give mine to Mrs. Blank;' I forget the name. And I said: 'I will do the same thing,' and what I did with it I don't know. I am so sure I had no stock after that," etc.

The learned counsel for the appellants argues that stock cannot be transferred in this way, as against creditors of the corporation, and among other authorities cites *Bowden* v. *Johnson*, 107 U. S. 251, 2 Sup. Ct. Rep. 246, and Thomp. Stockholders, § 215. But the rule he invokes requires that the transfer should be for the purpose of escaping liability, and to a person whom the stockholder knows to be irresponsible. The evidence shows no such case. And if the rule is to be applied in this state, (as to which we express no opinion,) this is not a case for its application

4. All three of the defendants were directors, and each had five shares of the company's stock transferred to their names upon the books of the company. This, we think, made them liable as stockholders. *Wolf* v. *St. Louis I. W. Co.*, 15 Cal. 319. But under the views above expressed this liability was barred by limitation. And, if this were not so, the matter is too trifling to require the reversal of the judgment. This seems to be the view of the counsel for the appellants; for on page 6 of his brief he says: "Even if the defendants had owned the five shares each, standing in their names, the amount for which they would be liable would be such a trifling sum that it would not justify them in taking up the time of a court with a suit, to say nothing of the costs to themselves. Five shares to each of the defendants would be 15-100,000 of 46,963, or just a little over 70 cents; or, with interest, about $1.40." We quite agree with counsel that this is too trifling a matter to take up the time of a court. It is a case for the application of the maxim, *de minimis non curat lex*. *Wolff* v. *Prosser*, 14 Pac. Rep. 852.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 219

LITTLE *v.* SUPERIOR COURT (No. 12,188.)

(*Supreme Court of California.* November 30, 1887.)

APPEAL—REVERSAL—NEW TRIAL—PARTIES NOT PARTIES TO THE APPEAL—INJUNCTION.

In a proceeding to restrain the trial court from retrying a case, so far as the petitioners were concerned, it appeared that in a foreclosure case in 1878, the mortgagor's (petitioner's) property was sold to pay two mortgages. The decree was satisfactory to the mortgagors, but not to one of the mortgagees, whose lien was subordinated to the other, and he appealed to the supreme court, where the mortgagors objected that, as to them, no appeal had been taken. The supreme court reversed the decree, and ordered a new trial, and in the course of the decision stated that, in considering the case, they had regarded the appeal as to the mortgagors not well taken. *Held*, that though the mortgagor's objection was not directly passed upon, yet the statement was in effect a decision that, as to the mortgagors, no appeal had been taken; that the only question on appeal was as to which mortgage had priority, in which question the mortgagors had no interest, and a new trial as against the mortgagors would be restrained.

In bank. Appeal from superior court, Monterey county; J. K. ALEXANDER, Judge.

M. Delmas, for petitioner. *T. O. Houghton*, for respondent.

PATERSON, J This is a proceeding to restrain the superior court of Monterey county from trying the case of *Withers* v. *Little*, so far as these petitioners are concerned therein. The action referred to is a foreclosure suit, commenced by Withers against David Jacks and petitioners herein, Milton Little and Mary Little, in 1878. It is alleged there that the Littles are indebted to Withers upon a certain promissory note; that they gave a mortgage on lots 1 and 2, in Monterey, to secure the payment of the note, and that Jacks claims some interest in the property. The Littles made default, Jacks put in an answer denying that his mortgage was subsequent in time or in equity to that of Withers upon lots 1 and 2, and in a cross-complaint, alleged that the Littles were indebted to him upon a promissory note secured by a mortgage upon said lots 1 and 2, and also upon lots 3, 4, 5, and 6. The Littles consented in open court to the entry of judgment against them as prayed for by Jacks in his cross-complaint. The cause was tried by the court, and a decree entered in favor of Withers against the Littles for the sum claimed by him, and in favor of Jacks for the sum claimed in his cross-complaint. It was further adjudged that the Withers mortgage upon lots 1 and 2 had priority At the foreclosure sale, Withers purchased lots 1 and 2. Jacks purchased lots 3, 4, 5, and 6, and certificates of sale were regularly issued to them, and were duly recorded. Thereafter Jacks filed a notice of appeal, which reads as follows:

"[Title of court and cause.] You will please take notice that the defendant, David Jacks, in the above-entitled action, hereby appeals to the supreme court of this state from the judgment made and entered in said district court on the twenty-fifth day of July, 1878, in favor of plaintiffs in said action, and against the defendants therein, and from the whole thereof.

"*Dated this twenty-first day of July*, 1879.

"HOUGHTON & REYNOLDS, Attorneys for Defendant David Jacks."

An objection was made by the Littles in the supreme court to the hearing of the appeal, on the ground that as to them no appeal had been taken. The

decision of this court is printed in 56 Cal. 370 *et seq.* The court did not directly and fully sustain the objection thus made, but in the opinion said: "In considering this cause we have regarded the appeal as to the administrator of Milton and Mary Little, his wife, not properly taken." The judgment was reversed and cause remanded, with directions to enter judgment, giving Jacks' mortgage priority. A rehearing was asked, which was denied, but the court remanded the case for a new trial. See report of the case.

The court below (respondent herein) has evidently been in doubt as to the effect of this decision upon future proceedings in the case to determine the rights of Withers and Jacks, respectively, and is now of opinion that it is necessary to proceed against all the parties, as if the case had never been tried. But the judgment rendered *against the Littles* is final. They have never been heard on appeal.

There was but one issue over which there was any contest, viz., as to which was the prior mortgage. That issue was between Withers and Jacks, and was the only issue considered by this court. Furthermore, the statement in the opinion as to the appeal is in effect a decision holding that the appeal, so far as the Littles were interested, was ineffectual,—there was no appeal as to them. That portion of the decision is not affected by the order made upon the petition for a rehearing. No other conclusion could have been reached than that the judgment, so far as it affected the Littles, was not before the court on appeal. The Littles were not before this court, and the reversal and order for a new trial affected only those who were before the court,—Withers and Jacks. *Nichols* v. *Dunphy*, 58 Cal. 605.

The court below will not be embarrassed because of the absence of the Littles as parties in determining the rights of Withers and Jacks as the case stands. The only question between them is which mortgage takes priority. The Littles care nothing how that is decided. But the Littles are interested in the question as to whether the judgment fixing the amount due to Jacks shall stand. It has stood for nine years; was entered by their consent; no one appealed from it; and the property, lots 3, 4, 5, and 6, was sold to satisfy the debt. It would be a manifest injustice to now reopen the judgment, put the note with accrued interest in a new judgment, and again sell the property (which Jacks purchased) to pay the increased amount of indebtedness and costs, or docket a personal judgment against the Littles for the deficiency.

Let the writ issue as prayed for.

We concur: SEARLS, C. J.; MCFARLAND, J., SHARPSTEIN, J.; TEMPLE, J.; MCKINSTRY, J.; THORNTON, J.

74 Cal. 224

BATES *v.* PORTER, Treasurer, etc. (No. 11,575.)

(*Supreme Court of California.* December 1, 1887.)

1. MUNICIPAL CORPORATIONS — CORPORATE LIABILITIES — SINKING FUND — "REVENUE" DEFINED.

Act Cal. 1858, § 35, incorporating the city and county of Sacramento, provides that 55 per cent. of the revenue derived from the water-rents, when paid into the treasury, shall be set apart and appropriated to the interest and sinking fund, which shall be applied for the payment of the annual interest and the final redemption of bonds issued for the city indebtedness of Sacramento. By section 28 it is made the duty of the water-works collector to pay into the treasury every week all the moneys collected. In an application by a bondholder for a writ of mandate to command the treasurer to set apart and appropriate to the sinking fund 55 per cent. of all moneys received by him, collected for water-rents in the city of Sacramento, *held*, that the meaning of the word "revenue," is not the excess of receipts over expenditures, but, as clearly denoted by the context of the statute, is the gross revenue derived from the water-rents collected and paid into the treasury, and that a writ of mandate should be issued. SEARLS, C. J., PATERSON and MCFARLAND, JJ., dissenting.

2. SAME—MANDATE TO SET APART FUND—MONEYS EXPENDED BEFORE APPLICATION. The city treasurer of Sacramento had collected the water-rents, and, after paying all expenses, including salaries for operating the water-works, set apart and appropriated 55 per cent. of the amount remaining to the interest and sinking fund. Upon petition that the court issue a mandate to the treasurer to set apart and appropriate to the interest and sinking fund 55 per cent. of the amount received from the water-rents since the first Monday in April, 1885, (a date prior to the filing of the petition,) *held*, that as that amount had already been paid out by the treasurer, although in violation of the law, the court could not grant the relief sought in that portion of the petition.

In bank. Appeal from superior court, Sacramento county; T. B. MCFARLAND, Judge.

W. C. Belcher, *Freeman*, *Bates & Rankin*, *Rosenbaum & Sheeline*, and *S. C. Denson*, for appellant. *A. P. Catlin* and *W. A. Anderson*, for respondent.

THORNTON, J. This is an application for a writ of mandate to command the respondent to set apart and appropriate to a fund known as the sinking fund, 55 per cent. of all moneys received by him collected for water-rents in the city of Sacramento. It is urged on behalf of respondent that the treasurer is bound to set apart the net receipts of the moneys above mentioned; that is, what remains of such receipts after deducting therefrom various items of expense in conducting the water-works, including salaries of its officers and employes. The contention of appellant is that the respondent is bound to set apart the gross receipts without deducting anything. We are of opinion that the contention of appellant is sustained by the law, which we shall proceed to show.

The city of Sacramento was incorporated by an act passed on the twenty-seventh of February, 1850. See St. 1850, p. 70. This act is referred to in the opinion in the case of *Meyer* v. *Brown*, 65 Cal. 583, 4 Pac. Rep. 25, 625, and some of the features of the organization of the city are there detailed. See 65 Cal. 584, 4 Pac. Rep. 25, 625. This act was amended as to the fifth and twentieth sections at the same session of the legislature by an act passed on the twenty-sixth of March, 1850. St. 1850, p. 96. By an act passed in 1851, (St. 1851, p. 391,) which became a law by permission of the governor, who neither approved nor vetoed the bill, a new act of incorporation was enacted. This act repealed the former acts above mentioned, (section 44, Act 1851, p. 401.) The act of 1851 was modified by the act of April 28, 1852, (see St. 1852, p. 19,) by amending the seventh and sixteenth sections thereof. On May 3, 1852, (St. 1852, p. 196,) an act was passed authorizing the mayor and common council of the city to contract, by special ordinance, in such manner as they might choose, with any association, person, or persons, to supply the said city with water, the act declaring that "any contract or contracts so made and entered into, shall be valid and binding in law." The act of 1851 above mentioned was again amended in 1855 by the act of thirty-first of March, (St. 1855, p. 63.) By section 9 of this act, the common council was empowered on their first meeting after a general election, or as soon thereafter as the same could conveniently be done, to appoint, in such manner as the council might prescribe, the following officers, *inter alia*, to serve during the pleasure of the council, to-wit, one superintendent of water-works, and one engineer of water-works, the salary of the latter office not to exceed $150 per month. By section 4 of this act, amending section 30 of the act of 1851, the salary of the superintendent of the water-works was fixed at $2,000 per annum. St. 1855, p. 64. By section 12, provision was made for the collection of water-rents by the city collector, with power in the common council by ordinance, to require the superintendent of the water-works to collect the water revenue. St. 1885, p. 66. The powers conferred in the act of incorporation of the city on the city council, (see act of 1851, § 7, St. 1851, p. 393,

and the amendatory act of 1852, p. 195, amending section 7 of the act of 1851) and the act of May 3, 1852, above stated, are ample to enable the authorities of the city of Sacramento to erect and maintain water-works, and to charge and collect water-rents.

Frequent references in subsequent acts of the legislature are made to the water-works as existing, and the revenue arising therefrom in the shape of water-rents. These may be found by examining the statutes. On the point of authority in the city authorities in the matter of erecting and maintaining the works above mentioned, and to collect water-rents, therefore, it is unnecessary to make more particular reference to these enactments. All the statutes affecting the city and county of Sacramento may be found mentioned in 1 Hitt. Gen. Laws, on pages 970–972

Early in its existence the city became indebted. It had power to borrow money which it had used for purposes not improper, and it had creditors who, as is usually the case, demanded payment. Provision was made by the legislature empowering the city to fund its indebtedness, and to issue bonds therefor. The legislation on this subject, so far as regards the case in hand, (for the action here was brought by a creditor and bondholder of the city,) will be referred to in the further progress of this opinion.

The main question in this case turns upon the construction of the act of 1858, (St. 1858, p. 267) This act is entitled "An act to repeal the act passed March 26, 1851, entitled 'An act to incorporate the city of Sacramento,' and the several acts amendatory and supplementary thereto, and to incorporate the city and county of Sacramento."

By its first section the city and county of Sacramento were consolidated, and for the government of the territory then known as the city and county of Sacramento there was created a board of supervisors, and this board of supervisors and their successors in office it was declared should be a body politic and corporate, under the name and style of "The City and County of Sacramento," and by that name shall be known in law It was in the same section invested with extensive powers. It was further provided in the same section that "the city and county shall not be sued in any action whatever, nor any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects be subject to attachment, levy, or sale, or any process whatever, either mesne or final."

By the second section of this act, the corporation constituted by it was made the successor of the corporation by this act dissolved, and heretofore known as "The Mayor and Common Council of the City of Sacramento." It was declared to be the owner of all the property, actions, rights of action, moneys, revenues, income, and trust at that time vested in or belonging or in anywise appertaining to the corporation known as "The Mayor and Common Council of the city of Sacramento."

The act of 1858 contains, *inter alia*, the following sections:

"Sec. 12. The treasurer of said city and county shall receive and safely keep in a secure, fire-proof vault, to be prepared for the purpose, all moneys belonging to, or which shall be paid into, the treasury, and shall not loan, use, or deposit the same, or any part thereof, with any banker or other person, nor pay out any part of said moneys, except upon demands authorized by law, and after they have been duly audited and ordered paid. He shall keep the key of said vault, and not suffer the same to be opened, except in his presence. At the closing up of the same each day, he shall take an account, and enter in the proper book the exact amount, of money on hand; and at the end of every month he shall make and publish a statement in one of the daily papers published in the city of Sacramento, of all receipts into, and payments from, the treasury, and on what account. If he violate any of the provisions of this section, he shall be considered a defaulter, and shall be deemed guilty of a misdemeanor in office, and he shall be liable to removal, and shall be pro-

ceeded against accordingly. If he loan or deposit said moneys, or any part thereof, contrary to the provisions of this section, or apply the same to his own use, or to the use of any other person, in any manner whatsoever, or suffer the same to go out of his personal custody, except in payment of audited demands upon the treasury, he shall be deemed guilty of felony, and on conviction thereof, shall suffer imprisonment in the state prison for a period not less than three nor more than ten years.

"Sec. 13 The treasurer shall keep the moneys belonging to each fund separate and distinct, and shall in no case pay demands chargeable against one fund out of moneys belonging to another. The said treasurer shall give his personal attendance at his office during office hours; and if he absent himself therefrom, except on account of sickness or urgent necessity, he shall lose his salary during his absence. For the purpose of collecting licenses he may employ a deputy, whose compensation shall be fixed by the board of supervisors, at a rate not exceeding $5 per day when necessarily and actually employed."

"Sec. 16. Every demand upon the treasury, except the salary of the auditor, and including the salary of the treasurer, must be acted on by the board of supervisors, and allowed or rejected in the order of presentation, and must, after having been approved by the board of supervisors, before it can be paid, be presented to the auditor of the city and county to be allowed, who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury is authorized by law, and out of what fund. If he allow it, he shall indorse upon it the word 'allowed,' with the name of the fund out of which it is payable, with the date of such allowance, and sign his name thereto. No demand shall be approved, allowed, audited, or paid, unless it specify each several item, date, and value composing it, and refer to the law, ordinance, contract, or authority, by title, date, and section, authorizing the same: provided, that in all cases demands shall be paid in the order of their approval by the board of supervisors.

"Sec. 17. The auditor must number and keep a record of all demands allowed by him, showing the number, date, date of approval, amount, and name of the original holder, on what account allowed, and out of what fund payable. The demand of the auditor, on account of his monthly salary, may be audited and allowed by the board of supervisors. The auditor is required to be constantly acquainted with the exact condition of the treasury, and every lawful demand upon it, and shall report to the president of the board of supervisors on the Monday of each week, or oftener if required, the condition of each fund in the treasury. He shall keep a complete set of books for the city and county, in which shall be set forth, in a plain and business-like manner, every money transaction of the city and county, so that he can, at any time when requested, tell the state of each and every fund, where the money came from, to what fund it belonged, and how and for what purpose it was expended; and also the collections made and the money paid into the treasury by each and every officer. He shall issue all licenses and permits, except as otherwise provided in this act, and countersign all warrants on the treasury. And until the general election, in the year 1859, he shall receive for his compensation at the rate of $3,000 per annum, payable from the salary fund, as provided in section 36 of this act.

"Sec. 18. No demand upon the treasury shall be allowed by the auditor, or approved by the board of supervisors, in favor of any person or officer in any manner indebted thereto, without first deducting the amount of such indebtedness; nor to any person or officer having the collection, custody, or disbursement of public funds, unless his account has been duly presented, passed, approved, and allowed, as required in this act; nor in favor of any officer who shall have neglected to make his official returns, or his reports, in writing, in the manner and at the time required by law, or by the regulations established by the board of supervisors; nor to any officer who shall have

neglected or refused to comply with any of the provisions of this or any other act of the legislature regulating the duties of such officer, on being required in writing to comply therewith, by the president of the board of supervisors, or the supervisor of his respective district."

"Sec. 28. Every officer, or other person, having the control, collection or custody of any money collected for taxes, licenses, water-rents, fees of office, or for any other account not otherwise herein provided, shall pay the same into the treasury on the Saturday of each week; and shall on the same day file the treasurer's receipt with the auditor; and shall at the same time file with the auditor a statement, under oath, of the sources from whence the money came, and that the money so paid over is the total amount collected since his last payment; and such statement shall also be filed in duplicate with the clerk of the board of supervisors. If the county clerk, recorder, sheriff, clerk of water-works, harbor master, or any other officer or person having the control or custody of any money collected for or belonging to the state or city and county, or any money collected for fees which this act provides shall be paid into the treasury, shall fail or neglect to pay over the fees or moneys collected by him, as required by the preceding section, or shall fail to make his affidavit, he shall forfeit his office; and it shall be the duty of the auditor to inform the president of the board of supervisors, in writing, of such failure; and at the next meeting of said board, after the said president shall receive such information, the said board shall enter an order requiring such officer to show cause, on a certain day, why such office should not be declared vacant; and, upon the return-day of such order, or at such time as the matter may be adjourned to, they shall proceed to hear and determine the matter; and, if such officer shall be found guilty of such failure, his office shall be declared vacant."

"Sec. 34. The board of supervisors shall not have power to levy any greater taxes than as follows, viz: On the real and personal estate, except such as is exempt by law, throughout the city and county, a tax of 100 cents on the $100; such state taxes as the laws may require, and, in addition thereto, they shall levy for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, a tax of 100 cents on the $100; also, a tax for road purposes of 5 cents on the $100 on the property outside the city limits. All of which taxes shall be levied and collected strictly in accordance with the revenue laws of the state, except as may be otherwise provided in this act: provided, that nothing contained in this section shall prevent the board of supervisors from levying, in addition, a tax in accordance with an act passed February, 1858, entitled 'An act to amend an act passed April 27, 1857, entitled "An act to submit to the people of the counties of Sacramento and El Dorado, a proposition for the construction of a wagon road."'

"Sec. 35. The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, water-rents, and fines collected in the mayor's court, or otherwise, when paid into the treasury, shall be set apart and appropriated as follows: 55 per cent. to an interest and sinking fund, which shall be applied for the payment of the annual interest and the final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act; 15 per cent. to a salary fund, which shall be applied to the payment of the salaries of municipal officers as provided in this act; 8 per cent. to a school fund, which shall be applied to the support of schools within the city limits; and the balance, 22 per cent., to a fund to be used for all such necessary municipal expenses as are not otherwise provided for in this section, and shall be called the 'Contingent Fund.'

"Sec. 36. The revenue collected or accruing prior to the first day of January, 1859, throughout the city and county, except such as may be collected for municipal purposes within the city limits, is hereby set apart and appropriated

as follows, viz.: Twelve per cent. to a school fund, to be used for school purposes as provided by law; 8 per cent. to the pauper and indigent sick fund; 18 per cent. to the salary fund; 12 per cent. to the contingent fund; and the balance to a general fund, which shall be applied to the payment of the outstanding auditor's warrants lawfully drawn on the treasury, and payable in the order of their registry; and the revenue accruing and collected for the county after the first day of January, 1859, when paid into the treasury, 25 per cent. shall go to the interest and sinking fund; 10 per cent. to the school fund; 8 per cent. to the pauper and indigent sick fund; 25 per cent. to the salary fund, and the balance, 32 per cent., to the general fund, all of which shall be exclusively applied to the several purposes for which such funds were set apart; and if, at the close of any fiscal year, there shall remain a surplus in either of the funds mentioned in section 35, such surplus moneys shall be transferred to the interest and sinking fund provided in such section 35; and if a surplus shall be found at the end of any fiscal year in either fund mentioned in section 36, such surplus shall be transferred to the interest and sinking fund mentioned in said section 36, and any transfer of any sum or surplus from one of the funds mentioned in section 35 and section 36 to another fund made at any other time, or in any other manner than as provided in this act, is hereby strictly prohibited, and any violation of such provision, on the part of any officer, shall constitute a misdemeanor, punishable by fine of not less than $500, or imprisonment in the county jail not less than three months. All money now in the treasury shall be appropriated as provided in this section.

"Sec. 37. For the purpose of liquidating, funding, and paying the claims against the city and county of Sacramento hereinafter specified, the treasurer shall cause to be prepared suitable bonds of the county of Sacramento, not exceeding the sum of $600, and for the city of Sacramento, not exceeding the sum of $1,600,000, bearing interest at the rate of 6 per cent. per annum, from the first day of January, 1859, and payable at the office of the treasurer. Said claims shall be funded in the order of their reception; shall, in the order of reception, be entitled to the shortest time; and one-fourth of the whole amount made payable on the first day of February, 1888; one-fourth on the first of February, 1893; one-fourth on the first of February, 1898; and the balance on the first of February, 1903. The interest on said bonds shall be made payable at the office of the treasurer, on the first day of January of each year. Said bonds shall be signed by the president of the board of supervisors, countersigned by the clerk of the board of supervisors, and indorsed by the treasurer, and shall have the seal of the city and county affixed thereto. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to the bond. Said coupons consecutively numbered, shall be signed by the treasurer. It shall be the duty of the book-keeper of the city and county, and the treasurer, each, to keep a separate record of all bonds issued, showing the number, date, and amount of each bond, to whom issued, upon what claim, and its amount; and none of the claims herein specified shall be liquidated or paid, except in the manner herein provided.

"Sec. 38. The following claims shall be received and funded under the provisions of this act: *First.* All legal debts or liabilities against the county of Sacramento, which may be unpaid and unprovided for by this act on the first day of January, 1859. The annual interest and principal of all bonds issued for claims mentioned in this section shall be paid from the interest and sinking fund, as provided in section 36, and in the manner otherwise provided in this act. *Second.* All legal debts or liabilities against the city of Sacramento, which may be unpaid and unprovided for by this act on the first day of January, 1859. The annual interest and principal of all bonds issued for claims against said city, shall be paid from the interest and sinking fund provided in section 35, and in the manner otherwise provided in this act."

By section 24 the salaries of certain officers are fixed, and it was declared that these salaries shall be paid out of the salary fund provided in the act. See sections 35, 36, St. 1858, p. 279. The salaries of the president, members and clerk of the board of supervisors, county auditor, and treasurer were to be paid one-half out of the salary fund provided for in section 35 and one-half out of such fund provided for in section 36 of the act, and the salaries of the sheriff, county clerk, assessor, district attorney, county judge, and superintendent of public schools were to be paid out of the salary fund provided for in section 36. By the last clause of section 24 it was provided that "all municipal officers shall be paid out of the salary fund provided for in section 35 of this act." Among the officers mentioned in section 24 are clerk and engineer of the water-works. Laborer at water-works is also mentioned. The salary of the clerk is fixed at $1,500 per annum, of the engineer at the same sum, and the pay of the laborer at $75 per month. The board of supervisors is, by section 7, of the act, empowered to elect a clerk and engineer of water-works. These are all of the municipal officers who are to be paid out of the salary fund provided in section 35. The laborer of the water-works is doubtless to be paid out of the same fund.

It will be seen that all moneys collected by any officer who has the control, collection, or custody of any money collected for taxes, licenses, *water-rents*, fees of office, or any other account not otherwise provided in the act, *are required to be paid into the treasury* on the Saturday of each week. Section 28. This duty is enforced under the heaviest penalties, which are prescribed by section 28. It must be further observed that the revenues of the city and county are set apart and appropriated to certain funds therein mentioned. By section 35, *the revenue* derived from and within the city limits for municipal purposes is to be set apart and appropriated as follows: *First*, 55 per cent. to an interest and sinking fund; *second*, 15 per cent. to a salary fund; *third*, 8 per cent. to a school fund; *fourth*, 22 per cent. to a contingent fund.

A perusal of section 36 will show the funds created by that act, and the distribution to be made between them. But let it be noted that of the sinking and interest fund of section 35 (55 per cent. of the revenue mentioned therein) it is enacted in these words: "Which shall be applied to the payment of the annual interest of and final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act." Section 35. The most cursory perusal of sections 35 and 36 will show that the funds therein mentioned were to be devoted strictly and exclusively to the payment of the demands on them as defined by the act. The revenue mentioned in section 35, derived from and within the city limits for municipal purposes, is clearly defined by section 35 as follows: "Taxes, licenses, harbor dues, *water-rents*, and fines collected in the mayor's court, or otherwise," and "when paid into the treasury" they shall be set apart and appropriated to the several funds as set forth above. It should be further noted that the annual interest and principal of all bonds issued for claims against the city of Sacramento are by section 38 to be paid *from the interest and sinking fund* provided in section 35 of the act. By this means the interest and sinking fund thus created is exclusively devoted to the payment of the interest and principal of the bonds mentioned.

The plaintiff in this action is the holder of such bonds issued under the act of 1858. The act of 1858 was before this court in *Meyer* v. *Brown*, 65 Cal. 583, 4 Pac. Rep. 25, 625, and it was there held to be a contract between the bondholders and the city of Sacramento which could not be changed to the hurt of the bondholders by subsequent legislation of any sort. The court, in its opinion, drawn up by Justice Ross, after quoting several sections of the act, among others section 35, and referring to others, said: "Having thus made provision for the payment annually of the interest on the bonds,

and ultimately for their redemption, the legislature offered them in payment of the legal claims against the old city government. The offer was accepted, and the holders of the latter surrendered their claims, in consideration of which the consolidated government issued to them its bonds, pursuant to the provisions of the act. The bonds carried with them the pledge of an annual tax for municipal purposes, on all real and personal property within the city limits, except such as is exempt by law, of 100 cents on the $100, 55 per cent. of which to be set apart and appropriated to an interest and sinking fund, to be applied to the payment of the annual interest upon the bonds, and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims. When the bonds for whose payment, with interest, provision was thus made, were issued and accepted by the creditors of the old city government, a contract was made, as solemn and binding and as much beyond subsequent legislation as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the supreme court of the United States, in a case entitled *Louisiana* v. *Pillsbury*, reported in 105 U. S. 278."

This should be regarded as settling the law on this point. Regarding it, then, as settled to be a contract between the city and the bondholders, the question arises as to the terms of this contract. The point, then, to be considered is whether this contract extends to and embraces within its terms the gross receipts from *water-rents*, or does it only include the net receipts after deducting salaries, expenses, etc.? This must be determined by the language of the act. That part of the act to which our attention is particularly called is the first clause of section 35. That clause is as follows: "The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, water-rents, and fines collected in the mayor's court, or otherwise, when paid into the treasury, shall be set apart and appropriated as follows," etc. The section then proceeds to designate the funds, as stated above.

Now, it is said that the word 'revenue" is defined by Worcester to mean: "(1) Income or annual profit received from lands or other property;" and "(2) the income of a nation or state derived from the duties, taxes, and other sources for the payment of the national expenses;" and we are referred to the definitions given by Bouvier and Burrill. Webster gives several definitions, as follows: "(1) That which returns, or comes back, from an investment; the annual rents, profits, interest, or issues, of any species of property, real or personal. (2) Hence, return, reward; as a rich *revenue* of praise. (3) The annual product of taxes, excise, customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use." According to the last definition given by Webster, the annual produce of taxes, excise, customs, duties, *rents* collected and received into the treasury for public use is revenue. Then whatever of taxes is received into the treasury is revenue, and this accords with the contention of appellant here.

BRONSON, J., in explaining the word "income," used in a statute, in *People* v. *Supervisors Niagara*, 4 Hill, 20, said: "It is undoubtedly true that 'profits' and 'income' are sometimes used as synonymous terms, but, strictly speaking, 'income' means that which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures, while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account. 'Income,' when applied to the affairs of individuals, expresses the same idea that 'revenue' does when applied to the affairs of a state or nation; and no one would think of denying that our government has any revenue because the expenditures for a given period may exceed the amount of receipts."

The word "revenue" is used in many senses. It is like thousands of

words in our language,—ambiguous in meaning, the significance of which can only properly be determined by the words with which it is connected. Let it be conceded that the usual and ordinary meaning of the word when used alone is net income,—that which remains of the annual income of property after deducting from gross receipts the expenses incurred in producing the gross income: still we must resort to the context to find the sense in which it is used in the writing presented for interpretation. If the context indicates a meaning different from its ordinary and popular signification, we must adopt the meaning so indicated; that is, indicated by the words of the statute or instrument in which it is used. And here the context clearly denotes its meaning It is the revenue derived from water-rents, collected and paid into the treasury which is spoken of. It is so said in the thirty-fifth section. By section 28 all water-rents are to be paid into the treasury. None can be held back. The collecting officer who fails to pay in all the water-rents, forfeits his office. This officer must pay into the treasury all such moneys on Saturday of each week, and must on the same day file the treasurer's receipt for such payment with the auditor, and shall at the same time file with the auditor a statement, under oath, of the sources from whence the money comes, and that the money so paid over is the total amount collected since his last payment; and such statement shall also be filed in duplicate with the clerk of the board of supervisors. The above provisions are enacted in section 28 of the act of 1858, quoted above in full. The penal provisions above referred to follow in the succeeding part of section 28.

The word "revenue" has the same meaning in section 36. The intent is a plain one. That the above represents its terms and stipulations we have no doubt. Any act or acts of the legislature making any change in it, to the detriment of the creditor, without the consent of the bondholder, are utterly void. This court so held in *Meyer* v. *Brown*, *supra*, and still adheres to that judgment.

Much is said as to the expense of constructing the water-works, and that the city has been obliged to build a new water-works. We cannot hold that any such considerations can alter the contract, or abridge the right of the creditor The payment of the expenses of conducting the works is provided for in the act. The officers and employes are salaried, (section 24,) and there is a fund, called a "Salary Fund," created for their payment, (see section 35;) and it is declared of the salary fund that it "shall be applied to the payment of the salaries of municipal officers, as provided in the act," and for all other expenses, if any there shall be, a contingent fund of 22 per cent. of the taxes, licenses, harbor dues, water-rents, etc., is provided for their payment. Of this it may be said that if the funds provided for in the act are not sufficient to pay such expenses, resort must be had to the legislature to procure further powers to raise the money by a constitutional act of that body, which is not allowed by any act to divert from the interest and sinking fund any portion of it, without the consent of the creditor.

As to the new water-works, and the payment of the expense of building them, it may be said that the act of 1858 has no reference to such a matter. If new water-works had to be built, the legislature could provide for their erection without interfering with the funds set apart for the payment of the bonds, and, if it did not do so, the act must stand as it passed. It would not be held that if a person mortgaged the gross proceeds of his farm to his creditor, that he could take part of these funds to build a new house, when the old one, from decay, had fallen and ceased to be habitable, without the consent of the creditor; or, if fertilizers were required to make his farm productive, that he could spend any portion of the gross proceeds to purchase the fertilizing material. The necessities of the farmer may have great weight with his mortgagee, and induce him to consent to the expenditure; but the contract would bind him without such consent.

It is hardly necessary to refer to the position that for a long time the bondholder consented to a withholding of the moneys due him. The embarassment of the city may have induced this waiting on the part of the bondholder; but we know of no rule of law which would authorize us to hold that this conduct on the part of the bondholder abridged or altered his rights under the contract as made. The foregoing conclusions are strengthened by the fact that the bondholder took his securities without the right to sue the city and county. Section 1. The city had no existence as a corporation after the act took effect, and could not, therefore, be sued. In accordance with the foregoing views, the judgment must be reversed.

The prayer of the complaint, which was filed on the twenty-ninth of January, 1886, is as follows: "Wherefore this petitioner prays that a writ of mandate issue from this court, ordering and directing the respondent, the treasurer, James N. Porter, to set apart and appropriate to said interest and sinking fund 55 per cent. of the amount received from the water-rents since the first Monday in April, 1885, and for general relief in the premises, and for costs. Also that the respondent, as treasurer as aforesaid, be ordered, and directed, from time to time, as money collected from water-rents is received by him as treasurer, to set apart and appropriate 55 per cent. thereof to the interest and sinking fund of said city."

The court, among other facts, finds the following: "That since the first Monday in April, 1885, (the beginning of the fiscal year for the city of Sacramento,) and prior to the filing of petitioners' petition herein, there had been collected for water-rents within the city of Sacramento the sum of $43,763.15, and said sum had been paid to the respondent as treasurer of said city. Of this sum there has been set apart and appropriated to the interest and sinking fund the sum of $6,600, which sum is 55 per cent. of the amount remaining of said sum of $43,763.15 after paying all expenses, including salaries for operating and maintaining the water-works of said city. That all of said $43,763.15, except the said sum of $6,600, and except $5,400 paid to other funds, the balance, to-wit, $31,763.15, was paid out by said treasurer upon warrants drawn by the auditor to pay bills for the expenses of carrying on said water-works, which bills were audited and allowed by the board of trustees."

It appears from this finding that the sum of $43,763.15 had, since the first Monday in April, been collected for water-rents and paid into the treasury. Of this sum $6,600, 55 per cent. of the amount, remained "after paying all expenses," including salaries of operating and maintaining the water-works. That of this larger sum, except $6,600 and $5,400 paid to other funds, all of it had been paid out by the treasurer upon warrants drawn by the auditor, to pay bills for the expense of carrying on the water-works, which bills were audited by the board of trustees.

That the creditors were entitled to have 55 per cent. of the sum of $43,763.15 set apart to the interest and sinking fund under the law we have no doubt. But all the money, except the sums mentioned, has been paid out as above stated, and though it was a violation of law and of the rights of the bondholders, such wrong cannot be redressed in this action. That portion of the prayer of the complaint cannot then be granted. The only relief which we can grant is to command the treasurer, as money collected from the water-rents above mentioned is, from time to time, paid to and received by him as treasurer, he shall set apart and appropriate 55 per cent. of all such moneys, without any deduction whatsoever, to the interest and sinking fund of the city of Sacramento.

The judgment is reversed, and the cause remanded to the court below, and said court is directed to enter judgment as above stated. Ordered accordingly.

We concur: TEMPLE, J.; MCKINSTRY, J.; SHARPSTEIN, J.

PATERSON, J., (*dissenting.*) I dissent. The legislative acts upon which petitioner bases his demand for a writ of mandate herein are fully set forth in *Meyer* v. *Brown*, 65 Cal. 584, 4 Pac. Rep. 25, 625. The court did not in that case define the word "revenue" as used in the act of 1858. In this case the meaning of that word is the direct question in the controversy. By an act approved, and which took effect May 20, 1861, section 35 was amended by adding the following provision: "Provided, however, that all moneys received from water-rents shall be applied, so far as may be necessary, to the payment of the current expenses of the water-works, exclusive of the salaries and fees of the officers thereof, and the balance, if any, shall be distributed as is hereinafter in this section provided."

The act of April 25, 1863, repealed the act of April 24, 1858, consolidating the city and county governments, and the acts amendatory thereof, and emancipated the one from the other, and incorporated the "City of Sacramento." In section 26 of this act the language of section 35 of the act of 1858 is used, except that the word "*net*" is inserted before the words "water-rents," and in section 27 it is provided that "all revenues derived from the water-works shall be paid into a fund to be known as the 'Water-Works Fund,' and at the end of every three months, after the payment of all necessary expenses, including salaries, to carry on and keep in order the said water-works, it shall be the duty of the auditor to apportion the residue, if any there may be, in the same proportions as the other funds of the city, provided in section 26.' St. 1863e p. 426.

The court found that, "from and after the twenty-fifth day of April, 1863, there has been apportioned to the interest and sinking fund only 55 per cent. of the amount of moneys collected from water-rents, which remained after the payment of all expenses, including salaries, to carry on and keep in order the water-works, as is provided for by the act of April 25, 1863, referred to in the pleadings in this cause."

Assuming that the meaning of the word "revenue" must be gathered from the provisions of the act of 1858, it is by no means clear that it was intended to be there used in the sense claimed for it by appellant. "Revenue" and "income" are used interchangeably. Thus Bouvier defines "revenue" to be "the income of the government arising from taxation, duties, and the like," and defines "income" by saying. "The word 'income' means the gain which proceeds from property, labor, or business. It is applied particularly to individuals. The income of the government is usually called revenue." Burrill says it is "that which returns or is returned; a rent, income; amount of profit received from lands or other property." He defines "income" to be, "in a strict sense, that which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures. In a looser sense, income is used as synonymous with profits."

Under a will which required the executor to pay the income of the estate to the widow during her life, Chief Justice SHAW decided that "the 'income' mentioned in the will must be considered the *net* income, after deducting the taxes, repairs, and ordinary current expenses attending the estate, from the gross receipts for rents." *Watts* v. *Howard*, 7 Metc. 482.

In *Andrews* v. *Boyd*, 3 Metc. 434, the court said. "It does not appear to us that any fair distinction can be raised between 'income' and 'net income.' 'Net' is a term used among merchants, to designate the quantity, amount, or value of an article or commodity, after all tare and charges are deducted. The income of an estate means nothing more than the profits it will yield after deducting the charges of management, or the rent which may be obtained for the use of it. The rents and profits of an estate, the income or the net income of it, are all equivalent expressions."

In view of the uncertainty as to the meaning the legislature intended to attach to the word "revenue," in the act of 1858, the mandatory and supple-

mental acts may be regarded as simply rendering its true meaning certain, and as in no way changing, adding to, or taking from it. They should not be declared void because of the insertion of the word "*net*," unless it is clearly repugnant to the sense in which the words "revenue from water-rents" had been used in the original act.

But conceding that a change in the meaning and operation of the act has been worked, we think it is one the legislature might make without impairing the obligation of the contract. As was said in *Meyer* v. *Brown*, "the tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims." That fund is fixed, certain,—at least to a minimum,—and can never be made less until the bonds are paid. Section 34.

The receipts to be derived from the other sources are not fixed, but depend upon ordinance or statutory regulation as to rates, and are subject to be discontinued at any time. The city authorities may, subject to legislative control, fix water-rates as they deem best, without violating any vested right. The city was not bound to keep up the water-works for any time by any provision in the act of 1858. When the old works became worn out and useless, the city was under no obligation to put up new works. But it is said in answer to this that the city did build new works, and is receiving rents, and so long as the rents are received, the city is bound to set apart 55 per cent. of the gross receipts. This answer would be sound if there were anything in the act of 1858 requiring the city to fix any particular rates, or any provision fixing a minimum, as in the matter of taxes. The contract still exists, its obligations are still as solemn and binding as they were under the act of 1858, and, for aught appearing to the contrary, the changes, if the new provisions can be regarded as changing the original, not only have worked no injury to the creditors, but have been a benefit to them as well as to the inhabitants of the city. The contract being one which by its nature, so far as certain sources of revenues or receipts are concerned, depends upon contingencies and expectancies, we think it clear that the mode and manner of its performance is within the control of the legislature.

There has been no attempt to repudiate. On the contrary, the interests of both creditor and city have been advanced. In 1876 the net receipts exceeded the gross receipts of 1863. If new water-works had not been erected, the revenue from this source would long since have ceased entirely. That the acts of the legislature and of the city authorities have operated beneficially to all interested is apparent, we think, from the second finding of the court below, which is as follows: "That the water-works of the city of Sacramento, which supplied the inhabitants thereof with water at the time of the passage of the act of April 24, 1858, and at the time of the issuance of the bonds for city indebtedness provided for by said act, gradually became, by reason of decay and the growth of said city, insufficient to supply the necessary amount of water; and in 1872 the city of Sacramento, in pursuance of an act of the legislature of said state, entitled 'An act to provide the city of Sacramento with a better supply of water,' which act was approved March 30, 1872, adopted the Holly system of water-works, and purchased a new site, and built thereon another building, and put in the necessary machinery of that system.

"By the old system for supplying water, the water was pumped from the Sacramento river into tanks or reservoirs, and from thence it flowed into the city mains or water-pipes by gravitation pressure. By the Holly system, the water was pumped from the Sacramento river and forced directly into the city mains by means of force pumps used by said system. Two new and costly pumps were purchased for this purpose. By said Holly system, the pressure on the mains or pipes was greatly increased, and a new main pipe of increased strength was laid along I street of said city for the purpose of conducting the water to the lesser pipes running throughout the city and in use under the old system, and other new pipes were provided when necessary."

The petition shows that for the 10 years, including and next preceding the fiscal year 1872–73, the gross receipts from the water-works amounted to the sum of $417,891, and the net receipts $79,650; and for the 10 years following the gross receipts were $662,307, and the net receipts $258,664.

There is nothing in the decision in *Meyer* v. *Brown* opposed to the views herein expressed. That was a proceeding to compel the municipal authorities to levy a tax of 100 cents on the $100, as required by the act of April 24, 1858. The petitioner alleged that said officers, "although requested by plaintiff to levy a tax of 100 cents on the $100 as required by said act passed April 24, 1858, have failed and refused to levy the tax for the year 1883 as required by said act, but have levied a diminished tax of 50 cents on $100." The defendants denied that they were required to levy the tax claimed by petitioner, and averred "that the tax required to be levied by section 34 is not an annual or continuing tax, and that the same was levied in the year 1859, and the power to levy a further tax under said section is exhausted." That was the issue and the only issue in that case, and what is said in the opinion must be considered as referring only to the question there determined.

I concur: SEARLS, C. J.

MCFARLAND, J., (*dissenting.*) I dissent from the conclusion of the majority of the court, and concur in the dissenting opinion of Mr. Justice PATERSON. It must be remembered that the water-works in question are conducted by the city of Sacramento *as a business*, just like the business of any other water company, or of any mining, manufacturing, railroad, or mercantile company. In such a case the "revenue" is, of course, the excess of receipts over expenditures. If other financial miracles could be wrought as easily as the turning of the gross proceeds of a business into revenue, "then chapels had been churches, and poor men's cottages princes' palaces."

74 Cal. 188

PEOPLE *v.* BITANCOURT. (No. 20,234.)

(*Supreme Court of California.* November 30, 1887.)

1. EXCEPTIONS, BILL OF—SETTLEMENT—APPLICATION TO SUPREME COURT—PETITION.
 Pen. Code Cal. § 1174, provides that, when the judge in any case refuses to allow an exception in accordance with the facts, the party may apply to the supreme court to prove the same. Defendant's counsel moved the supreme court to have a bill of exceptions settled according to the facts, but did not set out in the petition wherein the bill as settled was incorrect, nor specify the facts to be proven, and their materiality. *Held*, that the application was defective and must be denied.
2. BURGLARY—INDICTMENT—OWNERSHIP OF BUILDING—VARIANCE.
 An information charged that the defendant burglariously entered the building of one B., "situated," etc. The proof was that another party was interested in the building with B. It did not appear that there was any other building in the locality corresponding to the description in the information. *Held*, under Pen. Code Cal. § 956, providing that, where the offense involves the commission of a private injury, an erroneous allegation as to the person injured is not material, that the variance was immaterial.

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

G. H. Perry, for defendant. *Geo H. Johnson*, Atty. Gen., for the People.

BY THE COURT. In this case there is a preliminary matter as to the bill of exceptions, concerning which the facts are as follows: The proposed bill was presented to the judge of the court below on June 6, 1887. On June 7th the appellant's counsel filed a verified petition stating the presentation of the proposed bill, and that the judge "refuses to allow certain exceptions of said defendant," and praying for leave to make proof of said exceptions. Upon this petition an order was made on the same day referring the bill to the Honorable WILLIAM T. WALLACE for settlement. On June 15th the appellant's

counsel filed another verified petition in the appellate court, stating that when he appeared before Judge WALLACE on June 14th, in pursuance of notice, "it was then and there discovered" that the bill of exceptions had been settled by the judge before whom the case was tried on June 13th, and forwarded by him to the appellate court; and that "said bill of exceptions, as settled, does not conform to the truth," and praying for an order directing Judge WALLACE to proceed with the settlement of a bill in conformity with the facts. Upon this second petition the judge of the court below filed an affidavit stating, in substance, that he never had refused to allow any exceptions, but had taken the whole matter under advisement; and that the bill had been settled by him on June 6th, "before the issuance of the order herein by the supreme court." The statement that the judge never refused to allow any exceptions is corroborated by the affidavits of the district attorney and the short-hand reporter. On June 28th the appellate court rendered a decision that the order of June 7th be set aside for insufficiency of the petition, and because no notice of the application had been given to the judge or the district attorney, and that the petition of June 15th was insufficient, and that it be denied without prejudice. On June 20th the appellant's counsel, pursuant to notice, made a motion "for an order to have the bill of exceptions in the above-entitled action settled according to the facts;" and this motion was submitted.

It is settled that if the judge before whom a case was tried, refuses to settle any bill of exceptions,—that is to say, if he refuses to take any action in the matter,—and the refusal is without cause, he may be compelled to take action by a writ of *mandamus*, (*People* v. *Lee*, 14 Cal. 510; *People* v. *Keyser*, 53 Cal. 184; *Lin Tai* v. *Hewill*, 56 Cal. 117; *People* v. *Crane*, 60 Cal. 279,) although the writ will not issue to compel the settlement in any particular way, (*People* v. *Judge of Tenth District Court*, 9 Cal. 20.) If the refusal is not to take any action whatever, but merely to settle the bill in accordance with the facts, application may be made to the appellate court for redress. The provision is that, "if the judge in any case refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner and under such regulations as that court may prescribe." Pen. Code, § 1174. Where, however, as in the present case, the bill has been settled by the judge, the application to this court for leave to prove the facts in support of the bill of exceptions should set forth distinctly wherein the bill as settled is incorrect, and specify the facts which it is desired to prove, as well as their materiality. It may well be that the facts which the applicant desires to substantiate, and the exceptions founded thereon, are of no importance to an adjudication of the cause. The remedy provided by section 1174 of the Penal Code should be resorted to only in aid of justice, and upon such affirmative showing as proves the judge of the court below derelict in some particular whereby the rights of the applicant are jeopardized.

The application is defective in all the particulars indicated, and must be denied.

Upon the merits, the question is whether there was a variance between the information and the proof. The information charged that the defendant burglariously entered the building "of one C. E. Benedict, situated on Nineteenth avenue, between K and L streets, south of Golden Gate park, in the city and county of San Francisco." The proof was that one J. S. Benedict was interested in the building with C. E. Benedict. It is argued that the ownership of J. S. Benedict was matter of essential description. It does not appear that there was any other building in the locality which would correspond to the description in the information, and we think the variance was immaterial. Pen. Code, § 956; *People* v. *Edwards*, 59 Cal. 359.

The motion for an order of reference is denied, and the judgment and order appealed from are affirmed.

74 Cal. 217

In re Estate of McConnell, Deceased. Graham *v.* Superior Court of Colusa Co. (No. 12,246.)

(*Supreme Court of California.* November 30, 1887.)

Certiorari—When Lies—Review of Order Authorizing Executor to Mortgage—Decedent's Estate.

Leg. Acts Cal. 1887, p. 115, provide for the mortgaging by an executor of his decedent's land. Code Civil Proc. § 963, provides for an appeal to the supreme court from an order in favor of, or against the sale or "conveyance" of, real property. Section 1215, which is part of the article treating of recording written instruments, provides that "conveyance," as used in this article, includes every instrument in writing by which any estate in real property is created, aliened, or mortgaged. *Held*, that the word "conveyance" in section 963 included mortgages, and that a writ of *certiorari* will not lie to review an order of the superior court allowing an executor to mortgage his decedent's estate.

Commissioners' decision. In bank.

In superior court, Colusa county; E. A. Bridgford, Judge.

Geo. A. Blanchard, for appellant. *H. M. Abbey*, for respondent.

Foote, C. The petition in this case is for a writ of *certiorari* to review the decision of the superior court of Colusa county, in making an order authorizing an executor to mortgage the lands of his decedent, under a statute approved March 15, 1887, to be found on page 115 of the Legislative Acts of the year 1887. It is contended that the petition should be dismissed, because a right of appeal exists (under section 963, Code Civil Proc.) from the order of the court, which it is sought to have reviewed by this tribunal. The words of that section pertinent to the matter in hand are: "An appeal may be taken to the supreme court from a superior court in the following cases: (1) * * * (2) * * * (3) From a judgment or order granting or refusing a new trial, * * * or against or in favor of directing the partition, sale, or conveyance of real property."

If the word "conveyance," as above used, can be held to include "mortgage," then undoubtedly the right of appeal existed from the order made in the premises, and the petition filed herein must be dismissed. It is true that it is a well-settled rule of this court that a mortgage "is merely a lien upon and passes no estate or interest in the mortgaged premises, except for purposes of taxation." *Williams* v. *Mining Ass'n*, 66 Cal. 201, 5 Pac. Rep. 85, and cases cited. But that was intended merely to define the nature of the interest which passed to the premises included in the mortgage. It did not declare what the legislative intent was in using the word "conveyance" in section 963, *supra*, as affecting the right of appeal. Section 1215 of the Civil Code, which is a part of the article treating of the recording of written instruments, is as follows: "The term 'conveyance,' as used in sections 1213 and 1214, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills.

In *Hassey* v. *Wilke*, 55 Cal. 528, the word "conveyance," as used in sections 1213 and 1215 of the Civil Code, is held to embrace mortgages. From this it will be perceived that the word "conveyance" has been used by the legislature in a sense which would include the term "mortgage." And, considering that much importance must necessarily be attached to such an order as that which authorizes the "mortgaging" of a decedent's land by his executor, it would appear that when the legislature placed the word "conveyance" in section 963, *supra*, it must have intended it to be taken in a broad and comprehensive sense, similar to that given to it in the sections of the Civil Code, *supra*.

Since the right of appeal existed from the order under consideration, it follows that the writ of *certiorari* cannot be invoked. Section 1068, Code Civil Proc; Hayne, New Trials, § 302.

For these reasons the writ prayed for should be denied, and the petition dismissed.

I concur: BELCHER, C. C.

HAYNE, C., took no part in this decision.

BY THE COURT. For the reasons given in the foregoing opinion the writ is denied and the petitioner dismissed.

2 Cal. Unrep. 812

PEOPLE v. CITY AND COUNTY OF SAN FRANCISCO.

(*Supreme Court of California.* November 30, 1887.)

1. PUBLIC LANDS—DECREE AND PATENT—BOUNDARIES—CONFLICTING TITLES.
 A decree of the United States circuit court, confirming a Mexican grant of lands, described them as a tract lying above high-water mark, bounded on three sides by the sea, and on the other by a direct line to be so run as to include the required quantity. The patent, issued by virtue of the authority of the decree and in pursuance thereof, granted a tract of land described by courses and distances which, if followed, would include a large tract lying below high-water mark, to which the state claimed title by virtue of act of congress of September 28, 1850. *Held*, in an action by the state to quiet its title, that the patent was not conclusive, but that the decree, by virtue of which it was issued, was entitled to be read in connection therewith in determining what lands were conveyed, and that the natural boundaries called for in the decree would overrule the courses and distances of the patent.[1]
2. SAME—ACTION TO QUIET TITLE—PLEADING.
 In an action to determine an adverse claim to certain lands wherein the state was plaintiff, the complaint alleged that the lands were below high-water mark, and consequently belonged to the plaintiff as swamp lands, by virtue of act of congress of September 28, 1850; that the defendant, as successor in interest to a Mexican citizen, obtained a decree from the United States circuit court, confirming its title to a tract of land described as included between certain boundaries, and as lying above high-water mark. The patent, issued by virtue of this decree, described a tract of land by courses and distances which, if followed, would include the lands in dispute. *Held*, that the complaint stated a good cause of action, in that if the allegations were true the plaintiff would be entitled to a decree, and a demurrer thereto should be overruled.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Phillip G. Galpin and *E. C. Marshall*, Atty. Gen., for appellant. *John Lord Love*, City & Co. Atty., and *Garber, Thornton & Bishop*, for respondents.

PATERSON, J. This is an action to determine an adverse claim to 150 acres of land, more or less, situated at the northern extremity of the peninsula of San Francisco, and the appeal is from a judgment rendered in favor of the defendant on demurrer to the complaint.

It is alleged in the complaint that the premises in dispute were below ordinary high-water mark at the date of the purchase from Mexico, and ever since have been; that on September 28, 1850, the congress of the United States passed an act granting to the state the swamp lands within her limits; that the lands in dispute were and are swamp lands, and that the title thereto is in the state; that by the treaty of Guadalupe Hidalgo and the act of March 3,

[1] In cases of conflict in the description of land in a deed, between courses and distances on the one hand, and monuments on the other, the latter must control. Church v. Stiles, (Vt.) 10 Atl. Rep. 674; McAnninch v. Freeman, (Tex.) 4 S. W. Rep. 369, and note.

1851, the United States guarantied the protection of the property of all Mexican citizens within the state at the date of the conquest; that under said act of March 3, 1851, the city of San Francisco, claiming to be successor in interest of the pueblo of San Francisco, a Mexican citizen, filed a petition before the board of commissioners established by the act for a determination of its claim to four leagues of land on the peninsula of San Francisco; that the board, after due proof, made a decree in the premises; that the cause was afterwards appealed to the United States district court for the Northern district of California, and was thence transferred to the circuit court of the United States for the circuit of California under a special act of congress of July 1, 1864; that the circuit court made a final decree adjudicating the case as between the United States and the city of San Francisco, and confirming the claim of the city to the lands therein described, which decree is recited in the amended complaint and describes the premises confirmed as a "tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh day of July, 1846) on which the city of San Francisco is situated, as will contain an area of four square leagues, said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions," etc. It is then alleged that the premises in question are not within these boundaries, and that under the laws of Mexico the pueblo could not and did not own land below ordinary high-water mark, nor said premises.

The complaint further avers that, for the purpose of carrying out the decree, a survey was made and approved by the United States surveyor general in 1867–68, of which notice was duly given and advertised as required by statute; that objections were made to the survey by parties interested in lands embraced therein, and affidavits and proofs were taken in support of the survey; that the surveyor general forwarded to the commissioner of the general land-office a copy of the survey and objections and proofs, with his opinion thereon; that after a full hearing of the parties interested, the commissioner, in November, 1878, decided in favor of the survey, but allowing an appeal to the secretary of the interior; that no appeal was taken by the city, but the military authorities appealed from that part of the decision which related to the Presidio Reservation, within which the premises in dispute were not included; that on the appeal the secretary reversed the commissioner's decision, disapproved the survey, and ordered a new survey, and transmitted his decision, directions, and instructions to the commissioner; that a new survey and plat were therefore ordered by the commissioner, and in December, 1883, a new survey and plat were made by the surveyor general, which included the premises in controversy; that the surveyor general indorsed on the new survey his certificate that the same was made in accordance with the instructions of the commissioner, and then, having signed and sealed the same with his official seal, returned it and the field-notes of the survey to the commissioner of the general land-office; "that thereafter a patent in due form of law, based upon the said last-mentioned plat and survey, was issued under the great seal of the United States, and signed by the president thereof, which purported, by virtue of the authority of said decree, and in pursuance thereof, to grant and convey to the city of San Francisco" the land embraced in said last-mentioned survey, and including the premises in controversy. The complaint then alleges the consolidation of the city and county, and its succession to all the rights, title, and interest of the city under the decree, survey, and patent; that under the patent and otherwise the defendant claims an interest in the premises, and that the patent is a cloud on plaintiff's title. The premises are then described by courses and distances referring to "Alardt

and Minto's survey of the pueblo of San Francisco, filed in the office of the surveyor general of the United States, in the city of San Francisco, June 23, 1882."

The only question is, does the complaint state facts sufficient to constitute a cause of action? Upon her admission into the Union, the state of California became the owner by virtue of her sovereignty of all tide-water lands within her borders, lying below high-water mark, except such as had been disposed of by the Mexican government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The state could not take more than the United States received Necessarily, therefore, the claim of the state by virtue of her admission and her sovereignty was subordinate to such prior equities, and subject to the power of the federal government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the extreme boundaries of larger tracts. *Teschmaker* v. *Thompson*, 18 Cal. 11; *Lux* v. *Haggin*, 69 Cal. 255, 10 Pac. Rep. 674; *Le Roy* v. *Dunkerly*, 54 Cal. 452.

There is a distinction between the case of *Goodtitle* v *Kibbe*, 9 How. 471, and cases like the one at bar, which is clearly shown and explained by Chief Justice FIELD in *Teschmaker* v. *Thompson*, *supra*.

The United States government has exercised the power vested in it, and has, through its courts, and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the city of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant, finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving as the boundaries thereof on the west, the north, and the east the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such a line as would include between it and the high-water lines north of it said four square leagues of land. This, it seems, the surveyor did not do; but ignoring the natural boundaries, fixed by the court in its decree for the west, north, and east, ran his lines into the sea below high-water mark, and included within his description of the tract by *metes and bounds* about 150 acres of land belonging to the state. Following the survey, the patent describes the land by metes and bounds, and the only questions to be considered—if it be true that the United States has the power which we have said it possesses—are, can the decree be read in connection with the patent? And which shall control, the boundaries given in the decree, or those given in the patent?

It is claimed by respondent that the patent is conclusive against the state as to location and boundaries of the pueblo grant, and it must be conclusively presumed in this action that the description by metes and bounds conforms to the decree. We do not think that this contention can be maintained in reason or upon authority. In the cases cited there was no variance between the decree of confirmation and the patent. In *Teschmaker* v. *Thompson*, *supra*, the grant was *assumed* to be one of *quantity* only The grant was confirmed by the court; and its boundaries as defined in the decree were followed in the patent, which was issued in November, 1857, at which time the federal courts controlled the surveys, and were empowered and expected to make them conform to the decree. The provisions of the act of March 3, 1851, had been regularly followed by the tribunals appointed to determine the claim and to fix the boundaries of the land. There was no variance or conflict between the decree and the patent as to description, and the court there held that the power of the government to determine the question as to the validity of the claim, and the extent and boundaries of the land having been regularly pursued, the patent was conclusive, although it appeared that it in

fact included lands lying below high-water mark. The defense in that case was that the land belonged to the state of California absolutely, by virtue of its sovereignty, and that the government of the United States could not by any proceeding had under the act of March 3, 1851, deprive the state of its title thereto. *Ward* v. *Milford*, 32 Cal. 365, was in all respects like *Teschmaker* v. *Thompson*, *supra*, page 370.

Many of the cases cited relate to grants with no specific boundaries whatever. In none of the cases cited by respondent is the question of the power of the officer to issue a patent for land not embraced in the decree considered. That question is important here, because the land in controversy, unlike the public domain of the United States, was not within the jurisdiction of the land department of the government, unless placed there by the decree of confirmation, and because the only unknown or undetermined line is that which bounds the tract on the south side. Upon all other sides, the high-water mark is the monument between the land of the city and that of the state. The sea is a fixed boundary.

As stated before, the government of the United States is in duty bound to carry into effect the stipulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by congress, and it would seem that when congress vested in the federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the surveyor general should "follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries," and that "it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him," that the officers of the land department are as to such lands merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Such seem to have been the views of this court as expressed in *More* v. *Massini*, 37 Cal. 432, where the patent granted certain lands described by metes and bounds, (following the survey,) but the court said: "The land *confirmed* is bounded on the south by the seashore, and the land included in the survey will also be held to be bounded on the south by the seashore, unless the calls imperatively demand other boundaries. When the decree of confirmation fixes the exterior bounds of a *rancho*, whether it is one granted with specific boundaries, or one of a specific quantity within a larger area, the presumption is that the lines of the survey coincide with, or at least do not extend beyond, the exterior limits or bounds of the decree; for the survey is not an independent act, but is an act performed under the decree, and preparatory to its being carried into effect by a patent. * * * It appears by the plat that, following the courses and distances of the survey, portions of the sea will be included in the lines of the *rancho*. *This is inconsistent with the calls of the decree of confirmation, which confirms a tract bounded by the seashore.*"

In that case the patent did not show upon its face that any land below high-water mark was included in the tract granted, but the fact was shown at the trial by witnesses,—surveyors. It is true the patent recited the description of the tract as confirmed by the decree, but the land described in the patent was the tract as surveyed, giving the metes and bounds. The recital in the patent referred to in the complaint herein is sufficient, we think, to connect the decree with the patent as part of the chain of title. Recitals of this character show, and are intended to show, why the patent was issued. They preserve—like recitals in deeds between individuals—the connection in the chain of title; are binding upon the grantee; and the muniments of title referred to become links on which the strength of the title may be tested. Where the deed recites the record of the authority upon which it is made, the record referred to becomes a part of the deed, and the grantee takes with notice of its limitations. *Cleveland* v. *Hallett*, 6 Cush. 404; Devlin, Deeds, §§ 1000, 1003.

Upon the allegations of the complaint, and the authority of *More* v. *Massini*, *supra*, we think that the plaintiff would be entitled to read the decree in connection with the patent, and if the facts stated be found to be true, would be entitled to a decree quieting title to the lands in controversy. In case of a conflict, courses and distances must yield to monuments. Where water-courses, or mountains, or any other natural objects, are called for in patents, distances must be lengthened or shortened, and courses varied so as to conform to those objects. Mistakes in distances and courses are more probable and more frequent than mistakes as to trees, rivers, mountains, and other objects capable of being clearly and accurately fixed. *McIver* v. *Walker*, 9 Cranch, 177.

Judgment reversed, with directions to overrule the demurrer, and allow the defendant to answer.

We concur: SEARLS, C. J.; THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN J.; MCFARLAND, J.; TEMPLE, J.

74 Cal. 183

CARIT *v.* WILLIAMS and others. (No. 9,747.)

(*Supreme Court of California.* November 30, 1887.)

1. INSOLVENCY—DISCHARGE—DEBT REDUCED TO JUDGMENT—REVIEW OF CAUSE OF ACTION.

Defendant applied to the court to have an execution against him stayed, and a judgment satisfied, by reason of a certificate of discharge in insolvency proceedings. *Held*, that the court had the right to go behind the judgment, and examine the pleadings; and where they showed the original claim was created by fraud, and not barred by the discharge, it was not so merged in the judgment as to create a new debt subject to be discharged by the insolvency certificate.

2. SAME—DENIALS IN ANSWER—PRESUMPTIONS OF AVERMENTS OF COMPLAINT.

Defendant moved to have an execution set aside, and the issuance of any further execution stayed, and the judgment satisfied on account of his discharge under the insolvency act. In the suit in which judgment had been entered and execution issued, the complaint could not be found, but the answer was, and it showed that the only material denials were as to the commission by defendant of acts of fraud. *Held*, that it will be presumed that the judgment was founded upon allegations in the complaint to which the answer was responsive, and that the debt arose through the fraud of defendant, and therefore not barred by the discharge.

Commissioners' decision. Department 1.

Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Cook & Cook, for appellants. *D. H. Whittemore*, for respondent.

FOOTE, C. This is an appeal from an order denying the motion of the defendant Andrew Charles to set aside a certain *alias* execution, to stay the issuance of any future execution, and to have the judgment marked "Satisfied." The grounds upon which the appellant based his contention that the motion should be granted were that he had been discharged as an insolvent from any and all obligation either to pay or have satisfied in any manner out of his property the judgment upon which the *alias* execution issued. It appears from the record in the original suit that the second amended complaint filed in the action was not to be found when the court below considered the appellant's motion, and that it was upon the issues made up by that pleading, and the answer filed thereto by the appellant, that the cause was submitted to a jury, who returned a general verdict for the plaintiff for a large sum of money.

The appellant contends that even if, in a matter of the kind in hand, the court could look behind the judgment, to the record in the action where it was rendered, to ascertain if the debt claimed to have been discharged by the certificate of the court presiding in the insolvency proceedings was created by

the appellant's fraudulent acts, yet that, as the *complaint* was not to be found, it was not permissible for the court to determine that the original debt was founded in the fraud and deceit practiced by the appellant. In this we think he is mistaken. If the complaint is not to be found, but the answer to that complaint is, and it shows, as in this case, that the only material denials upon the part of the appellant are as to the commission by him of acts of fraud, it will be presumed that the judgment was founded upon allegations in the complaint to which the answer was responsive, and that, therefrom, the debt must have arisen through the fraud of the appellant. The latter should certainly be held to the statements of his answer; and as that is devoted to a denial of specific acts of fraud, and there is nothing else to show what the allegations of the complaint were, it will be presumed that there were none other than those to which the answer was responsive, unless admitted by the answer to be true.

But the appellant contends that the court below had no right to look at anything in the record of the action in which the judgment was recovered, except that judgment, that the original debt was merged in the judgment; that the latter had been obtained before the certificate of discharge was granted; and that the court, upon the hearing of his motion to stay the *alias* execution, etc., was bound to treat that judgment as covered by and included in the certificate. But such does not seem to have been the views in similar cases of learned judges other than the one who determined this contention against the appellant.

This court has, it seems to us, clearly intimated what the law is, as to such a matter, although the precise question here involved was not in issue, in *Imlay* v. *Carpentier*, 14 Cal. 177; saying, after citing numerous decisions of other courts: "The judgment is but the original debt in a new form. * * * The opposing decisions are from Massachusetts and Maine, and proceed upon the technical doctrine, so pointedly repudiated in *Dresser* v. *Brooks*, that the original debt is merged and lost in the judgment, and that the judgment is a debt newly created and conclusive in its nature. * * * The force of the reasoning and the weight of authority are against this view." And in that case (*Imlay* v. *Carpentier*, *supra*) this court appears to have agreed to the right of the trial court to go behind the judgment, and look into the pleadings in the original action, with a view to grant a motion to set aside an execution.

In *Dresser* v. *Brooks*, 3 Barb. 448, it is said: "These cases have arisen under our insolvent laws, and the courts have uniformly held that, in an action upon a judgment to which a discharge under the insolvent law was pleaded, they would look behind the judgment to the debt on which it was founded, in order to determine whether that was of such a character, had its origin at such a time and place, and between such parties, as to be within the provisions of the act."

Section 33 of the last United States bankrupt act is very similar in its provisions to section 52 of the insolvent act of this state, as bearing upon the right of discharge from a debt created by fraud; and in *Re Patterson*, 2 Ben. 156, Judge BLATCHFORD very clearly, and as we think conclusively, disposes of the point we are now considering. He says: "The only other question is whether the debt is once excepted by section 33 of the act from the operation of a discharge. That section provides that 'no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act.' It is claimed by the bankrupt that, the debt in this case being in the shape of a judgment, this court cannot, in applying section 33, go behind the judgment, to see whether the claim on which the judgment was recovered was created by fraud; that the judgment, which is now the only debt, was created by the claim, and not by the fraud; and that although the judgment was cre-

ated by the claim, and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound. Wherever the debt, no matter whether it be in the shape of a judgment, or in any other form, was created by fraud, had its root and origin in fraud, there it is not to be disregarded. To hold that the recovery of a judgment in an action where the *gravamen* of the complaint is fraud, condones that very fraud by so merging the original claim that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the thirty-third section. The case of *Bangs* v. *Watson*, 9 Gray, 211, cited to sustain this view, does not, in my judgment, support it, and I have been referred to no case which leads to any such conclusions."

It would therefore appear that the court below had a right to go behind the judgment, and inspect the pleadings in the original action; that it was justified from an inspection of the defendant's answer in concluding that the only claims made by the second amended complaint against the defendant, which were not admitted by the answer, were founded upon his alleged fraudulent acts; and that the jury in rendering its verdict did so upon the issues thus submitted to them; and that the original claim, created by fraud, was not so merged in the judgment as to make it a new debt, and subject to be discharged by the court granting the certificate of discharge in insolvency.

It follows that the order appealed from should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

74 Cal. 199

In re Estate of SANDERSON, Deceased. (No. 9,653.)

(*Supreme Court of California.* November 30, 1887.)

1. EXECUTORS AND ADMINISTRATORS—LIABILITY TO ACCOUNT—LACHES.
An executor failed to account for a long period, and pleaded the statute of limitations and laches to a demand for an accounting. *Held*, that his obligation to account was continuous, and the right to demand one could be asserted as long as the duty remained unperformed.

2. SAME—ACCOUNTING AND SETTLEMENT—EXCHANGING CURRENCY FOR GOLD.
An executor exchanged $500 in currency, the property of the estate, for $370 in gold, and paid a coin debt of the estate, getting current value for the greenbacks. *Held*, that he was only liable to account for the $370.

3. SAME—EXCEPTIONS TO ACCOUNT—SUBMISSION TO JURY.
Code Civil Proc. Cal. §§ 1713-1716, provides that, except when otherwise enacted, the provisions of part 2 of the Code, relating to ordinary actions, shall constitute the rule of proceeding in probate matters, and that issues of fact joined in such proceedings must be tried as provided for the trial of contested wills by section 1312. Sections 1635-1638 provide that any person interested in an estate may file exceptions to the account in writing, and a method of settling the account. *Held*, that exceptions to an account are aids to the court in his duty of scrutinizing it, but are not issues of fact to be submitted to a jury on demand of a party in interest.

4. SAME—LIABILITIES—FAILURE TO COLLECT NOTE—PRESUMPTION.
Code Civil Proc. Cal. § 1631, provides that an executor may be examined upon oath on rendering his account. Section 1613 provides that he shall be charged with the estate coming into his hands at the value in the inventory of appraisement. Section 1615 provides that he shall not be responsible for debts uncollected if it appear to be without his fault. Section 1635 provides that any person interested may contest the account. An executor charged himself with balance of a certain note and mortgage in his account, and credited himself with the same amount uncollected. *Held*, that the presumption was that he could have collected the note, in absence of showing by him that it was not collected without any fault by him, and the power of the court to examine the executor on his account was not limited by the fact that no specific objections had been filed.

5. Same—Release by Heirs of Co-Executor.
An executor of an estate had at the death of his decedent a note and mortgage in his hands belonging to him, which he turned over to his co-executor, who collected part of the debt. He called the attention of his executor to the fact that the note was about outlawed, and he replied that he knew all about it, and would look after it. The statute of limitations ran against the note. The heirs agreed with the executor not to call him to account, and that an order settling his account might be filed with the probate court. Code Civil Proc. Cal. § 1613, provides that each executor shall be liable for all the estate coming into his hands. *Held*, that as the executor was not liable for the balance of the note uncollected by his co-executor, and could not be called upon by him for contribution for any sum he might have to pay for his failure to collect, the agreement of the heirs not to sue the executor could not therefore operate to discharge the co-executor.

6. Same—Interest on Balances—Annual Rests.
When there has been great delay in settling an estate, the court is justified in charging legal interest on balances, with annual rests.

7. Same—Order Settling Account—Appeal.
An order was entered by the court that the account of an executor "be, and the same is hereby, allowed and approved, except as to the matters following," etc. *Held*, that it is an order settling an account, and is appealable.

8. Same—Appeal—Review—Defects Waived.
An executor asked for a reversal of judgment in a contest of his account because there were no findings by the probate court. There was nothing in the transcript to show that findings were not waived. The bill of exceptions recites that, when the "statement on motion for new trial was made," the court struck out an allegation that on October 3, 1883, counsel was asked to waive findings, and refused. The order settling the account was of October 11th. *Held* that, for aught that appears, findings may have been waived before or after October 3, 1883, and the matter struck out had no place in the statement.

9. Appeal—Review—Credibility of Witnesses.
Where there is a conflict of testimony, the court below is the judge of the credibility of the witnesses.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

T. Z. Blakeman, for appellant. *Cope & Boyd*, for respondent.

McKinstry, J. 1. It is contended by appellant, L. A. Sanderson, executor, that a new trial of the contest of his account should be directed, because the court below failed to find upon the issues made by the contest. But the transcript contains no bill of exceptions which shows that findings were not waived, *if findings were proper*. There is a bill of exceptions which recites that, when the "statement on motion for a new trial" was settled, the judge struck out from the proposed statement an allegation, "On October 3, 1883, counsel for contestants requested counsel for the executor to waive findings of fact, which counsel for the executor declined to do," and that "the said matter so struck out recited facts." The trial of the contest took place April 12th, and the order settling the account was made and entered October 11, 1883. For aught that appears, findings may have been waived at the close of the testimony, or before or after October 3, 1883, and prior to the entry of the decree. The bill of exceptions fails to show distinctly that findings were not waived. Moreover the matter struck out has no proper place in the *statement*.

2. Appellant claims that, by failing to contest his verified account upon the specific ground that the balance of the "Braly note" remained uncollected by reason of the neglect of the executor, the contestants admitted that it remained uncollected without any fault on his part. Section 1631, Code Civil Proc., provides that, on rendering his account, the executor may be examined on oath touching any property or effects of the decedent. The power of the court so to examine him, and to base the terms of its decree settling the account upon such examination, is not limited by the circumstance that no person interested in the estate has filed specific exceptions to which the examina-

tion is appropriate. To hold that the executor should be entitled to the benefit of every credit to himself in his account, which is not specifically objected to by a party in interest, would be to deprive the court of its wholesome supervision over the accounts of executors and administrators, to encourage negligence, and open the way for fraud. It seems to have been held in *Trotter's Case*, 40 Miss. 711, that the probate courts of that state "cannot command the conscience of an administrator so as to compel him to conform his returns under oath to the views of the court." But, as we have seen, section 1631 of our Code (Code Civil Proc.) provides in terms that the executor or administrators may "be examined." And in addition to what is said in *Estate of Moore*, 13 Pac. Rep. 880, and in *Estate of Herteman*, 15 Pac. Rep. 121, the power of the court to go behind an account, and its duty to require a full and fair account, was recognized in *Hirschfeld* v. *Cross*, 67 Cal. 662, 8 Pac. Rep. 507, and other decisions. In the case last mentioned this court said: "The probate court is the guardian of the estates of deceased persons, and has control of the person appointed by it to administer the estate, subject to review as provided by law "

Even if it should be conceded that an account presented by an executor establishes its own correctness *prima facie*, the account should at least show on its face that a failure to collect a debt due to decedent was not the result of the negligence of the executor. Every executor is chargeable with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory. Code Civil Proc. 1613. No executor is accountable for any debts due decedent "if it appears that they remain uncollected without his fault." Id. 1615. But, if it do not so *appear to the court*, the executor must be held answerable for the amount of a debt due the decedent as appraised in the inventory. In the account herein presented, all that appears is that the executor is debited with a balance of the Braly note uncollected, and that the executor is credited with the same balance; that is, that a portion of the Braly note was not collected. That fact, if taken as true, is not a statement that it remained uncollected "without fault" on the part of the executor. There is no presumption here as to the executor having done his duty. The presumption is he could have collected the note in the absence of showing, by his own averment, *at least*, that a portion was not collected without any fault in him.

The Code of Civil Procedure provides that, at the hearing for settlement, "any person interested in the estate may appear and file his exceptions in writing to the account, and may contest the same." Section 1635. An exception may be taken to an account for that credits appear therein to which, as matter of law, the executor is not entitled; as if an executor shall attempt to set off, as against money or property of the estate which has passed into his hands, individual expenditures of his own, from which the estate could receive no benefit, and for which it was in no way responsible. Here the contestant of the account of the executor objected that it appeared therefrom he had failed to charge himself therein with the whole of the principal and interest of the M. A. Braly note and mortgage. The exception called the attention of the court to the fact that, by his account, the executor sought to relieve himself of responsibility as to part of the Braly note, without any showing, even by entry in the credits, that he had not been guilty of negligence. Moreover, the account is expressly excepted to "because it is not made to appear therein that the Braly note remained uncollected without the fault of said executor."

3. But appellant contends that the contestant of an account is *plaintiff;* that the exceptions in writing must be as fully and accurately drawn as a complaint in an ordinary civil action; that the account as presented must be taken and settled as correct in all respects, except as to the specific exceptions taken to it; that at the trial of the contest no evidence is admissible, except such as

supports, not only the attack upon the particular items referred to in the specifications, but the specific averments set forth in the specifications as grounds of objection to the particular items. And appellant claims that, under the allegations in the exceptions as to the Braly note, the court below should have allowed no testimony to prove that the executor had been guilty of negligence in failing to collect that note. In New York the practice obtains of permitting objections to an account to be stated in the most general language, although the surrogate may require them to be made more specific. Under a general objection to any and all of the items, it was there held that the surrogate could inquire into and scrutinize the account, and was not bound by the executor's oath thereto, or by the vouchers produced by him; and in examining it he could allow, for his information, any person to point out errors and defects therein. Red. L. & P. Surrogates' Courts, (2d Ed.) 672; *Peck* v. *Sherwood*, 56 N. Y. 615; *Buchan* v. *Rintoul*, 70 N. Y. 1.

Appellant relies, in support of his contention, on sections 1713–1716, Code Civil Proc. By sections 1713 and 1714, the provisions of part 2 of the Code —relating to proceedings in ordinary actions—do *not* constitute the rules of practice in probate proceedings when "it is otherwise provided;" and the provisions of part 2—relating to new trials and appeals—are *not* applicable when "inconsistent" with the provisions of the title in which the sections are found. A mode and manner of settling accounts of executors and administrators is specially provided, which, if followed, is inconsistent with the provisions relating to new trials. An *appeal* from an order settling an account is expressly allowed within 60 days. Code Civil Proc. 963, 1715. The article and chapter referred to in section 1716 relate to contests of the probate of wills. Code Civil Proc. 1312. The suggestion of appellant is that the "exceptions" permitted by section 1635 constitute a complaint which may be demurred to on any of the grounds mentioned in section 631; and which, if sufficient in form, must be answered by the executor; that the issues made by such complaint and answer must, on the demand of either party, be tried by a jury; that judgment must be entered against the party to whom the special verdict is adverse, together with *costs* in favor of the prevailing party. That the procedure thus marked out is singularly inappropriate as a mode for settling an account, which it is the duty of the court of its own motion carefully to scrutinize, appears on saying it.

It may aid in ascertaining whether the legislature has required the procedure insisted upon, to look for a moment at the history of the laws with reference to the joinder of issues of fact in probate, and their trial. April 23, 1855, the twentieth section of the act of May 1, 1851, "to regulate the settlement of estates of deceased," etc., was amended so as to provide: "If any person appears and contests a will, he shall file a statement in writing of the grounds of his opposition. When issues shall be joined in the probate court respecting the competency of the deceased to make a last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence, or fraudulent representations, or for any other cause affecting the validity of such will, such issue or issues shall, at the request of either of the parties interested, be certified immediately to the district court of the proper county for trial by jury. * * * Upon the determination of such issue or issues of fact, the jury trying the same shall render a special verdict thereon, and the finding of the jury shall be certified by the district court to the probate court, whereupon the probate court shall proceed to admit such will to probate or not, according to the facts found and the law." St. 1855, p. 132. Compare section 1312, Code Civil Proc. The original act of 1850 (St. 1850, p. 402, § 295) gave *an appeal* to the district court from certain orders of the probate court, including "all settlements of executors or administrators," and provided that, on filing the appeal papers, the district court should be possessed of the cause, to re-examine the account anew. And the

act of 1851 (pages 486, 487, §§ 294, 298) attempted to give like appeals, and provided that the district court should try the matter anew. Neither act purported to declare that, on such appeal, questions of fact arising upon a settlement of accounts should be tried by jury in the district court. May 20, 1861, (St. 1861, p. 628,) section 20 of the probate act of 1851 was again amended by providing that the issues of fact arising on the contest of a will, which might previously have been sent to the district court, should be tried in the probate court, and, if so requested by a party in interest, by jury. Such is substantially the provision of the Code of Civil Procedure.

Thus it appears that, prior to the Codes, there was no express provision of law requiring, nor any which could be construed to require by implication, that any issues of fact arising in the probate court should be tried by jury, except such as might arise upon the contest of the probate of wills. Are sections 1716 and 1717 to be read as commanding the proceedings set forth in section 1312, Code Civil Proc., and those which immediately follow, to be resorted to whenever an account is contested?

In *Re Estate of Moore, supra*, the question was fully considered and discussed by Justice TEMPLE, and the question above stated was answered in the negative. The court there held that sections 1716 and 1717 "should not be construed as granting an absolute right to a jury trial in cases in which, according to the course of the common law, a jury trial was denied as inappropriate, and especially upon the settlement of the accounts of administrators and executors, where so much is left to the mere discretion of the judge, and in the face of the language of the Code, in many sections, implying that the settlement shall be by the court. Sections 1636–1638, Code Civil Proc." See, also, the remarks of MCFARLAND, J., in *Estate of Hertman, supra*.

There may be a manifest propriety in requiring, at the request of a party, issues of fact such as ordinarily arise in the contest of the probate of a will, (was the testator of sound mind? was he subjected to undue influence?) to be tried by a jury. But the proceeding in probate for the settlement of an account is *sui generis*, bearing but a distant and incomplete analogy to the procedure for an accounting in equity. The executor or administrator derives his power to act as such from the will, or order of the court, but in his conduct of the affairs of the estate he is subjected largely to the discretion and control of the court. The court is bound to protect the estate, and, as far as may be, the rights of all concerned. Publication is had that all interested may have an opportunity, by written exceptions, to call the attention of the court to alleged errors or defects; but, in the absence of exceptions, the court may and should inquire into any matter which may seem to the court objectionable, and pass judgment thereon, and, in the presence of specific objections, the court is not limited to the specific objections. A special verdict must pass on all the issues by presenting the conclusions of fact bearing on all. Code Civil Proc. 624. Section 1314, relating to contests of wills, provides that the jury must return a special verdict "upon the issues submitted to them by the court," upon which the judgment of the court must be rendered. For many years it has been the practice in this state, when a special verdict is desired, to cause to be prepared and submitted to the jury special issues,—usually in the form of questions,—and it would seem that this practice is recognized by the legislature by the words, "the issues submitted to them by the court." In cases of contests of a will the issues must be such as that the determination of them will leave to the court no office except to enter a judgment admitting the will to probate or rejecting it. Section 1314.

But if, as claimed by appellant, when an account is contested, the trial and evidence must be confined to the particular items excepted to, and to the grounds of exceptions thereto, no judgment settling the account can be based on a special verdict of a jury *alone*, unless all of the items of the account are excepted to. This strengthens the presumption that the statute does not re-

quire that a contest of an account must be submitted to a jury on the demand of a party in interest. Even if it should be conceded that there are any issues of fact, other than those arising on the contest of wills, which, on demand, must be submitted to a jury, in conformity to the requirements of the Code as to such contests, they must at least be like—of the same kind as—those joined in contests of wills, and like those which by the former statutes were directed to be sent to the district court for trial. It would seem that they must be such the verdict whereon would be determinative of an order or judgment to be entered by the court, and not merely determinative of subordinate facts which may be considered by the court in connection with other facts in making its order of judgment.

We are clearly of opinion that exceptions to an account do not create "issues of fact joined," such as must be submitted to a jury on demand of a party in interest. The language of section 1635 does not of itself require the elaborate procedure provided for in sections 1312–1314. No time is given the executor to prepare to meet or to answer the exceptions; although, doubtless, in proper cases, the court may grant him time to secure further evidence in support of his account as rendered. On the day appointed, or on *any subsequent day* to which the hearing may be postponed, any party in interest may "contest the account." True, his exceptions must be in writing, but this may well be that the point of his objections shall be made clearly to appear to the court. It is proper, and we believe it has been the practice, to extend to contestants the widest latitude in amending and supplementing their exceptions. What, then, is the purpose of section 1635? To us it appears the object is that all interested may inspect, and, if it is desired, object, to the account. But it is the duty of the court carefully to scrutinize the account, and to reject all claims of the executor illegal in themselves or unjust in fact. The court might perhaps overlook particular objections which were not called to its attention; and the exceptions are permitted in aid of the court when performing its duty of making the account correct. It was not intended to deprive the court of its power to supervise in every particular the accounts of executors and administrators, a power conferred for the protection of all interested, including infants, and oftentimes adults ignorant of their rights. The only point decided in *Boughton* v. *Flint*, 74 N. Y. 485, was that an *auditor*, to whom objections to an account were referred by the surrogate, must confine the inquiry before him within the limits of the reference.

4. It is said by appellant that the evidence would not support a finding of such negligence on his part, with respect to the Braly note, as should render him liable for the balance thereof uncollected. But even if the testimony of the appellant tends to prove an excuse for his neglect, for the reason that he was not specifically advised by the attorney, Fabens, of the necessity of commencing an action to foreclose the mortgage, the testimony of Weeks was to the effect that the attention of appellant was called to the fact that the Braly note would "outlaw" in a few weeks, and that appellant did know of the consequences of the running of the statutory limitation. It was for the court below to determine the credibility of the several witnesses.

5. It is insisted, however, that, even if the appellant was guilty of negligence, his co-executor, Weeks, was also liable for negligence in the same matter; that their liability was joint, and, the devisees having *released* Weeks from all liability as executor unconditionally, appellant was thereby discharged from liability Appellant urges that any negligence on the part of the executors constituted a *tort*, and as there can be but one satisfaction of a tort, the release of one of them released both. But, for a neglect of their duty as trustees, they were liable as for breach of the contract obligations they took upon themselves as executors. Appellant claims that if the executors were joint debtors, the release of one released the other. The obligations of co-executors arise from their contract, and are several. Although one may in some cases

make himself liable by placing the other in a position to do wrong, or by aiding him in his acts or misfeasances, the liability is still the several liability of each. And this is so, even if it be conceded the devisees or legatees may under some circumstances claim both to be liable. Whether the executor Weeks was guilty of negligence in not taking more active measures to enforce the collection of the Braly note and mortgage, which was in the possession of the appellant, was to be determined by the evidence below, and in reviewing the evidence we must assume the testimony of Weeks to be true.

At common law, executors were generally liable for their own acts, and not for the acts of their co-executors. Each executor had an independent right over the personal property of his testator; he might sell it, and receive the purchase money, and give receipts in his own name. There were, indeed, cases in which both of the executors were made severally—perhaps jointly and severally—liable. "If an executor does any act to transfer the property into the exclusive control of the co-executor, and thus enables his co-executor to misapply the same, he will be liable; *as* if he joins in drawing or indorsing a bill or note, or delivers or assigns securities to his co-executor *to enable him to receive the money alone*, or if he gives him a power of attorney, or does any other act that enables his co-executor to misapply the money; and so it was held 'that if by agreement between the executors, one to receive and intermeddle with such a part of the estate, and the other with such a part, *each of them* will be chargeable with the whole, because the receipts of each are pursuant to the agreement made betwixt both.' Probably the case *would not now be followed*, but it illustrates the principle." Perry, Trusts, §§ 421, 422, and cases cited in notes. And so if an executor stands by and sees a breach of trust committed, or about to be committed, by a co-executor, and does nothing to protect the estate, or to call the defaulting executor to account, he is liable. But a neglect to collect a debt which might, with proper exertion, be collected, is a *devastavit*, (Bouv. Dict.,) and a *devastavit* by one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it; for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other. *Rowland* v. *Milforth*, Cro. Eliz. 319; Williams, Ex'rs, bottom p. 1820. In the American note to the same page are collected many decisions in this country to the effect that where one executor merely permits his co-executor to take possession of assets without going further, and *concurring in a misapplication of them*, he does not render himself responsible for the receipts of his co-executor

The extent of the liability of one executor for the acts of his co-executor will depend very much upon the circumstances of each case. *Fonte* v. *Horton*, 36 Miss. 350; *Noland* v. *Calvit*, 12 Smedes & M. 273; *Clark* v. *Blount*, 2 Dev. Eq. 51. In the case before us, the note and mortgage were in the exclusive possession of the appellant, and we cannot say the co-executor failed in reasonable diligence when he relied upon the positive statements of appellant that he knew all about the matter, and that there was plenty of time to attend to the collection of the Braly note. Such was the effect of his declarations. It has sometimes been broadly stated that, if an executor turn over assets which he has received to his co-executor, he becomes responsible for the due application and administration of those assets by his co-executor. The rule, as settled by authority, however, and as laid down by Williams on Executors, (bottom p. 1823,) is: "If an executor is merely passive by not obstructing his co-executor from getting the assets into his possession, the former is not responsible. If, however, the one in any way contribute to enable the other to obtain possession, he is answerable, notwithstanding his motive be innocent, *unless he can assign a sufficient excuse.*" In a note, many authorities are referred to in support of the text. In all the cases there seems to have been some circumstance to put the executor, when he trans-

ferred the actual possession to his co-executor, on his guard against possible misconduct or irresponsibility on the part of the co-executor, or an entire absence of any explanation to show that in delivering the asset to his companion he acted with the prudent care of a reasonable person.

The English case—*Langford* v. *Gascoyne*, 11 Ves. 333—goes further, perhaps, than any other cited by appellant. A bill for an accounting was filed by a widow against the three executors of the estate of her deceased husband. The master, in his report, charged all three of the defendants with a certain sum, which (upon advice of a witness) the plaintiff, in the presence of all the executors, had delivered into the hands of one of them, Spurrel, the witness not having a good opinion of the circumstances of Gascoyne, another of the executors. Spurrel immediately gave the money over to Gascoyne, who took it away. The witness, before the master, also testified: "*Gascoyne was reputed not to be in good circumstances.*" The court, with hesitation, held that Spurrel, as well as Gascoyne, was properly charged with the amount, but that the master erred in charging the third executor with it.

In *Edmonds* v. *Crenshaw*, 14 Pet. 166, the testator by his will directed his property, real and personal, to be sold by his executors, and the proceeds to be by them invested in certain stocks for the benefit of persons named in the will. The property *was sold*, and the account of sales settled with the ordinary by the executors. One of the executors became insolvent. The beneficiaries named in the will filed a bill in the circuit court of the United States to compel a performance of the direction of the will. The solvent executor stated in his answer that the moneys were not invested while he remained in South Carolina, where testator died, because the sums collected were small; and that he removed to Alabama, having first delivered over to his co-executor all the assets of the estate which had ever come into his hands, and taken the receipt of his co-executor for the same, which he filed with the ordinary. The parties went to a hearing on bill and answer. The executor had proceeds of the sale of the property in his hands, which it was his duty to see were invested as directed by the will. The supreme court held that the executor could not discharge himself by paying over the assets to his co-executor, but must show that he made the investment required by the will, or applied the funds in some other manner in conformity with the trust.

In *Clarke* v. *Clarke*, 8 Paige, 152, an executor paid over all the moneys in his hands belonging to the estate to the executrix, testator's widow. The executor contended he was not liable because by the terms of the will the widow was entitled to the use of all the property during her widowhood. The court held the widow was not entitled under the will to the possession of the estate, and that the executor, who had suffered her to use the proceeds of the property for her own purposes, and to sell the last piece of real estate, when the proceeds were more than sufficient to pay all the testator owed, was liable.

In *Mesick* v. *Mesick* an executor had assets in his possession, for which he had given a receipt *undertaking to collect* the same, and apply *the proceeds* in the manner designated by the testator. He afterwards voluntarily delivered the assets to his co-executor, without any "good reason." The court held that while, ordinarily, an executor is not liable for *money received* by his co-executor, yet when, having it in his actual possession, he hands it over to his co-executor, he will only be exempted from liability on showing *good reason* for having done so. 7 Barb. 120.

Johnson v. *Corbett*, 11 Paige, 266, holds that where an administrator suffers or permits his co-administrator to misapply the funds of the estate, when he has the power to prevent it, he is liable, in equity, for such misapplication, if the amount misapplied cannot be collected from the co-administrator. This last decision would seem to imply that his liability was in its nature that of a *surety*.

Chancellor KENT has said, speaking of the liability of co-executors: "The defendant P. is not responsible for the *devastavit* of his co-executor C., any further than he is shown to have been knowing or assenting to it at the time. * * * Merely permitting a co-executor to possess assets, without going further and concurring in the application of them, does not render an executor liable for the receipts of the other. * * * Each executor is liable for his own acts, unless he hands over *moneys collected or received* to his co-executor, or joins in the direction or misapplication of the assets." *Sutherland* v. *Brush*, 7 Johns. Ch. 22.

As we have seen, the liability of an executor for acts or omissions of his co-executor depends upon the circumstances of each case. Some of the cases relied upon as authority for holding Weeks liable, are cases in which the loss to the estate was caused by malfeasance, or affirmative misapplication of the assets by one executor which the other could have prevented. Some were cases in which assets were delivered to a co-executor who was insolvent, or whose probable insolvency was known to the executor delivering them. In some, money collected or received by an executor, and for which it was his duty to account, was turned over to a co-executor. In others, the executor surrendering the money or assets was charged by the will with some special duty in respect to them; as that they should be invested in a particular manner under his direction. In all there was a failure to make it appear that there was good reason for passing the actual possession to the co-executor.

In the case at bar, the Braly note and mortgage were in the possession of the appellant from the time of making up the inventory of the estate until the debt was barred by the statute of limitations; with the exception of a brief period near the commencement of the administration, when they were in the hands of counsel, having been placed in his hands by appellant. Prior to the death of the testator, they were in the possession of Weeks as his attorney in fact. Precisely how or when they passed into the possession of appellant does not appear, although this occurred shortly after the death of decedent. The appellant was, and continued to be, amply able to respond for all the assets that passed into his hands. The asset was not collected by Weeks, and the money paid over to appellant. And the testimony of appellant supplies a sufficient reason why the note and mortgage were placed in his actual custody: "The note was, with all the balance of the papers, placed in my safe. Captain Weeds had no safe, and I kept the accounts and papers." We think that under the circumstances, neither upon principle, nor on the weight of authority, did the executor Weeks become liable for the balance of the Braly note, in part collected by appellant, merely from the fact that he was in possession of it (the note) at the time of the testator's death, and delivered it or permitted it to be delivered to appellant.

But is this the case of the "release" of one of two joint debtors? Even at law it is necessary that a technical release under seal be given to one of several debtors jointly bound, in order that the others may avail themselves of it as a discharge. *Armstrong* v. *Hayward*, 6 Cal. 183; *Prince* v. *Lynch*, 38 Cal. 531. The provisions of our Code with reference to the effect of a release of one of several joint obligors have no application here, as the liability of Weeks, if it accrued at all, accrued prior to the adoption of the Codes. At common law a release of one of several obligors, whether bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar. But when two are bound jointly and severally, and the obligee covenants with one *not to sue him*, it does not amount to a release, but is a covenant only, and the obligee may still sue the other obligor. *Rowley* v. *Stoddard*, 7 Johns. 209. Courts endeavor to carry out the intention of the parties when the instrument appears to have been intended to be a covenant not to sue, and not a release. 2 Chit. Cont. 1155. Here the instrument signed and not sealed by the devisees amounts to a promise not to call the executor Weeks to any account-

ing, and a consent that an order settling his account might be entered in the probate court without notice to them. The language of the writing clearly indicates it was intended as a contract not to seek legal redress as against Weeks. If the consideration for the promise of the devisees appeared to be the payment in whole or in part of the debt due from the Braly estate, the appellant would be entitled to a credit for the sum so paid. This because it *was* paid; but it remained for appellant to show the fact.

When the executors give a joint and several bond, the effect is to make them jointly and severally liable, *on such bond*, for the misconduct of each. Williams, Ex'rs, 1820, note *y*. Here the will provided that the executors should not give bond, and so far as appears none was given. By our statute, when two or more persons are appointed executors or administrators, the superior court must require a separate bond from each of them Code Civil Proc. 1391. Each is chargeable in his account with the whole of the estate which may come into his hands. Id. 1613. When an executor is guilty of neglect with reference to assets in the possession of his co-executor, he is not made liable upon the theory that the assets are in the possession of both, which, in fact, they are not, but upon his neglect in delivering them to his co-executor without good cause, or in not seeing to it that they were taken out of the possession of the co-executor, or were not by him misapplied or lost.

Even if it should be conceded that Weeks could, at the option of the devisees, be charged with the part of the Braly note uncollected, by reason of his neglect in not taking measures to cause it to be collected, it would not follow that the *appellant*, who had the note in his possession, could assert the agreement styled a "release" as a release to him. Co-executors are not liable to each other, but each is liable to the *cestuis que trust* to the full extent of the fund he receives. *Edmonds* v. *Crenshaw, supra*. As between the executors herein, the primary and principal obligation was on appellant to account for the note and mortgage which was in his possession. We know of no principle by which *Weeks* could be held to contribute towards any sum appellant might have to pay as a consequence of his failure to collect the Braly note. The appellant, therefore, could have lost no right to contribution by the arrangement between Weeks and the devisees.

6. On the twenty-sixth of February, 1869, the appellant exchanged $500 in currency—the property of the estate—for $370 in gold. The court below directed the appellant to charge himself with the former instead of the latter sum. There is no dispute but that the $370 were paid to satisfy a coin debt due from the estate, or that the $500 "currency" were then worth $370 in gold. The transaction is treated by counsel as a "sale," but we think that is hardly the term to apply to the exchange of one currency for another. We take notice that coin was always treated as the standard of value in this state, and was so recognized by our legislation. If the executor had paid the gold debt with $500 in greenbacks, the transaction would not have been refused the approval of the probate court for that reason alone. If, indeed, he had gold at his disposal, he should have paid the debt in gold; but, if he had not, any sale of property he might have made would have produced either "currency" or a proportional less amount in gold. It is suggested he should at once have proceeded to collect the Braly note. But, although the appellant was properly held liable for the Braly note, the question whether he used a reasonable discretion in changing the paper currency into gold is to be determined by the conditions existing when it was done. The Braly note bore interest at the rate of 1 per cent. a month, and had several months yet to run. The appellant may reasonably have believed it was for the interest of the estate to dispose of the greenbacks rather than to bring the foreclosure suit, which might be pending a considerable period of time before decree. The court erred in compelling him to account for more than the $370.

7. Considering the great delay of appellant in accounting, we cannot say

the superior court was not justified in charging the appellant with legal interest upon balances, with annual rests.

8. It is claimed by appellant that the right of respondents to demand an accounting was barred by the statute of limitations, and that by their laches they had lost their right to call the executor to an account. From the expiration of the time mentioned in the notice to creditors, it was the duty of the executor to account. His obligation to account was continuous, and he cannot claim that his failure to do so, at any moment of time, set the statute in motion, or cast upon the respondents the duty to demand an accounting; since their right to demand it ran with his duty, and could be asserted so long as his duty remained unperformed. There is no express provision of our law with respect to the limitations of actions which applies to the case, and we discover in the record no such laches as a court of equity will sometimes consider sufficient reason for dismissing an appeal to its jurisdiction It cannot be claimed that the devisees and legatees consented that the executor should be relieved of his duty to account as such, and that the estate should remain open and unsettled. If any unfavorable consequences may be supposed to have been suffered by appellant by reason of the insolvency of his co-executor, he could have avoided them by more prompt action on his part; but such insolvency could not relieve him from the burden of accounting for the property of the estate in his possession. He did not and could not "repudiate his trust" entirely by his mere failure to account. He failed to perform a specfic duty which still continued imposed upon him until his accounts were settled.

9. It is claimed by *respondent* that the order entitled, in the transcript, "Order Settling and Correcting Account," is not appealable, because *not* an order settling an account. But, while informal, we think the order that the account "be, and the same is hereby, allowed and approved, except as to the matters following," etc., is an order settling the account. It directs the executor to charge himself in the account with certain sums, and approves of the account as rendered in other respects. There remained only the clerical duty of making the account conform to the order. *Estate of Miner*, 46 Cal. 566.

The order appealed from is modified by striking therefrom the words, "The said executor is directed to charge himself in said account with the sum of $500, as of the twenty-sixth of February, 1869, instead of the sum of $370, 'amt. rec'd, sale of $500 currency found on R. A. Sanderson's body, at 74 cents;'" and the order appealed from is in all other respects affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

(2 Cal. Unrep. 819)

MALONEY and another *v.* HEFER. (No. 9,866.)

(*Supreme Court of California.* November 30, 1887.)

HOMESTEAD—HOW LOST—TEMPORARY ABSENCE—FILING DECLARATION.

A married woman owned two houses and a lot, and, while residing in one of the houses, prepared a declaration of homestead, and went into another county to visit for four months. Her husband, during her absence, occupied lodgings in a house, not on the property. While she was away, the declaration of homestead was filed. Defendant obtained judgment against the plaintiffs, and levied on a portion of the lot, and sold it. *Held*, in an action by the husband and wife to quiet their title to the lot, that, as the claimants were not residing on the lot when the declaration was filed, it was not valid.

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco county; JOHN F. FINN, Judge.

E. J. & J. H. Moore, (*Nathaniel Bennett*, of counsel,) for appellants.

N. B. Mulville, for respondent.

BELCHER, C. C. The plaintiffs were husband and wife, and brought this action to quiet their title to a lot of land in the city of San Francisco. The lot fronts on Perry street, having a width of 25 feet and a depth of 80 feet, and is claimed by the plaintiffs as their homestead.

In January and February, 1883, there were two houses on the lot, one on the front and the other on the rear part of it, and the value of the whole property was between $2,500 and $3,000. The front house had a basement, and above it two flats or stories, which were leased to and occupied by tenants. The rear house was a small one and was reached by a narrow passage-way along the side of the front house from Perry street. Between the street and the front house was a yard sixteen and one-half feet long and five feet wide, and between the two houses was a yard which was divided by a board fence from five to seven feet high. Mrs. Maloney owned the whole lot as her separate property, and had resided with her husband in the rear house for more than 10 years. On the twenty-fifth day of January, 1883, while so residing on a part of the premises, she executed and acknowledged, in proper form, a declaration of homestead on the whole lot, and on the eighth day of February following filed it for record. After executing the declaration, and on the same day, she temporarily went away to visit friends in another county, and was gone about four months. During her absence her husband occupied other lodgings in the city, and the house, with the exception of one bed-room, which with its furniture was reserved, was occupied by a tenant. On or about the first day of March, 1883, the defendant obtained a judgment against the plaintiffs, and subsequently, under an execution issued thereon, sold, bid in, and in due time obtained a sheriff's deed for a part of the lot described as 22 feet wide on Perry street, and extending back 55 feet.

At the trial it was claimed by the plaintiffs that the quality of a homestead was impressed upon the whole lot, and so no part of it was subject to sale under execution. The court thought otherwise, and adjudged that the defendant had acquired a good title to that part of the lot on which the front house stood, and the yards which were attached to it in front and rear. The plaintiffs moved for a new trial, and the case comes here on appeal from the judgment and an order denying their motion.

It has frequently been decided by this court that to constitute a valid homestead the claimant must *actually reside* on the premises when the declaration is *filed*. *Babcock* v. *Gibbs*, 52 Cal. 629; *Dorn* v. *Howe*, Id. 630; *Aucker* v. *McCoy*, 56 Cal. 524; *Pfister* v. *Dascey*, 68 Cal. 572, 10 Pac. Rep. 117. Here the homestead claimants were not actually residing on the premises when the declaration was filed. Nearly two weeks before it was filed they went away and ceased to occupy any part of the premises. It is true, they went away temporarily, and were gone only about four months; but during that time they certainly did not actually reside on any part of the lot filed upon.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 191

KAMM v. BANK OF CALIFORNIA. (No. 9,412.)

(*Supreme Court of California.* November 30, 1887.)

1. ABATEMENT—ANOTHER ACTION PENDING—PLEADINGS AS EVIDENCE.
Plaintiff sent to a banking firm $75,000 to be invested in loans and commercial paper. The money, with the knowledge and consent of the plaintiff, was taken charge of by R., one of the firm, and by him invested; it being secretly understood between him and plaintiff that a new bank was to be started, in which R. was to be interested, and these notes and securities were to be used to pay the subscription of plaintiff to its stock. Fifty thousand dollars was subscribed by R. for the plaintiff and paid, when the bank, the defendant, went into business. R. in all these matters had controlled the money and investments, and most of the time had them in his own name. Four thousand dollars of the balance was paid to plaintiff, and he sued the new bank to recover the $21,000, alleging that it received it as his agent. Defendant claimed that the money had been sent to R., as the agent of the plaintiff, and that he was liable therefor, and offered to show on the trial that the plaintiff had presented the identical claim against the estate of R., now deceased; that it was rejected, and suit was brought against the executor of R., which was then pending and being prosecuted, and that the claims of the plaintiff in that suit were the same as the facts set up as a defense by the defendant in this suit, and denied herein by the plaintiff; that the complaint was verified by plaintiff's attorney, who was authorized to prosecute the suit. *Held*, that the complaint in that action was admissible in evidence to show the fact of suit brought and the nature of the action.

2. PLEADING—AMENDMENT—PENDING MOTION FOR NONSUIT.
Upon the close of plaintiff's testimony, defendant moved for a nonsuit. Pending the motion, the court allowed the complaint to be amended, so as to conform more nearly to the proofs. *Held*, that it was in the furtherance of justice, and a proper exercise of the discretion of the court.

3. LIMITATION OF ACTIONS—PLEADING THE STATUTE—DEFECT NOT APPARENT—DEMURRER.
A pleading contained a cause of action which was not on its face amenable to the charge of being barred by the statute of limitations. *Held*, that a demurrer to it was properly overruled.[1]

Department 2. Appeal from superior court of the city and county of San Francisco; M. A. EDWARDS, Judge.

F. G. Newlands and *S. M. Wilson*, for appellant. *McAllister & Bergin* and *Mastick, Belcher & Mastick*, for respondent.

SEARLS, C. J. This is an action to recover from the defendant, the Bank of California, (a corporation,) the sum of $20,810, interest, and costs of suit. The cause was tried by the court, a jury having been waived, written findings filed, and judgment entered thereon in favor of plaintiff for the sum of $32,051.60, and costs. Defendant appeals from the judgment and from an order denying a new trial.

The action was commenced on the twenty-third day of September, 1876, and was tried upon the issues made by the fourth amended complaint, filed April 27, 1883, and the answer thereto, up to and pending the trial, when the complaint was again amended. Jacob Kamm, the plaintiff, during all the times hereinafter mentioned, was a resident of Portland, Oregon. "The Bank of California" was organized as a corporation on the fourth of July, 1864, on which day its directors held their first meeting, and on the fifth of July, 1864, the bank was opened for business. Before that time there existed the banking firm of Donohoe, Ralston & Co., composed of Joseph A. Donohoe, William C. Ralston, Eugene Kelly, and Ralph S. Fretz. With that firm the plaintiff did business, such as depositing moneys, drawing checks upon it, and

[1] Where a pleading does not show on its face that the cause of action sued on is barred by the statute of limitations, the defense of the statute must be specially pleaded. Chellis v. Coble, (Kan.) *ante*, 505. Concerning the necessity and manner of pleading the statute, see Merriam v. Miller, (Neb.) 34 N. W. Rep. 625, and note; Hayt v. Hunt, (Colo.) 15 Pac. Rep. 410; Piper v. Hoard, (N. Y.) 13 N. E. Rep. 632; Cameron v. Cameron, (Ala.) 3 South. Rep. 148.

other banking business. That firm dissolved about the latter part of June, 1864, by dividing into two parts, one of which was Donohoe & Kelly, and the other Fretz & Ralston. The latter under that firm name did business for the short interval between the dissolution of the firm of Donohoe, Ralston & Co., and the fifth of July, 1864, when the Bank of California commenced business.

While the firm of Donohoe, Ralston & Co. was doing business, and in the early part of the year 1864, a project was formed by William C. Ralston, the plaintiff, Jacob Kamm, R. S. Fretz, and a number of others to form, incorporate, and inaugurate a new bank, to which Ralston and Fretz were to carry as much of the business of Donohoe, Ralston & Co. as they could. Mr. Ralston was very active in procuring associates and in obtaining possession and control of a large amount of notes, bills, and commercial paper, in which the funds of the new associates were from time to time invested for the purpose of using them ultimately in payment of subscriptions to the stock of the new bank when formed, and as a nucleus upon which to start business. This matter was kept secret from Donohoe and Kelly, who were not taken into the new project, and much of the business that would have naturally flowed into the current affairs of Donohoe, Ralston & Co. was diverted by Ralston from its natural channel, and kept in such condition and control by him as would enable him to throw it at once into the new bank when it should be organized. In this Mr Kamm was co-operating with Mr. Ralston, as will be seen by the correspondence between the parties; Kamm living at the time in Portland, Oregon, and only coming to San Francisco from time to time.

Kamm, it would seem, had concluded to take stock in the new bank to the extent of about $75,000, and, following out the plan adopted by Ralston, was to forward that amount to Ralston, to be invested in commercial paper; so that, when he should be called upon to pay up his subscription to the new bank, he would be enabled to pay in the commercial paper instead of cash, and that commercial paper would then become the property of the bank. Thus its funds to that extent would, on its opening for business, be already invested, filling the important part of a beginning and nucleus, as already stated, for its general banking business.

Kamm already had a general deposit account with Donohoe, Ralston & Co., and was remitting and drawing. For the purposes of the new project, he commenced to remit on the eleventh of April, 1864, and continued up to the twenty-fifth of May, 1864, at which time he had remitted $69,500. By adding to this the sum of $5,500, drawn from his general deposit account with Donohoe, Ralston & Co., he made up the aggregate amount of $75,000 named in the complaint. Though these amounts came nominally to Donohoe, Ralston & Co., in the beginning, for the ostensible purpose of investments, they were immediately taken charge of by Ralston, with the express knowledge and consent of Kamm and Donohoe, Ralston & Co., and invested on loans and in commercial paper, with the secret intent of Kamm and Ralston to transfer such investments and commercial paper to the new bank when formed, in payment of Kamm's subscription. In all of these matters Ralston managed and controlled the funds and investments, and most of the time had them in his own name, and secretly gave information to and corresponded with Kamm, constantly imposing on the latter the most profound secrecy. In this manner the $75,000 in cash and checks came to the possession and control of Ralston, and was by him invested, and the investments, from time to time, changed.

When the Bank of California went into business, or shortly after, $50,000 of the amount, it is admitted, went to pay up his subscription to the stock, which had been subscribed for him by Ralston at his (Kamm's) special direction. Of the remaining $25,000 Kamm admits payments to him of $4,190, but still claims as unpaid to him the sum of $20,810. This amount, with interest, he demands from defendant, upon the theory that it was his agent for these investments, and as such agent received the $75,000 in commercial

paper and securities, and had failed to account to him for so much thereof as is involved in this action.

The important question of fact presented for determination at the trial was whether the Bank of California received the money and securities involved in the action as the agent of plaintiff, or whether Ralston retained custody thereof as such agent, and became liable therefor. The testimony was voluminous and conflicting, and while the court below found in favor of the plaintiff, grave doubts were expressed concerning the propriety of the conclusion reached.

We have stated these facts to the better understanding of a question raised at the trial, upon certain testimony offered by the defendant and excluded by the court, the exclusion of which is assigned as error, viz.: Defendant proved that in September, 1876, plaintiff executed a power of attorney to Joseph M. French, whereby the latter was authorized and empowered for and on behalf of the former to collect and receive all claims and demands due him, the said plaintiff, to take and prosecute all legal proceedings necessary and proper to collect the same, etc. Defendant then offered to prove that the identical claim involved in this action was presented, duly verified, by J. M. French, on behalf of plaintiff, to the executors of W. C. Ralston, (who departed this life on the twenty-seventh day of August, 1875,) on the twenty-fifth day of October, 1876, as a claim in favor of plaintiff and against the estate of Ralston, that said claim was rejected by the executors of Ralston, deceased, and that thereafter, and on the twenty-fifth day of January, 1877, an action was instituted in the district court of the Fourth judicial district of the state of California, in and for the city and county of San Francisco, in the name of and for the plaintiff, against the executors aforesaid, to recover the sum of money claimed in this action, which suit against said executors was then "pending and being prosecuted against the estate of Mr. Ralston, with the knowledge and consent of Mr. Kamm, the plaintiff here." The testimony was excluded, an exception taken to the ruling, and the action of the court is assigned as error.

The complaint in the action against the Ralston estate was a part of the proffered evidence, and is signed by the same attorneys as appear for plaintiff in this case. It appears from the complaint in this cause, supported by evidence, that plaintiff remitted certain moneys, which the Bank of California agreed to invest, and did invest, for him, and had collected and appropriated to its own use $20,810, parcel thereof; that the bank was the contracting party with plaintiff, and responsible to him for the money.

In the other action pending he set up that this money was remitted to and deposited with William C. Ralston, and that Ralston had undertaken to invest for him that money; that Ralston received it, and that Ralston agreed to invest it, and Ralston agreed to keep it invested; and that Ralston reported to him, from time to time, of and concerning this money which was invested; and that he had made a request and demand on Ralston to pay him that money, and that Ralston had refused to pay it to him prior to the time of his death, and that it remained unpaid to him at the time of Ralston's death. In that suit Kamm avers the facts to be just as defendant in this action claims them to be True, plaintiff did not verify the complaint in that cause, but it was verified by his attorney, and we find nothing to indicate that the act was unauthorized; but, on the contrary, proof was offered that the action was being prosecuted with the knowledge and consent of the plaintiff.

Where a suit is brought in the name of and for the benefit of a party by his attorney in fact, thereunto duly authorized, and is being prosecuted with his knowledge and consent, he must be presumed to know these facts, and to have assented thereto, and, so far as the same is evidence for or against him, to be bound thereby

Greenleaf, in treating of the subject of admissions, says: "So, the allegations in the declaration or pleadings in a suit at law have been held receiv-

able in evidence against the party in a subsequent suit between him and a stranger, as his solemn admission of the truth of the facts recited, or of his understanding of the meaning of an instrument, though the judgment could not be made available as an estoppel, unless between the same parties, or others in privity with them." 1 Greenl. Ev. § 195; *Parsons* v. *Copeland*, 33 Me. 370.

In *McDermott* v. *Mitchell*, 47 Cal. 249, it was held that a joint answer by two defendants, signed by their attorneys and verified by only one of them, was not admissible in evidence, for the purpose of proving the allegations therein contained, in an action brought against the defendant who did not sign or verify such answer.

To hold a party bound by all the allegations in a pleading which he has not signed, and with which he may not be acquainted, would in many cases work a great hardship. When, however, an action is brought by or for a party, and is being prosecuted with his knowledge or consent, the complaint therein is evidence against him of the fact of suit brought, and of the nature of the action. These are special facts dependent upon the general tenor and effect of the pleading, and are independent of many of the formal allegations therein. To this extent and for this purpose we think the complaint in *Kamm* v. *Ralston* was admissible. It may well be that the proffered testimony would carry but little weight with a jury or the court acting as such. We can well see how a party, being in doubt as to which of two parties is legally liable to him, may bring separate suits against each, but these and other like considerations go to the weight of the testimony when introduced, and not to its admissibility. We are of opinion the testimony ought to have been admitted, and that its exclusion was error.

Upon the close of plaintiff's testimony, defendant moved for a nonsuit, pending which motion the court permitted plaintiff to amend his complaint so as to more nearly conform to the proofs. This action was in the furtherance of justice, and a proper exercise of the discretionary power of the court.

The demurrer to the fourth amended complaint was properly overruled. The pleading contained a cause of action, and was not on its face amenable to the charge of being barred by the statute of limitations. We find no error in the action of the court in refusing to strike out portions of the complaint as amended pending the trial. It is apparent that, through all the numerous amended complaints, plaintiff was pressing, by somewhat varied statements, the same cause of action set out in his original complaint. We are therefore of opinion the plea of the statute of limitations was not well taken.

As a new trial must be had, it can serve no useful purpose for us to enter upon the difficult task of discussing the findings of the court below, or the sufficiency of the evidence to support them.

The judgment and order appealed from are reversed, and a new trial ordered.

We concur: McKinstry, J.; Temple, J.; McFarland, J.; Paterson, J.

72 Cal. 591

KEARNEY and others *v.* KEARNEY. (No. 11,547.)

(*Supreme Court of California.* June 27, 1887.)

HOMESTEAD—ALLOTMENT—NOTICE TO HEIRS—VALUE.

Code Civil Proc. Cal. § 1465, provides that the probate court, in the course of administration, must set apart a homestead to the widow, if none has been selected, in the manner prescribed in article 2 of the same chapter, which provides for homesteads not exceeding $5,000 in value. A probate court, after appointing an administrator, set apart a homestead to a widow, on her own motion and without notice to the heirs, on proof that it was worth less than $5,000. In a suit to set the decree aside, it appeared that the property was worth $10,000, though no fraud was suggested in making proof of the value of the property before the probate court. *Held*, that the court had jurisdiction of the matter, and the decree setting apart the homestead was valid.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

L. W. Elliott and *John C. Byers*, for appellant. *Stanton L. Carter* and *Carter, Smith & Keniston*, for respondents.

SEARLS, C. J. This is an equitable action brought by the plaintiffs, as heirs at law of J. W. Kearney, deceased, against the defendant, the widow of decedent, to set aside a certain decree of the superior court in probate, whereby a homestead was set apart to defendant. The cause was tried by the court, findings in writing filed, upon which judgment in favor of defendant was entered. Plaintiffs appeal from the judgment, and the cause comes up on the judgment-roll.

The *gravamen* of the charge is fraud in procuring the decree whereby the homestead was carved out of decedent's estate, and that no notice was given of the application or hearing in the proceeding for such decree. The defendant was appointed administratrix of the estate of her deceased husband. There were no children, and the heirs at law other than the widow are two brothers and a sister. The property in question, upon which deceased and defendant had their residence prior to the death of the former, consisted of 320 acres of land, and was appraised at $4,200. Subsequent thereto, and on the eighteenth of March, 1878, defendant applied to the probate court by petition to have the same set apart to her as a homestead; and on a hearing before the court, but without notice to the other heirs, the property was found to be of less value than $5,000, and was, by a decree duly entered, set apart to defendant, the widow, as a homestead.

In this action the court finds that the homestead, when set apart, was of the value of $10,000, but that defendant in good faith believed the same was of no greater value than $5,000, and the findings negative any fraudulent intent on the part of defendant. Subsequently to the order setting apart the homestead, the usual proceedings for a distribution of the residue of the estate were had, of which due notice was given, and in which proceedings it affirmatively appeared that the homestead had been set apart, etc. The residue of such estate was, by decree of April 7, 1879, duly distributed. On the twenty-second of February, 1883, the plaintiffs moved the superior court, as the successor of the former probate court, to set aside the decree of homestead upon the same grounds substantially as urged here; which motion, after a hearing, was denied by the court, whereupon this action was instituted. The property in question was community property of defendant and her deceased husband, upon which they had resided for many years prior to the death of the latter, and they had no homestead under any statute.

The first contention of appellants is that the decree setting apart the homestead is void for want of jurisdiction in the court to hear and determine the same without notice. Probate proceedings, and the judgments rendered therein, are in the nature of proceedings *in rem*. In other words, such judgments are

founded in proceedings, not against persons as such, but against or upon the thing or subject-matter itself, whose *status* or condition is to be determined, and the judgment when rendered is a solemn declaration of the *status* of the thing, and *ipso facto* renders it what it declares it to be. *Woodruff* v. *Taylor*, 20 Vt. 65. The probate of a will establishes its *status*, and such *status* adheres to the will, and concludes the whole world, subject only to be avoided by such direct proceedings to that end as may be provided by some affirmative law. 2 Smith, Lead. Cas. (6th Amer. Ed.) 669, and cases cited; *Deslande* v. *Darrington's Heirs*, 29 Ala. 95; *Woodruff* v. *Taylor*, *supra*; *State* v. *McGlynn*, 20 Cal. 234. Decrees of sale of the real estate of lunatics and deceased persons stand upon the same footing. *Latham* v. *Wiswall*, 2 Ired. Eq. 294; *Wyman* v. *Campbell*, 6 Port. (Ala.) 219.

A prominent distinction between proceedings *in personam* and proceedings *in rem*, consists in the different methods by which jurisdiction is obtained by the court. In the former, jurisdiction of the parties is obtained by personal service, or its equivalent, while in the latter, or at least in such cases coming under that head as relate to *things* exclusively, jurisdiction is acquired by taking possession of the *thing*, or by some act tantamount thereto, and a judgment *in rem* in such a case binds the "*res*, in the absence of any personal notice to the parties." *The Globe*, 2 Blatchf. 427. The parties in interest in such cases are deemed parties to the suit without personal notice. *Bauduc's Syndics* v. *Nicholson*, 4 La. 81; *Thomas* v. *Southard*, 2 Dana, 475.

In this class of cases, two questions only need be answered in the affirmative to uphold a judgment: (1) Did the court have the authority to determine the subject-matter of the controversy? (2) Did the court have jurisdiction over the *thing* proceeded against as a defendant? Freem. Judgm. § 611.

The first question is answered in the affirmative in this case by our statute, which authorizes the court to act in cases like the one at bar. Code Civil Proc. § 1465. This section provides that "upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion or on petition therefor, set apart * * * the homestead selected, designated, and recorded. * * * If none has been selected, * * * the court must select, designate, and set apart * * * a homestead for the use of the surviving husband or wife and the minor children * * * in the manner provided in article 2 of this chapter, out of the common property," etc. The answer to the second question is that the proceeding to set aside the homestead is in the nature of a proceeding *in rem*, and that, to obtain jurisdiction over the *thing* for the purpose of decreeing its *status*, only such notice is required as is provided by positive law. We have said that in a proceeding *in rem* against *things* no notice is required. This must, of course, be taken with the proviso that the statute has not provided for notice. It is a familiar principle of law in such cases that the local law as to notice governs, and whatever provision it makes, whether for personal or constructive notice, must be obeyed. In the language of *Monroe* v. *Douglas*, 4 Sandf. Ch. 182: "But such party cannot be permitted to show that he never had any notice of the suit, otherwise than by showing that the notice prescribed by the local law was not given, thereby proving the judgment to be void by that law. Actual notice in suits *in rem* is not required to be given to absentees in any system of municipal law with which I am acquainted."

The inquiry in such cases is not, was the defendant therein served with process, or did he appeal in the action? but the question is, did the court proceed according to its own municipal laws in pronouncing the judgment or decree? The record shows that the court in this case acquired jurisdiction of the subject-matter of the estate in the usual manner, and, having such jurisdiction and authority to set apart a homestead, and the statute not requiring notice thereof to be given, we are of opinion the decree of the court

in that behalf was not void for want of notice to the heirs. It follows that the proceedings by which the homestead was set aside are to be treated as though the plaintiffs were personally present thereat. Evidence was there introduced as to the value of the land, and it is not suggested that any fraud or device was resorted to by the defendant, whereby plaintiffs, had they in fact been present, would have been prevented from making proofs in reference to such value.

If the defendant believed, as the court found she did, that the value of the land did not exceed $5,000, there was no fraud or imposition practiced by her upon the court in bringing witnesses to establish such fact. Appellants also contend that the statute relating to single persons permits only $1,000 worth of land to be taken for a homestead. The section referred to provides for a homestead of not exceeding $5,000 in value by any head of a family, and not exceeding $1,000 in value by any other person. As before stated herein, the homestead is to be set apart in the manner provided in article 2, *c.* 5, tit. 11, Code Civil Proc.

Referring to article 2, we find it provides for a homestead not exceeding in value $5,000. It is true, the article as it now stands only treats of homesteads perfected before the death of the husband or wife. Section 1485 of that article, which provided the manner of setting apart a homestead of the value of $5,000 where none before existed, has been repealed; but as the probate act provided for a homestead of not exceeding $5,000, where the declaration is made during the life-time of decedent whether there are or are not minor children, and as it provides a means whereby the court shall set aside a homestead in cases where none has before been designated, we are of opinion that the court being called upon to do what the parties might have done, while both were living, may properly set aside for the survivor and minor children if any, or for the minor child or children if neither husband nor wife is living, a homestead of any value not exceeding $5,000. This question was before this court in *Estate of Burns*, 54 Cal. 223, where it was held that a homestead not exceeding $5,000 in value could be set apart without notice. The judgment is affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

TEMPLE, J. I concur on the authority of *Mawson* v. *Mawson*, 50 Cal. 539, and under some feeling of compulsion, in view of the consequences of a different ruling. In *Mawson* v. *Mawson*, it was intimated that the method originally provided for setting apart a homestead in article 2, *c.* 5, Code Civil Proc., had been repealed, and there was therefore no mode prescribed, and the court would proceed under section 187, Code Civil Proc. Section 1465 still prescribes, however, that when no homestead has been selected in the life-time of the deceased husband or wife, the court may proceed to set apart one as provided in article 2. That article formerly contained other sections specifically directing the mode of setting apart a homestead in such cases. They have been separated, but there still remains a procedure in article 2 for setting apart a homestead where one had been selected, but is found to exceed $5,000 in value. This procedure *mutatis mutandis* could be made applicable. In view of the very grave questions which have been raised in regard to the validity of these homesteads which have been set apart without notice, I suggest that probate judges adopt as a suitable mode of proceeding the mode still found in article 2, so far as applicable. That is the admeasurement and appraisal of the homestead, the report, the setting of a day for hearing, and the notice as there prescribed.

SEARLS, C. J. I concur in the suggestions of Justice TEMPLE as to a proper course to be pursued in the cases indicated.

2 Cal. Unrep. 811

In re Petition of MARSHALL.

(*Supreme Court of California.* November 8, 1887.)

PLEADING—NEW PARTIES BY AMENDMENT—CERTIORARI.

In a suit to condemn land the plaintiff obtained, in March, 1887, leave to amend complaint and summons filed December, 1886, by inserting the name of the petitioner herein as defendant, and, in April, 1887, having consolidated with other railroad companies, obtained an order to substitute the consolidated company as plaintiff. Petitioner applied for a writ of *certiorari*. *Held*, that it must be denied.

In bank. *Certiorari* to superior court of San Diego county; J. D. WORKS, Judge.

J. H. Marshall petitioned for a writ of *certiorari* to the superior court of San Diego county. His name appeared in the body of a complaint in a condemnation suit, but not in the summons nor as defendant in the complaint filed December, 1886. Plaintiff, in the condemnation proceedings in March, 1887, obtained leave to amend the summons *nunc pro tunc* by inserting petitioner's name as defendant, and later the complaint was so amended, and in August, 1887, the complaint was amended by substituting a company as plaintiff.

J. G. Deakin, (*Myrick & Deering*, of counsel,) for petitioner. *Lewis Chase*, *contra*.

BY THE COURT. In the above-entitled cause the application for a writ of review is denied.

74 Cal. 222

SANTA CRUZ WATER CO. *v.* KRON and others. (No. 12,025.)

(*Supreme Court of California.* December 1, 1887.)

MUNICIPAL CORPORATIONS—BONDS—ELECTION—TIME OF TAKING EFFECT OF ACT.

Under California act of March 9, 1885, entitled "An act to authorize corporations of the fifth class containing more than three thousand and less than ten thousand inhabitants to obtain public water works," an election was held in the city of Santa Cruz on March 30, 1885, and bonds were issued to pay for the works. *Held* that, by virtue of Pol. Code Cal. § 323, which enacts that an act shall take effect 60 days after its passage unless otherwise prescribed therein, the election was void, and a writ of *mandamus* to compel payment of interest on the bonds would not be granted. MCFARLAND, J., dissenting.

In bank.

Application by the petitioners, the Santa Cruz Water Company, for a writ of mandate, commanding defendants Kron, Swanton, Jeter, and Squirm, constituting the common council of the city of Santa Cruz, to allow payment of interest on certain bonds issued in payment of city water-works.

Pringle & Hayne, for petitioners *J. M. Lesser* and *Charles B. Younger*, for defendants.

PER CURIAM. This is an application for a writ of mandate, commanding the defendants Kron, Swanton, Jeter, and Squirm, constituting the common council of the city of Santa Cruz, to audit and allow a demand for interest on certain bonds of the city aforesaid, issued to purchase and pay for water-works, and to command the mayor, Effey, who, as well as the city, is made a defendant, to draw his warrant on the city treasurer therefor. The bonds in question were issued pursuant to authority conferred by an election held, or purporting to be held, under an act of the legislature approved March 9, 1885, entitled "An act to authorize corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain public water-works." St. 1885, p. 42. "Every statute, unless a different time is prescribed therein, takes effect on the sixtieth day after its passage." Pol. Code, § 323. The act of March 9th did not in terms prescribe when it

should take effect, and hence did not become a law until the sixtieth day thereafter, viz., May 8, 1885. The election was held March 30, 1885. Conceding the act of March 9, 1885, to be applicable to Santa Cruz, the election authorizing the bonds to issue was null and void, because held before the law took effect. *Andrews* v. *Railroad Co.*, 16 Mo. App. 305; *McDougal* v. *Johnson*, 6 Cal. 674.

It follows that the petition for a writ of mandate must be denied and the proceedings dismissed. Ordered accordingly.

74 Cal. 250

LOUGHBOROUGH, Adm'r, etc., *v.* MCNEVIN and others. (No. 9,520.)

(*Supreme Court of California.* December 1, 1887.)

1. PLEDGE—LIEN—EXTINGUISHMENT—TENDER.
 The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law, and is refused by the pledgee.
2. SAME—REFUSAL TO DELIVER—CONVERSION.
 A refusal by a pledgee to deliver up the pledge to an assignee of the pledge, upon a sufficient tender being made by the assignee of the amount due him, is conversion, and the fact that the property pledged had been attached by a third person, with whom the assignee had no privity, is no justification.
3. SAME.
 In an action of trover to enforce the redemption of a pledge, the pledgee will be held responsible for any depreciation in value of the pledge, after the tender of the amount due, and refusal by the pledgee.
4. SAME—INTERVENING CLAIMANT.
 One to whom a pledge has been assigned pending litigation concerning it, may file a complaint in intervention, under section 386, Code Civil Proc. Cal., which provides for order of substitution.
5. TENDER—SUFFICIENCY.
 Where one who held certain shares of stock as security for money loaned, demanded payment of the debtor, which was refused, and afterwards an assignee of the stock tendered to the pledgee the whole amount due him, with interest, *held* a sufficient tender, under section 1492, Civil Code Cal., which provides that where delay in the performance of an obligation is capable of exact and entire compensation, and time has not been declared to be the essence of the contract, an offer of performance, accompanied by an offer of such compensation, may be made at any time after the obligation is due.
6. SAME.
 A tender to a pledgee of the amount secured by the pledge is not vitiated by a condition that the pledge be delivered to the one tendering payment.
7. SAME.
 A tender of the amount due a pledgee by an assignee of the pledge is sufficient without bringing the money into court.

In bank. Appeal from superior court, city and county of San Francisco.

THORNTON, J. The judgment and order appealed from are affirmed for the reasons given in the decision by department 2, filed June 27, 1887, (14 Pac. Rep. 369.)

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J.; PATERSON, J.

74 Cal. 269

DOMINGUEZ *v.* MASCOTTI. (No. 12,210.)

(*Supreme Court of California.* December 2, 1887.)

1. NEW TRIAL—APPLICATION—TIME TO SERVE NOTICE.
 Section 659, Code Civil Proc. Cal., provides that "the party intending to move for a new trial * * * must, * * * after notice of the decision of the court, * * * serve upon the adverse party a notice of his intention," etc. *Held*, that such a notice, given before the findings were signed and filed, was ineffectual; there being no decision, and no party aggrieved, within the meaning of section 657, which provides that "the former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved," etc.

2. SAME—APPEAL—RECORD.

Under section 661, Code Civil Proc. Cal., a notice of motion for a new trial is no part of the record on appeal, but must be made to appear by a statement on bill of exceptions, and, when the motion for a new trial is denied, the fact that a statement or affidavits were filed does not warrant the presumption that such notice was either given or waived.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

Horace Bell and *C. H. Connell*, for appellant. *Robert Hardie* and *W. I. Foley*, for respondent.

HAYNE, C. The notice of motion for a new trial was given before the findings were signed, and was therefore premature and ineffectual. Under the present system the findings constitute "the decision." Until the findings are signed and filed there is no decision, and nobody is "aggrieved," within the meaning of section 657, Code Civil Proc. That a premature notice of motion is ineffectual has frequently been decided. *Mahoney* v. *Caperton*, 15 Cal. 313; *Bates* v. *Gage*, 49 Cal. 126; *Hinds* v. *Gage*, 56 Cal. 487; *Spottiswood* v. *Weir*, 66 Cal. 529, 6 Pac. Rep. 381.

It is true that the notice of motion is not a part of the record on appeal. *Girdner* v. *Beswick*, 69 Cal. 112, 10 Pac. Rep. 278; *Hook* v. *Hall*, 68 Cal. 23, 8 Pac. Rep. 596. But if, for that reason, the notice printed in the transcript cannot be looked at to see when it was given, then the record does not show that a notice was given or waived, and this of itself was good ground for denying the motion. *Wright* v. *Snowball*, 45 Cal. 654; *Calderwood* v. *Books*, 28 Cal. 154. Formerly the notice was part of the record on appeal. But by careless legislation it is no longer so; and, this being the case, it must, as stated in *Girdner* v. *Beswick*, above cited, "be made to appear as part of the record, by a statement or bill of exceptions," or in some appropriate mode. If it had appeared that the respondent had proposed amendments to the proposed statement without reserving proper objection, the notice of motion would have been waived. But the record does not show this, or anything from which it can be inferred that there was a waiver. It cannot be presumed from the naked fact that a statement or affidavits were filed that a notice of motion was given or waived, where the motion is denied.

The question as to the insufficiency of the evidence cannot be considered on appeal from the judgment, because that appeal was taken more than 60 days after the decision.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

74 Cal. 261

PACIFIC COAST RY. CO. *v.* PORTER and Wife. (No. 12,122.)

(*Supreme Court of California.* December 2, 1887.)

1. EMINENT DOMAIN—COMPENSATION—BENEFITS ACCRUING TO RESIDUE OF LAND.

Const. Cal. art. 1, § 14, provides that no right of way shall be appropriated to the use of any corporation not municipal, until compensation is made, irrespective of any benefits from the proposed improvements. *Held*, that the benefits supposed to result to the rest of a piece of land by the taking of part of it for the right of way for a railroad, cannot be considered in a suit to determine the compensation to be paid the owner.

2. SAME—PROCEDURE—VERDICT.

Code Civil Proc. Cal. § 1249, provides that compensation and damages on condemnation proceedings shall be assessed as of the date of the issuing of the sum-

mons. Section 1243 provides that the proceedings "must be commenced by filing a complaint and issuing a summons thereon." The verdict of a jury in a condemnation suit assessed the damages as to "the *present* value of the strip of land." *Held*, that the verdict was to be construed with reference to the issues in the pleadings, which related to the time of the beginning of the proceeding in this case identical with the summons.

Commissioners' decision. In bank.

Appeal from superior court, San Luis Obispo county; JAMES G. MAGUIRE, Judge.

The Pacific Coast Railway Company, plaintiff, sued Uriah and Fanny R. Porter, defendants, to condemn a right of way. Judgment for defendants, and plaintiff appealed.

R. B. Treat, for appellant. *C. W. Goodchild* and *W. H. Spencer*, for respondents.

HAYNE, C. This was a proceeding to condemn a strip of the defendants' land for the purposes of the plaintiff's road. The cause was tried by a jury, who rendered a verdict, and judgment was entered thereon and on the additional findings of the court condemning the said land, and decreeing that the plaintiff pay to the defendants Uriah and Fanny Porter: (1) The sum of $75, adjudged to be the value of the land taken; (2) the sum of $800, as damages to the remainder of the land; and (3) the sum of $275, cost of fencing and cattle-guards, which, however, the plaintiff was given the option to build at its own expense. The plaintiff appeals from that part of the judgment directing payment to the said defendants.

1. It is argued for the appellant that evidence should have been admitted of the benefits accruing to the remaining land, and that such benefits should have been deducted from the amount of damage assessed. But the constitution expressly provides that "no right of way shall be appropriated to the use of any corporation *other than municipal* until full compensation therefor be first made in money or ascertained and paid into court for the owner *irrespective of any benefit* from any improvement proposed by such corporation." Article 1, § 14.

Under this provision the benefits supposed to result to the remainder of the land cannot be considered. An exception to this rule is provided when the corporation for whose use property is taken is a "municipal corporation." The cases of *Butte Co.* v. *Boydston*, 64 Cal. 110, and *Tehama Co.* v. *Bryan*, 68 Cal. 57, 8 Pac. Rep. 673, fall within this exception. For, as is well said by respondent's counsel, the word "municipal," as used in the provision, refers to such corporations as are for public government, and therefore includes counties. Unless the cases mentioned proceed upon this ground, we do not see how they can be sustained.

2. It is claimed that under section 1249, Code Civil Proc., the compensation and damages should have been assessed at the date of the issuing of the summons; and that the verdict of the jury was as to "the *present* value of the strip of land," etc. This seems to verge close to those criticisms upon the form of the verdict which are to be made in time to admit of correction. *Algier* v. *The Maria*, 14 Cal. 170, 171. But without reference to this rule it seems to us that the verdict did relate to the time of the issuance of the summons. The verdict is to be construed with reference to the issues made by the pleadings; and the issues made by the pleadings ordinarily relate to the time of the commencement of the action or proceeding, which in this kind of case is identical with the issuance of the summons. Section 1243 of the Code provides that the proceedings "must be commenced by filing a complaint *and issuing a summons thereon.*" Under this language, the proceedings were not commenced until the summons was issued. Compare *Flandreau* v. *White*, 18 Cal. 639; *Green* v. *Water Co.*, 10 Cal. 374. In the case before us the complaint was filed and the summons issued on the same day.

We therefore advise that the part of the judgment appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion that part of the judgment appealed from is affirmed.

74 Cal. 263

ROACH and Wife *v.* RIVERSIDE WATER CO. (No. 12,079.)

(*Supreme Court of California.* December 2, 1887.)

1. EMINENT DOMAIN—PROCEDURE—NOTICE OF LIS PENDENS—PURCHASER—CLAIMANT OF HOMESTEAD.

Code Civil Proc. Cal. § 409, provides that from the time of the filing a *lis pendens* "a purchaser or incumbrancer" of the property shall be affected with constructive notice. Section 1256 provides this shall apply to condemnation proceedings. In November, 1885, defendant filed notice of *lis pendens* at the beginning of a condemnation of a right of way. March, 1886, the wife of the owner of the property, living with him, filed a declaration of homestead. April, 1886, judgment was rendered in the condemnation proceedings, and the damages paid into court for the owner of the property. *Held*, that the word "purchaser" in section 409 included those who had acquired a homestead interest in the property.

Commissioners' decision. Appeal from superior court, San Bernardino county; J. A. GIBSON, Judge.

William Roach and Rufina Roach, plaintiffs, sued the Riverside Water Company, defendant, in an action of ejectment. Judgment for defendants. Plaintiffs appealed.

H. C. Rolfe, for plaintiffs. *Curtis, Otis & Conner*, for defendants.

HAYNE, C. Ejectment. On November 9, 1885, the plaintiff William Roach was the owner of the land in controversy. On that day the defendant herein commenced proceedings against him to condemn a right of way over the land for a public purpose, and on November 23, 1885, duly filed a notice of *lis pendens*. On March 22, 1886, the plaintiff Rufina Roach, who was the wife of William Roach, and who resided on the premises with him, filed a declaration of homestead thereon. On April 1, 1886, judgment of condemnation was rendered in pursuance of a stipulation, which was as follows: "It is hereby stipulated by the respective parties that plaintiff have judgment for the right of way over the land of defendant, as claimed in the complaint, and that defendant and his wife will execute a deed of said right of way, in addition thereto, to plaintiff, upon plaintiff's paying to defendant $925." The plaintiff in said proceedings (defendant herein) paid said sum into court subject to the order of the plaintiff. It has not been withdrawn, but remains in the hands of the clerk for Roach, whose property it is. The plaintiff Rufina Roach was not a party to the condemnation proceedings, and it is argued that she was not a purchaser or incumbrancer within the meaning of section 409, Code Civil Proc., which provides, with reference to notices of *lis pendens*, that "from the time of filing such record only, shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action." This provision applies to condemnation proceedings. Code Civil Proc. § 1256. And we think the word "purchaser" must receive a liberal construction, and be held to include those who have acquired a homestead interest in the property. Any other rule would enable parties to commit frauds. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(74 Cal. 273)

ROYLANCE and others *v.* SAN LUIS HOTEL CO. and others.[1] (No. 12,000.)

(*Supreme Court of California.* December 2, 1887.)

1. APPEAL—REQUISITES—NOTICE—SERVICE.

Plaintiffs recovered a judgment against certain of the defendants, and it was adjudged that "they take nothing against the defendant * * * company, and that their complaint, in so far as it seeks to foreclose a lien, is hereby dismissed," etc., and "that the defendant * * * company, do * * * recover from * * * plaintiff its costs," etc. Plaintiffs then served upon that defendant the following notice: "Plaintiffs * * * appeal from the judgment * * * dismissing said action as to the defendant * * * company and for recovery by said * * * defendant from plaintiffs * * * costs of * * * action. The plaintiffs appeal from the whole of said judgment, and from every part thereof." *Held* to include only an appeal from that part of the judgment dismissing the complaint, and for the recovery of costs against the plaintiffs, and the appeal should not be dismissed for failure to serve notice of appeal upon the other defendants.

2. MECHANIC'S LIEN — PROCEEDINGS TO PERFECT FILING CLAIM BEFORE COMPLETION OF BUILDING.

Section 1187, Code Civil Proc. Cal., regulating mechanics' liens, provides that "every original contractor, within sixty days after the completion of his contract, and every person save the original contractor, * * * must, within thirty days after the completion of any building, * * * file for record * * * a statement," etc. *Held*, that a claim of lien filed before the completion of the building was premature, and could not be enforced.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

This action is to foreclose a mechanic's lien. Appellants, plaintiffs, were material-men, and furnished material to be used in the construction of the hotel of the defendant, the San Luis Hotel Company. These materials were furnished directly to the defendants, who were doing work in the hotel for the original contractors. The complaint showed that the claim of lien was filed before the completion of the building. The following is the judgment of the court below: "This cause coming on regularly to be tried, * * * the court having heard and considered the allegations and evidence of the respective parties, did * * * make and file its findings of fact and conclusions of law herein, and ordered judgment to be entered herein, that the plaintiffs take nothing herein against the defendant San Luis Hotel Company, and that the plaintiffs' complaint, in so far as it seeks to foreclose a lien, be dismissed, and that the said hotel company, defendant, have judgment against the plaintiffs for costs, and that the plaintiffs do have and recover from John D. Armstrong and William Armstrong, partners as Armstrong Bros., the sum of," etc. Wherefore * * * it is ordered, adjudged, and decreed that the plaintiffs take nothing against the defendant, the San Luis Hotel Company, and that the plaintiffs' complaint herein, in so far as it seeks to foreclose a lien, be, and the same is hereby, dismissed out of this court; and it is further ordered and adjudged that the defendant, the San Luis Hotel Co., do have and recover of and from the plaintiff its costs and disbursements herein, now taxed at $20.25."

The following is the notice of appeal: "You will please take notice that the plaintiffs Joseph Roylance, Robert Dalziel, and Frederick Delger, partners under the firm name and style of San Francisco Brass-Works, hereby appeal * * * from the judgment * * * filed and entered in the said superior court on the twenty-first day of January, 1886, * * * dismissing said action as to the defendant San Luis Hotel Company, and for recovery by said last-named defendant from the plaintiffs of twenty dollars and twenty-five cents ($20.25) costs of said action. The plaintiffs appeal from the whole of said judgment and from every part thereof."

Wm. R. Davis and *Wm. Shipsey*, (*Wm. Lair Hill*, of counsel,) for appellants. *McD. R. Venable* and *C. W. Goodchild*, (*Metcalf & Metcalf* and *F. B. Ogden*, of counsel,) for respondents.

[1] For a corrected report of this case, see 20 Pac. Rep. 573.

PER CURIAM. As it appears to us, the notice of appeal in this action was intended to embrace only that part of the judgment of the court below which affected the plaintiffs in adjudging that "they take nothing against the defendant, the San Luis Hotel Company, and that their complaint, in so far as it seeks to foreclose a lien, be, and the same is hereby, dismissed out of this court," and "that the defendant, the San Luis Hotel Company, do have and recover from the plaintiff its costs and disbursements, now taxed at $20.25." It was not intended to include in the notice any appeal from that portion of the judgment where the plaintiff recovered a personal judgment against Armstrong Bros. for a sum of money. Taking all the terms of the notice of appeal together, it seems to us that the words "said judgment," where they occur in the last clause of the notice, refer not to the whole judgment as rendered by the court, but to that part of it which is set out in the language of the notice preceding the last clause thereof, which language, fairly interpreted, includes only that part of the judgment which affects the hotel company and the plaintiff, but does not include that portion which affects the rights of Armstrong Bros. Therefore the appeal, as taken, should be entertained notwithstanding that the counsel for Armstrong Bros. were not served with notice of the appeal.

But the complaint does not show that the plaintiffs are entitled to enforce any mechanic's lien upon the building of the hotel company; for as alleged in the complaint, the claim of lien was filed on the thirteenth of October, 1884, and the building was not completed until after that date. Hence, from that pleading itself, it appears that the plaintiffs prematurely filed their claim of lien, and according to their allegations could not enforce it. In *Perry* v. *Brainard*, 8 Pac. Rep. 882, it was said: "The court below found that the lien which was sought to be enforced by the action was filed prior to the completion of the building, and was therefore prematurely filed. The statute reads: 'Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record,' etc. Code Civil Proc. § 1187. It will be seen that the time prescribed by the statute for the filing of the plaintiff's claim was 'within thirty days after the completion of the building.' Under a similar statute, the supreme court of Kansas lately held in two cases—*Davis* v. *Bullard*, 4 Pac. Rep. 75, and *Seaton* v. *Chamberlain*, Id. 89—that a claim so filed was premature, and a lien based thereon could not be enforced. The reasoning of that court commends itself to our judgment."

74 Cal. 266

WAGGLE v. WORTHY and another. (No. 12,221.)

(*Supreme Court of California.* December 2, 1887.)

1. COVENANT—ACTION FOR BREACH—DISCHARGE IN INSOLVENCY.
To an action for breach of a covenant against incumbrances, given in a deed to land dated July, 1884, which was subject to a lien of a judgment rendered in March, 1884, defendant pleaded a discharge in insolvency in February, 1884. *Held* that, if the discharge were a bar to the debt on which judgment was entered, it should have been pleaded at that time, and the judgment could not be attacked collaterally.

2. HOMESTEAD—ABANDONMENT—SALE UNDER EXECUTION, AND REMOVAL FROM LAND.
Under Civil Code Cal. § 1243, providing that a homestead can be abandoned only by a declaration of abandonment or grant, one who had claimed a homestead in lands, but permitted them to be sold under judgment, and moved out, it not appearing that this former homestead was worth more than $5,000, and that steps had been taken for admeasuring the excess as provided in section 1245 *et seq.*, cannot claim a homestead in other lands.

Commissioners' decision. In bank.

Appeal from superior court, Fresno county; R. E. ARRICK, Judge.

William M. Waggle, Sr., plaintiff, sued Robert E. Worthy and Sarah E. Worthy, defendants, to recover for breach of a covenant of warranty. Judgment was rendered for defendants, and plaintiff appealed.

Nourse & Church, for appellant. *Terry & Terry*, for appellees.

HAYNE, C. This an action upon a covenant against incumbrances implied by statute from the use of the word "grant" in a conveyance of real property. Civil Code, § 1113. The conveyance was made on July 5, 1884. The breach alleged is that the property was at the date of the deed subject to the lien of a judgment "suffered" by the vendor for $840.30, docketed on the twenty-first of March, 1884, under which the property was sold, and subsequently redeemed by the plaintiff. The cause was submitted on briefs, but no brief for respondent is on file. So far as we can gather, the defenses were two, viz.: (1) That on February 12, 1884, the vendor had filed her petition in insolvency, and received her discharge from such claims as existed at the date of filing her petition; and (2) that the property was the homestead of the vendor, and therefore was not subject to the lien of the judgment. The court below gave judgment for the defendants, and the plaintiff appealed.

1. The discharge in insolvency could only affect such debts as existed at the time of the filing of the petition, viz., on February 12, 1884, (Civil Code, § 51;) and this is all that the discharge in question purported to do. The claim arising from the breach of a covenant made subsequently was not affected by it. It may be that the debt upon which the judgment against the vendor was obtained was within its operation. But that matter was concluded by the judgment. If the discharge was not pleaded in that action, it was waived. If it was pleaded, and disregarded by the court, the judgment, however erroneous, was not void, and is not subject to collateral attack. The defendants cannot retry that action here.

2. The homestead claimed by the defendants to have prevented the lien of the judgment from attaching to the property was declared on June 1, 1881. To show the invalidity of this alleged homestead, the plaintiff proved that the vendor had declared a homestead on other land on March 21, 1873; and in reply the defendants proved that this last-mentioned homestead had (previously to the declaration of the other homestead) been levied upon and sold under two judgments rendered by a justice of the peace. In relation to this the vendor testified as follows: "Immediately after the sale of my first homestead, the purchaser, Jacobs, demanded possession of me, and as I was poor, and dreaded a lawsuit, I gave up possession, and moved off the land. Jacobs went into possession, and since that time I have claimed no interest in the said land embraced in my first homestead." But, so far as this record shows, the sale to Jacobs was of no effect. A homestead is exempt from execution, and, if the land was worth more than $5,000, (which does not appear,) the proceedings provided by the Code for admeasuring the excess (Civil Code, § 1245 *et seq.*) should have been taken. This not having been done the attempted sale was void. The homestead still existed, and was not abandoned by the claimants moving off the premises. In this state, "a homestead can be abandoned *only* by a declaration of abandonment, or a grant thereof, executed and acknowledged" etc. Civil Code, § 1243. It results that the first homestead was a valid and subsisting homestead at the time the second was

attempted to be declared. A party cannot have two homesteads, and, if he attempts to acquire a second while the first is in force, the second is void. The second "homestead" being void did not prevent the lien of the judgment from attaching to the land conveyed to the plaintiff.

We therefore advise that the order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order denying a new trial is reversed, and the cause remanded for a new trial.

74 Cal. 258

SHAW v. STATLER. (No. 11,561.)

(*Supreme Court of California.* December 2, 1887.)

COUNTIES—LIABILITIES—PAYMENT OF DEMANDS—PRIORITIES.

Const. Cal. art. 11, § 18, provides that no county shall incur any liability or indebtedness in any manner or for any purpose, exceeding in any year its annual income, without a two-thirds vote of the electors. County government act, § 77, provides that claims shall be paid "according to the priority of time in which they were presented." Petitioner had a warrant issued on a valid claim. There was money enough in the fund on which it was drawn to pay it and all other warrants on claims accruing during that fiscal year. The treasurer refused to pay it, because there were not funds enough for it and outstanding warrants for former years previously presented. *Held*, that the income of each year must be used to pay the debts of that year, and section 77 of the county government act must apply primarily, as between the warrants of any given year. TEMPLE, J., dissents.

Commissioners' decision. In bank.

Appeal from superior court, San Diego county; W. T. MCNEALY, Judge.

Shaw petitioned for a writ of *mandamus* to compel Statler, defendant, treasurer of San Diego county, to pay two warrants. The court granted it as to one, but denied it as to the other. Defendant appealed from the judgment granting the writ.

E. W. Hendricks, for appellant. *Works & Titus*, for respondents.

HAYNE, C. Application for writ of *mandamus* to compel the payment by the treasurer of San Diego county of two warrants which had been duly issued. The court below granted the writ as to the first warrant, (No. 54,) and denied it as to the second, (No. 602.) The petitioner has not appealed from the judgment denying the writ as to the second warrant, and therefore the questions argued as to it do not arise upon the record. The case comes up on the appeal by the defendant from the judgment granting the writ as to the first warrant. This warrant recites that it was issued upon a claim allowed by the supervisors "for services as boss of chain gang, *accrued* January—, A.D. 1886." The claim was audited and allowed on January 18, 1886, and the warrant was issued on the twenty-seventh of the same month. The validity of this warrant is not questioned; and the fact appears to be that there was at the time of its presentation enough money in the fund upon which it was drawn to pay it and all the other warrants upon claims accruing during that fiscal year. The treasurer, however, refused to pay it on the ground that certain outstanding warrants for previous years had been previously presented, and that there was not enough money in the treasury to pay these outstanding warrants and the one involved here. And in support of his action we are referred to section 77 of the county government act, which provides that claims are entitled to payment, "according to priority of time in which they were presented." The question is whether these outstanding warrants furnish any reason why the treasurer should not pay the one sued on.

Section 18 of article 11 of the constitution provides that "no county, city, town, township, board of education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors." It will be observed of this provision that it refers in terms to the *incurring* of indebtedness, and not expressly to its payment. There is no express provision that the income and revenue of each year shall be applied to the payment of the indebtedness of such year. But we think that such is the necessary implication. For unless this is so all the income and revenue of a given year might be taken up at its commencement, in the payment of old claims, and, there being no more income or revenue for that year, no more indebtedness could be incurred, and the business of the city, county, or other body would have to stop, which could not have been the intention.

In *Gas Co.* v. *Brickwedel*, 62 Cal. 642, the court said: "Each year's income and revenue must *pay* each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year *shall be paid* out of the income or revenue of any future year." This was only a dictum, for the proceeding in that case was to compel the *auditing* of a demand. It therefore involved only the validity of the demand, and not the disposition of the funds then in the treasury. But we think it is a correct exposition—at least so far as the revenue of any particular year is required for the expenses of that year. It is not necessary in this case to decide whether, if anything be left over after payment of the expenses of the year, the surplus could be applied to the payment of any outstanding claims for previous years, which might happen to exist and be valid.

It results that section 77 of the county government act must be construed to apply primarily as between the warrants of any given year. We do not see that it is necessary to pass upon the question whether an indebtedness is "incurred" when a service is rendered, or when the claim is audited and a warrant therefor is issued. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

I dissent: TEMPLE, J.

74 Cal. 271

VOLLMER *et al. v.* DE CASTILLO. (No. 11,939.)

(*Supreme Court of California.* December 2, 1887.)

MORTGAGE—FORECLOSURE—ISSUES AND FINDINGS—APPEAL.

In an action to recover money due upon a promissory note, and to foreclose a mortgage upon certain lands given to secure it, a personal judgment was rendered against defendant, under a finding that the mortgage had never been delivered, and without findings having been made as to other questions in issue. *Held* that, the appeal being upon the judgment roll alone, and the material issue having been found against plaintiffs, it became unnecessary to make other findings.

Commissioners' decision. In bank.

Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Action by Edward and A. Vollmer against Gorgonia O. de Castillo to recover $1,225 due upon a promissory note executed by defendant, and to foreclose a mortgage upon certain lands, given to secure said note, and to correct the name of defendant, alleged to have been misspelled in the acknowledgment to the mortgage. Defendant denied that the mortgage had ever been acknowledged or delivered, and claimed that execution of it was obtained by

fraudulent representations. A jury having been waived, the court made, in substance, the following among other findings:

That on September 10, 1884, the defendant made, executed, and delivered to plaintiffs said promissory note, and that no part of the same has been paid; that on September 10, 1884, and at the time the mortgage is claimed to have been executed by her, the defendant was a married woman; that she did not at said time, and never did, execute or deliver said mortgage; that she was not at said time made acquainted with the contents of said mortgage by the notary public, or by any one; that in the certificate of the notary public attached to said mortgage the name of the defendant was not misspelled, but said certificate contains, as the name of the person purporting to acknowledge the execution of said mortgage, the name of a different person; that said mortgage was never recorded in the records of the county of San Luis Obispo, etc.

And as conclusions of law found: "(1) That plaintiffs are entitled to judgment against defendant for the amount due on said promissory note, viz., $1,225, and interest thereon at the rate of ten per cent. per annum from September 8, 1884; (2) that the certificate of acknowledgment set forth in the amended complaint herein should not be altered, amended, or corrected; (3) that the mortgage set forth in said amended complaint is not a lien upon the lands and premises therein described, and that plaintiffs are not entitled to a decree that said land and premises, or any part thereof, be sold hereunder."

Plaintiffs appeal.

S. M. Swinnerton, for appellants. *McD. R. Venable* and *C. W. Goodchild*, for respondents.

FOOTE, C. This is an action to obtain a judgment against the defendant for money alleged to be due upon a promissory note, and to enforce a mortgage lien upon certain lands for the purpose of subjecting them to judicial sale, etc. The court rendered a personal judgment against the defendant as prayed for, but found, among other things, that she had never *delivered* the mortgage sought to be foreclosed. Such delivery was one of the issues made by the pleadings, the appeal is upon the judgment roll alone, and since that material issue is found against the plaintiff, it became unnecessary to find upon the other issues as to which the appellant complains there was no finding. The judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

74 Cal. 280

STRONG v. STAPP, (MACK *et al.*, Intervenors.) (No. 11,406.)

(*Supreme Court of California.* December 2, 1887.)

1. PARTNERSHIP—DISSOLUTION BY WRONGFUL ACT—PLEADING—ANSWER.
Plaintiff and defendant were formerly partners doing business in Missouri. Defendant sold out the business, and with the proceeds went to California, and engaged in the same business there in his own name. Plaintiff levied an attachment on the property of defendant. The intervenors, who were creditors of defendant, alleged, in substance, in their complaint, the former partnership, and that the same was not dissolved when the defendant sold out and left Missouri. The answer of plaintiff alleged, in substance, that the acts of defendant in selling out were done without plaintiff's knowledge or consent, and that there was otherwise no dissolution of the partnership, and that plaintiff had no knowledge of defendant's whereabouts for a considerable time after he had left Missouri. *Held*, that the answer was not an admission on the part of plaintiff that the partnership was not dissolved by the wrongful acts of the defendant.

2. SAME—CLAIM OF PARTNER—PRIORITY OVER SUBSEQUENT INDIVIDUAL CREDITORS.
Plaintiff and defendant were partners doing business in Missouri. The defendant, without the knowledge or consent of plaintiff, sold out the largest part of the

stock of goods, good-will, etc., and removed to California, taking some of the partnership goods with him, and commenced business there in his own name. Plaintiff sought out defendant at his earliest opportunity, and induced him to give a promissory note for the payment of a *bona fide* debt; afterwards proceeding to attach the stock of goods in defendant's possession, a part of which had been purchased of the intervenors at a time when they had no knowledge of the plaintiff, or that he ever had been defendant's partner. *Held*, plaintiff having elected, under the wrongful acts of defendant, to dissolve the partnership, had a right as a creditor to collect his debt, and, having attached, was entitled, as against the intervenors, to the priority of his superior diligence.

Commissioners' decision. In bank.

Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

J. M. Wilcoxon and *Wm. Shipsey*, for appellants. *Venable & Goodchild* and *N. W. Spencer*, for respondents. *Ernest & Wm. Graves* and *J. N. Turner*, for defendant.

FOOTE, C. This action was instituted by Strong, and an attachment was issued and levied upon the property of Stapp. Mack & Co. intervened, demanding a judgment against both Strong and Stapp for a certain amount of money, and praying that the goods thus attached might be subjected to the payment of that judgment. The court rendered judgment by default against Stapp, and in favor of Strong, and the latter had judgment also given in his favor against the intervenors, Mack & Co., that they take nothing by their complaint, and for costs, etc. From that judgment, and an order denying their motion for a new trial, the intervenors have appealed.

An inspection of the pleadings leads us to the conclusion that all of the material allegations of the complaint of intervention are denied by the answer thereto. Nor do we perceive, as is claimed, that the latter pleading admits the partnership was never dissolved which is alleged by the complaint to have existed in Missouri between Strong and Stapp. On the contrary, it appears to us to be alleged in the answer of Strong that Stapp sold out the goods, good-will, business, etc., in Missouri, and left that state, *without Strong's knowledge and consent*, taking with him to California the proceeds of the sale, and a portion of the stock of goods remaining unsold, and that Strong had no knowledge for a considerable period of time after Stapp had left Missouri where he had gone. All that the answer contains which in any manner can be said even in the remotest degree to resemble an admission that the partnership was not dissolved, after such action on the part of Stapp, is where the statement occurs (after the recital of his acts in selling out in Missouri without the knowledge or consent of Strong) that there was otherwise no dissolution of the partnership. It is clear that the answer of Strong most unequivocally negatives the declarations of the intervenors' complaint that the partnership was not dissolved when Stapp sold out and left Missouri. Such is the clear import of the language of the former's pleading, and it cannot, as we think, be held to contain any admission on the part of Strong that the partnership was not dissolved by the wrongful acts of Stapp.

It is evident from the recitals of the answer to the intervenors' complaint, from the findings of the court, and the evidence as it appears in the record, that Stapp sold out the largest part of the stock of goods, good-will of the business, etc., and removed to California, bringing some of the partnership goods with him, without the knowledge or consent of Strong, and set himself up in business here under his own name, buying goods from Mack & Co. on his own sole credit. But the intervenors contend that such acts of Stapp did not work a dissolution of the partnership as it had existed in Missouri; that between Stapp and Strong it still existed; and that Strong's claim was therefore subordinate to theirs, which they assert was entitled to prior satisfaction out of the stock of goods upon which the attachment had been levied. If Strong had agreed to the sale in Missouri, and had consented that the partnership

there existing should be continued in California, we could perceive merit in the intervenors' contention. But, according to the record, the wrongful acts of Stapp towards Strong induced the latter to exercise his right of election, and treat the partnership which had existed in Missouri as having been dissolved; and it was not renewed in California. Strong sought out Stapp in the latter state at his earliest opportunity after ascertaining his whereabouts, and induced him to give a promissory note for the payment of a *bona fide* debt, afterwards proceeding to attach the stock of goods in Stapp's possession, a part of which had been purchased from the intervenors at a time when they had no knowledge of Strong, or that he was, or ever had been, Stapp's partner; they having given the whole credit to Stapp as an individual doing business solely in his own name, and for his own benefit, and without even a suspicion that Strong could be held responsible for any indebtedness of Stapp.

The theory of the intervenors, as we understand it, seems to be based upon the idea that the acts of Stapp were not wrongful, did not work a dissolution of the partnership, and did not authorize Strong to treat the partnership as dissolved, and himself a creditor of Stapp; and that, being still a partner of Stapp in California, Strong should not be permitted to set up his claim against that of the intervenors, and have it satisfied by a sale of the attached goods before the intervenors should have their debt due from Stapp paid in full from the same source, notwithstanding the fact that their goods were sold to Stapp without Strong being known to them in any way as a partner of Stapp, and without Strong knowing of the sale, or claiming to be a partner. As it appears to us Strong has done nothing to make himself liable in any way for Stapp's purchases in California; he has a right as a creditor to collect his debt, if he can, just as Mack & Co. have, and it was a mere question of diligence in the present matter as to which should first obtain satisfaction of his or their demand. Strong has first attached, and we see nothing in the record which should postpone his rights to those of Mack & Co., who intervened.

We perceive no prejudicial error, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

74 Cal. 284

DICK'S ESTATE. (No. 11,841.)

(*Supreme Court of California.* December 7, 1887.)

SPECIFIC PERFORMANCE—REQUISITES OF CONTRACT—DEATH OF OWNER BEFORE APPROVAL OF CONTRACT BY AGENT.

Where a contract for the sale of land had been made by an agent, expressing that it was "subject to the owner's approval," and it was not shown that the owner knew of its execution or that he ever signified his approval in any way, having died within a few days after it was made, *held*, that specific performance could not be enforced under section 1597, Code Civil Proc. Cal., which provides: "When a person who is bound, by a contract in writing, to convey any real estate, dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto;" the decedent not having been bound by such contract in his lifetime.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Wm. & Geo. Leviston, for appellant. *Mich. Mullany*, for respondent.

SHARPSTEIN, J. This is an appeal by the executrix of the will of Stephen W. Dick, deceased, from an order and decree of the superior court directing ap-

pellant to convey certain real estate, of which the testator died seized, to Charles Mayer. The sole authority for making such a decree is found in chapter 9, tit. 11, § 1597, Code Civil Proc., which contains this provision: "When a person who is bound, by contract in writing, to convey any real estate, dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto."

The only question raised by this appeal is, was the decedent in his life-time bound by a contract in writing to convey any real estate to the respondent; *i. e.*, so bound that he might, if living, be compelled to make such conveyance? An agreement for the sale of real property, or of an interest therein, is invalid unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent; and if made by his agent, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged. In this case, it is claimed that the agreement to sell, or the memorandum thereof, was made by the agents of decedent. Conceding that they were duly authorized to sell, and that the writing which is relied on as an agreement to sell was subscribed by them as such agents, recourse must be had to the writing itself, for the purpose of determining whether the decedent, at the time of his death, was bound to convey any real estate to the respondent. The following is a copy of the agreement made by said agents:

"M. J. Burke. F. H. Burke.

"Office of Madison & Burke,
"Real Estate Agents, 401 and 403 Montgomery Street, North-West Corner California.

"San Francisco, April 5, 1886.

"Received of Charles Mayer one hundred ($100) dollars, being deposit on account of four thousand ($4,000) United States gold coin, the purchase price of the property this day sold to him, subject to the owner's approval, and being in the city and county of San Francisco and state of California, and described as follows: Lot on the north-west corner of Guerrero and Twenty-Second street, 61 feet on Guerrero street, by 117½ feet, more or less, to an alley. Terms of sale: Ten days are allowed to examine title, and consummate the sale. At the termination of said time the balance of said purchase money is due and payable, upon tender of the deed of the property sold. If the title is defective, thirty days are allowed to perfect the same; and if after the expiration of said term, unless extended by mutual consent, the title shall not have been perfected, the deposit is to be returned. The purchaser agrees to pay the taxes on said property sold for the fiscal year 1886, from July 1, 1886, to July 1, 1887. If the sale is not consummated according to the foregoing conditions, the deposit is to be forfeited. Time is of the essence of this contract. The said Chas. Mayer hereby agrees to comply with the conditions of this contract. Sale to be consummated at the office of Madison & Burke.

S. W. Dick,
"By Madison & Burke, Agents.
"Martin."

A counterpart of it was signed by the respondent. This constitutes the memorandum of the contract subscribed by the agents of the party to be charged; and unless it bound the decedent, in his life-time, to convey the property described in it, the decree appealed from is erroneous. No proceedings in specific performance can be had unless it be shown that a contract has actually been concluded. This contract was made "subject to the owner's approval." It is not claimed that he ever signified his approval of it in any way. He died within a few days after it was made, and it is not shown that

he ever knew of its existence. He did not have an opportunity to approve of it. We think the contract relied on as the basis for a decree of specific performance has never been concluded, and for that reason we think the decedent, in his life-time, was not bound by an instrument in writing to convey the real estate described in the decree herein.

Order and decree appealed from reversed.

We concur: McFARLAND, J.; THORNTON, J.

74 Cal. 287

CALIFORNIA ANNUAL CONFERENCE OF THE M. E. CHURCH *v.* SEITZ.

(No. 9,764.)

(*Supreme Court of California.* December 8, 1887.)

1. LANDLORD AND TENANT—LEASE—PRIVILEGE OF PURCHASE OF BUILDINGS—ASSIGNMENT.

Defendant entered into a contract with a third party for the lease of certain land on which the third party had erected some buildings. The contract provided that at the expiration of the term of the lease the owner of the buildings might remove them, or defendant would purchase them. This contract was assigned to plaintiff, with consent of defendant, in these words: "I hereby sell and assign all my right, title, and interest in and to the within lease to [plaintiff.]" *Held* that, the intention of the assignment being to transfer the ownership of the buildings, the contract to purchase passed with it.

2. SAME—AGREEMENT FOR VALUATION NOT A SUBMISSION TO ARBITRATORS.

A contract for the lease of certain land whereon buildings had been erected by the lessee provided that, at the expiration of the term, the lessee might remove the buildings, or require the lessor to purchase them at a valuation "to be ascertained by two persons, one to be chosen by each party, and, in case the persons so chosen disagree, those two shall choose an umpire, whose decision shall be final and binding on the parties hereto, and their legal representatives." *Held*, that this was an agreement for mere appraisement or valuation, which, though binding upon the parties, is not a submission of a controversy to arbitration, and is not subject to the rules which govern arbitrators.

Commissioners' decision. Department 2.

Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

This was an action to recover $6,213 upon a contract of sale contained in a lease made by the defendant, Christy Seitz, to William Perkins, and by Perkins assigned to the California Annual Conference of the Methodist Episcopal Church. Judgment was rendered for the plaintiff, and defendant appeals.

W. H. Fifield, R. Thompson, and *W. F. Gibson*, for plaintiff. *E. W. McGraw*, for defendant.

HAYNE, C. This is an action to recover $6,213 upon a contract of sale contained in a lease. The defendant was the owner of a lot of land, and one William Perkins was the owner of certain buildings upon it. This being the situation of the parties, they entered into a contract by which defendant leased the land to Perkins at a rental of $120 per month, and which contained a provision that the buildings should stand as security for the rent, and that at the expiration of the term Perkins should have the option either to remove the buildings, or to require defendant to take them at a valuation "to be ascertained by two persons, one to be chosen by each party; and, in case the persons so chosen disagree, those two shall choose an umpire, whose decision shall be final and binding on the parties hereto, and their legal representatives." Afterwards Perkins, with the consent of the defendant, executed the following paper: "For value received I hereby sell and assign all my right, title, and interest in and to the within lease to the California Annual Conference of the Methodist Episcopal Church." At the expiration of the term

plaintiff and defendant each selected a person to ascertain the value of the buildings; and they (not being able to agree) selected an "umpire," who decided that the value was $6,213. Defendant refusing to pay, the plaintiff brought this action for the amount. The court below gave judgment for the plaintiff and the defendant appeals.

1. The point is made that the assignment was not sufficient to pass the right to the contract of purchase. The argument is that the right of purchase was a distinct thing from the "lease;" that the title to the buildings was in Perkins; that he did not lease his own property from himself, but only *the land* of the defendant; and that the assignment was only of "the within lease," no words of conveyance of the buildings being used; that, therefore, the title is still in Perkins, and the plaintiff has nothing to sell. This argument is exceedingly plausible, but we do not think it is sound. The parties to the assignment certainly supposed they were transferring the lessee's right in relation to the buildings. For it does not appear the land had any use as distinct from the buildings. A town lot covered with buildings could not well have such distinct use as long as the buildings remained upon it, which, in this case, was to be until the expiration of the lease. But, if the ownership of the buildings remained in the assignor, the right to use them would remain in him also; and upon this theory the assignee contracted for a barren right. We do not think this was the intention of the parties. It seems to us that they intended to transfer the ownership of the buildings, and that the assignment does not defeat this intention. The original parties called their contract a lease. The stipulation not to "assign this lease" without the consent of the lessor certainly included the provision in relation to the buildings. "Lease" was their name for the contract. And the parties to the assignment used the word in the same sense. "The within lease" was their phrase for "the within contract." And this meant the *whole* contract, including the provision as to the sale of the buildings. In other words, the original lessee assigned to the plaintiff the right to compel the defendant to purchase the buildings at a valuation. But in order to compel the defendant to purchase the buildings the plaintiff must have been in a position to sell them. Such a right assumes their ownership. One thing is necessarily implied from the other. Inasmuch, therefore, as it necessarily appears from the writing that it was the intention of the parties to transfer the ownership of the buildings, we think it must be held that such ownership was transferred. This was the practical construction of the parties, including the defendant. For he joined with plaintiff in appointing appraisers preparatory to purchasing from plaintiff the ownership which he now says plaintiff never had. The cases cited for the appellant do not conflict with this conclusion; for in none of them, except *Barroilhet* v. *Battelle*, 7 Cal. 450, was there an assignment of a contract containing a right of sale to the lessor. In *Barroilhet* v. *Battelle*, the lease contained such a right; but this feature was not considered. The case related solely to the lien of the lessor upon the building as security for the rent due. The case of *Demarest* v. *Willard*, 8 Cow. 206, which is most relied upon, simply held that a transfer by the lessor of the lease was not a transfer of the reversion. There was no covenant similar to the one above mentioned.

2. The appellant makes several points which turn upon the question whether the agreement of the parties is to be considered to be a submission to arbitration in the proper sense of the term. If it was such, then the arbitrators should have been sworn, (*Day* v. *Hammond*, 57 N. Y. 482,) the parties should have had notice of the meeting of the arbitrators, and an opportunity to be heard, (*Curtis* v. *Sacramento*, 64 Cal. 102;) and it is probable that the agreement did not constitute a sufficient submission in writing,—the appointment of the individuals chosen not having been in writing. The question presented, then, is whether the agreement amounts to a submission

to arbitration. There are two time-honored rules in relation to arbitrators,—one that courts will not enforce an agreement to submit to arbitration, or, in other words, that it can be revoked; and the other that arbitrators must give notice of their sessions so as to afford the parties a right to be heard. These rules rest upon the same idea, viz., that an arbitration is a substitute for proceedings in court. It being considered against sound policy to allow parties to deprive themselves of their right of resort to the courts, agreements to that effect are not binding so long as they are executory; but if the parties choose to resort to other tribunals, such tribunals are held to the more important rules which govern courts in their proceedings. It was found, however, that to apply the above rules to all agreements in which parties regulated their action by the determination of third persons would interfere with the ordinary transactions of mankind, and put unnecessary clogs upon business. Accordingly in the well-considered case of *Scott* v. *Avery*, 5 H. L. Cas. 811, it was held that a condition in a policy of insurance in a mutual company, that the loss should be "ascertained and settled by the committee," was not a submission to arbitration in its proper sense, but was a condition precedent to the right of action. Similar decisions have been made in this and other states. *Holmes* v. *Richet*, 56 Cal. 307; *Loup* v. *Railroad Co.*, 63 Cal. 103; *Cox* v. *McLaughlin*, Id. 207; *Old Saucelito Co.* v. *Commercial Co.*, 66 Cal. 253, 5 Pac. Rep. 232; *Adams* v. *Insurance Co.*, 70 Cal. 198, 11 Pac. Rep. 627; *Carroll* v. *Insurance Co.*, 13 Pac. Rep. 863; *Canal Co.* v. *Coal Co.*, 50 N. Y. 250; *Hudson* v. *McCartney*, 33 Wis. 344; *Haley* v. *Bellamy*, 137 Mass. 359; *Flint* v. *Pearce*, 11 R. I. 577; *Gauche* v. *Insurance Co.*, 10 Fed. Rep. 355; *Fox* v. *Railroad Co.*, 3 Wall, Jr. 245.

These cases hold that a contract by which the value of property or the amount of damage is, for the purpose of the contract, to be fixed by third persons, is not a submission to arbitration, and therefore to enforce it does not trench upon the jurisdiction of the courts. Now, if this is so, if such a proceeding is not analogous to the investigation by a court of a controversy between the parties, why need it be conducted according to the rules which govern courts in their investigations? We think that it need not; that the proceeding is a mere appraisement or valuation, which, although binding upon the parties, is not the submission of a controversy to arbitration, and is therefore not subject to the rules which govern arbitrators. And to this effect are the best-considered cases.

The precise point was decided, after careful consideration, in *Norton* v. *Gale*, 95 Ill. 533. The counsel for the appellant admits this to be a case in point, but characterizes it as a "lonesome American case." But it is not so lonesome. There are cases which are similar in principle, both in England and America.

In *Collins* v. *Collins*, 26 Beav. 306, the parties agreed upon a sale of real property at a price to be fixed by valuers, one of whom was to be selected by each party, and the persons so selected were to choose an "umpire." They failed to choose an umpire, and the question was whether the case was within an act of parliament which provided that "if in any case of arbitration" there was a failure to appoint an arbitrator, the court might appoint one upon application. It was held that the proceeding was not an arbitration. And Sir JOHN ROMILLY, M. R., said: "It appears to me that the case of *Leeds* v. *Burrows*, [12 East, 1,] draws the proper and fit distinction between an arbitration, in the proper sense of the term, and an appraisement or valuation; for valuation undoubtedly precludes differences, and does not settle any which have arisen. That is the distinction which in my opinion, exists between those cases of appraisement and those of valuation." See, also, *Bos* v. *Helsham*, L. R. 2 Exch. 78–79; *Eads* v. *Williams*, 31 Eng. Law & Eq. 203.

In *Curry* v. *Lackey*, 35 Mo. 394, the agreement was that the price of a slave to be taken in payment for another slave was to be fixed by a third party. It

was held that this third party was not an arbitrator, and therefore that he need not be sworn. The court said: "A reference to arbitration occurs only where there is a matter in controversy between two or more parties. In this case there was no controversy."

In *Green* v. *Moore*, 64 Pa. St. 90, 91, the agreement was for the purchase of a stock of horses, etc., at a price to be fixed by three disinterested persons to be selected as provided by the contract. If this was a simple contract, the claim was barred by the statute of limitations; otherwise if the determination of the third persons was an award. It was held to be a simple contract, and not an award. And SHARSWOOD, J., delivering the opinion, said: "An award is the judgment of a tribunal selected by the parties to determine matters mutually at variance between them,—not merely to appraise and settle the price of property contracted for under the stipulation that this term of the contract was to be so ascertained. Had the parties made the contract, and afterwards, on a dispute arising, chosen arbitrators to determine what was due upon it, that might have been an award. The case is entirely different where the parties originally agree to buy and sell at a sum to be fixed by an appraisement to be made by a third person or persons. When the original contract is established by competent and sufficient evidence, then, indeed, the assessment thus made by the authority of the parties, or by authority of law, as in the case of the justice of the peace, may be conclusive as to the price; but there is nothing in the transaction to conclude the parties as to anything else. They may fall back—dispute the existence of any contract at all—or prove that it was tainted with fraud or illegality. Here is a clear and palpable distinction between such an appraisement and an award."

So in *Palmer* v. *Clark*, 106 Mass. 389, where certain work was to be paid for according to the certificate of a specified engineer, it was held to be no objection that the certificate was based upon the notes by a deputy, of measurements made in the absence of the engineer. The court, per COLT, J., said: "A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive." See, also, *Garrard* v. *Macy*, 10 Mo. 164; *Willingham* v. *Veal*, 74 Ga. 759; *Gustavesen* v. *McGay*, 12 Daly, 427.

It is quite true that the facts of the cases above quoted are not absolutely identical with the facts of the case before us. But they proceed upon the same principle, and that makes them authority here. It must be admitted that there are cases to the contrary. But in most of them the distinction does not seem to have received attention. And the cases in which the distinction was noticed do not seem to us to be well reasoned. Certainly, if parties expressly say in their agreement that the "arbitrators" are to determine the question upon their own skill and judgment without examining witnesses or hearing argument, there could be nothing to prevent such agreement from being carried out. And if this can be expressed, it can in a proper case be implied. This is recognized in some of the cases cited for the appellant. Thus in *Wilson* v. *Boor*, 40 Md. 488-489, the court said: "Parties may waive notice, or *the case may be of such a character as not to require notice.*" See, also, *Wiberly* v. *Matthews*, 91 N. Y. 649. This seems to be sufficiently obvious. And, if so, it is a mere question as to the intention of the parties in each case. They could stipulate for the formalities of an arbitration if they chose to do so. But in a case like the present, where the reference to a third person is provided for in a con-

tract made long before any controversy arises, which contract is made upon valuable consideration other than the mutual promise to submit to the decision of the third party, the decision being merely one link in the chain of the claim, we think that the proceeding is not an arbitration; and, in the language of the supreme court of Massachusetts above quoted, the decision may be made without notice or hearing, "unless such notice and hearing be required by express provision or reasonable implication." Such a rule seems to us to accord with the intentions of the business men in the great majority of cases. Such transactions are very common. So much so that a provision has found its way into the Code that, where the consideration of a contract is executory, "it may be left to the decision of a third person." Civil Code, § 1610. Surely it could not have been the meaning that the omitted term was to be settled by a proceeding in the nature of a suit between the parties. In this regard ROBERTSON, C. J., delivering the opinion of the supreme court of New York, to the effect that a reference to a third person to fix the amount of loss under a policy of insurance was not within the rule that one partner could not bind the firm by a submission to arbitration, said: "There is scarcely a day in which in commercial transactions the valuation of property or estimate of damages is not intrusted to third parties, and no one has yet dreamed of looking upon them as arbitrations, and subjected to all the formalities imposed on them by the Revised Statutes, with the paraphernalia of oaths, witnesses, and notices of trials. It is most frequently confided to the personal skill, knowledge, or experience, or even acquired information of appraisers." *Brink* v. *Insurance Co.*, 5 Rob. (N. Y.) 123. This was the practical construction put upon the contract by the parties here; for the defendant "was present one day there," but made no offer of evidence or request to be heard.

3. Several other points are made by the learned counsel for the appellants, which may be mentioned briefly: (*a*) It is said that there is nothing to show that the plaintiff entered into possession of the premises, and that therefore there was no privity between it and the lessor. But the complaint alleges that Perkins entered into possession, and that "he *and his assignee* continued in said possession to the end of the term." The averment in the answer related to the possession of Perkins "since the termination of said lease," which is quite a different matter. Assuming, therefore, that the objection is good in point of law, it has no foundation in fact. If the assignee went into possession of the premises under the lease, it does not matter that Perkins remained there also. (*b*) It is objected that the rent due at the expiration of the lease was not paid. The complaint alleges that the rent was paid by the plaintiff and Perkins. The answer denies that it was paid by the plaintiff. This admits that it was paid. If the "rent" was paid it is immaterial which of the persons in possession paid it. The defendant is not entitled to have it paid twice. (*c*) There was probably a variance in proving a reduced rent without pleading the agreement of reduction. But, under the circumstances, it could not have misled the defendant to his prejudice, and therefore it is to be disregarded. Code Civil Proc. § 469. (*d*) The testimony of the witness Wilcox was merely as to the fact of his selection as "arbitrator." And this being so it was properly admitted. The objection was in effect to the form of the question. The other points do not require special mention.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

74 Cal. 298

LOVELAND *v.* GARNER and others. (No. 12,209.)

(*Supreme Court of California.* December 9, 1887.)

CORPORATIONS—ACTIONS AGAINST—ANSWER OF DIRECTORS ON INFORMATION AND BELIEF—FACTS WITHIN THEIR KNOWLEDGE—JUDGMENT ON THE PLEADING.

The California act of April 23, 1880, prescribes certain duties to be performed by directors of mining corporations, and for failure to perform they should be liable in the sum of $1,000 liquidated damages, at the suit of any stockholder. Plaintiff brought action under this act, and his complaint contained all the averments necessary. Defendants denied upon information and belief. *Held*, that as the matters alleged in the complaint were all within the knowledge of the defendants, a denial thereof upon information and belief was insufficient, and the plaintiff was entitled to judgment on the pleadings.[1]

In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

J. S. Loveland, as stockholder in a mining company, brought suit for $1,000 liquidated damages against W. B. Garner and others, directors of said company, for failure to comply with the provisions of the California act of April 23, 1880, requiring directors of mining corporations to make certain reports. Judgment was rendered for the plaintiff on the pleadings, and defendants appealed.

Hargrave & Gray, for plaintiff. *Harris & Gregg*, for defendants.

MCFARLAND, J. On April 23, 1880, the legislature passed an act amendatory of "An act for the better protection of stockholders in corporations," etc. It was intended for the benefit of stockholders in mining corporations, and prescribes, with great detail, the duties of directors, presidents, superintendents, secretaries, and other officers of such corporations. St. 1880, (State Ed.) 134. It is sufficient to say here that section 1 of the act provides that the directors shall, on the first Monday of each month, cause to be made and posted in the office of the company an itemized account or balance-sheet embracing a full statement of all receipts and disbursements; also all existing indebtedness or liability, the amount of money on hand, etc.; and that section 3 provides that if the directors fail to comply with section 1, they shall be liable in the sum of $1,000, liquidated damages, to any stockholder bringing an action therefor.

In the case at bar the complaint, which is verified, avers the existence of a certain mining corporation; that the defendants are, and at the times mentioned were, the directors of said corporation; and that plaintiff is and was a stockholder therein. It then avers that said corporation was seized and possessed of divers valuable mining claims and mineral lands, and also of certain mills, machinery, and other property of great value; that certain persons named were superintendent, president, and secretary; that defendants, as directors, had the management and control of its property and business; that during the months of January, February, March, April, May, June, and July, 1885, said mines and mills were operated, and large sums of money were received and disbursed, liabilities incurred, etc.; and that defendants failed to cause any itemized account or balance-sheet to be made, etc., as provided by said act. All facts necessary to make a complete cause of action under said act of April 23, 1880, are set forth in the complaint with great particularity.

The only positive and direct denial of the answer is the denial that the corporation "was seized or possessed of any *mill* or *mills*, or any *machinery* of

[1] If the facts alleged in a complaint are presumptively within the knowledge of the defendant, he must deny positively, and a denial on information or belief will be treated as an evasion. But if the facts alleged are not such as must be within the personal knowledge of the defendant, he may deny knowledge or information thereof sufficient to form a belief. Railroad Co. v. Railroad & Nav. Co., 22 Fed. Rep. 245. So held in *Wisconsin*. Stacy v. Bennett, 18 N. W. Rep. 26.

any nature or kind whatever." All the other averments of the complaint which are attempted to be denied at all are denied "upon information and belief." No new matter was set up as a defense. Plaintiff moved for judgment upon the pleadings. The motion was granted, and judgment was rendered for plaintiff for $1,000; this court having held, when the case was here before, that there could be a recovery for only one month's failure. 12 Pac. Rep. 616. From this judgment defendants appeal.

The judgment of the court below should be affirmed. It is settled practice here that judgment for plaintiff may be rendered upon the pleadings where the material averments of a sufficient complaint are not denied by the answer. *Felch* v. *Beaudry*, 40 Cal. 439; *Hemme* v. *Hays*, 55 Cal. 339; *Gay* v. *Winter*, 34 Cal. 153; *Fitzgibbon* v. *Calvert*, 39 Cal. 261. It is equally well settled "that if the facts alleged in the complaint are presumably within the knowledge of the defendant, he must answer positively; and a denial upon information and belief will be treated as an evasion." *Curtis* v. *Richards*, 9 Cal. 38. And in such a case the defendant should at least show "how it happened that he was without knowledge as to such facts." *Brown* v. *Scott*, 25 Cal. 190. And the rule applies as well to corporations and their officers as to natural individuals. *Gas Co.* v. *San Francisco*, 9 Cal. 453. Now, the only positive denial in the answer, namely, that the corporation did not own any mill or machinery, is immaterial. The complaint is perfect without the averment of that fact. The other denials, upon information and belief, are all of matters within defendants' knowledge,—things which they presumably knew. For defendants to say, practically, that they do not know whether for seven months a certain person was their superintendent, or whether, during that time, the the corporation of which they were directors worked or developed any mine, or extracted any ores or minerals, or employed any miners or teamsters, or incurred any liabilities, or disbursed any money, or was engaged in conducting the business of mining, or received any money whatever, is to indulge in a playful frivolity not consistent with the solemnity of sworn pleadings in a court of justice. Judgment affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; PATERSON, J.

74 Cal. 301

BREEN *v.* DONNELLY *et al.* (No. 9,566.)

(*Supreme Court of California.* December 10, 1887.)

1. EQUITY—REFORMATION OF DEED—MISTAKE—LIMITATION.
 Two tenants in common, wishing to divide 48,000 acres grazing land, employed a surveyor in 1867, and conveyed by deeds to each other one-half each, according to his description. In 1880, upon survey for purposes of taxation by the state, it was discovered that defendants' ancestor had 500 acres too much. In less than two years plaintiff filed a bill to correct the mistake in the deed, and defendants pleaded the statute of limitations. Code Civil Proc. Cal. § 338, subd. 4, provides that, in an action for relief on account of mistake, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the mistake, and it must then be brought in three years. *Held* that, as there were no circumstances by which plaintiff could be held to have knowledge, before the actual discovery of the mistake, the action was brought in time.

2. BOUNDARIES—LINES ESTABLISHED BY UNITED STATES SURVEYOR.
 In the absence of anything to the contrary, the boundaries of a *rancho* established by the final survey of the United States surveyor general, approved by the government, and incorporated into the patent, and followed in establishing a partition of the *rancho*, should be taken as correct.

Department 2. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Edward J. Breen, plaintiff, sued A. J. Donnelly and E. T. Donnelly, executors of James Dunne, deceased, and others, to correct a mistake made by James Dunne in a deed in 1867.

T. H. Laine, *W. Matthews*, and *Montgomery & Ryland*, for appellants. *S. F. Leib* and *Briggs & Hawkins*, for appellees.

McFARLAND, J. This is an action to reform a deed. Judgment went for plaintiff in the court below; and from the judgment and order denying a new trial defendants appeal.

The following are the material facts: On and before December 18, 1867, Patrick Breen and James Dunne were the owners in fee and in possession, as tenants in common, of a large tract of land containing over 48,000 acres, and known as the "Sobrante de San Lorenzo Rancho," each owning an equal undivided interest. Prior to said last-named day they had agreed upon a partition of the *rancho*, to be accomplished by ascertaining a line drawn from the easterly to the westerly side of the land, which should divide it exactly into two halves or equal parts, and interchanging deeds of conveyance so that each would own a half in severalty. To this end they had employed one Smith, reputed and believed by them to be an honest, competent, and skillful surveyor, to run said line, who had reported that he had surveyed and established a certain line which divided the *rancho* into two equal areas as contemplated. This line was marked by stakes, and was afterwards designated for some distance by a plow furrow. Both Breen and Dunne were informed by Smith, and believed, that he had correctly computed the areas on each side of said line, and that they were equal. Thereupon, in accordance with their agreements, on the said eighteenth day of December, 1867, said Breen executed and delivered to said Dunne a deed of conveyance of the north-east half of said *rancho*, and said Dunne in like manner conveyed to said Breen the south-east half, and in each deed the description by metes and bounds included said line run as aforesaid by said Smith as a boundary line. The land was then, and ever since has been used solely for the purpose of grazing; and after the date of said deeds each party occupied separately his supposed part of said *rancho* as divided and designated by said Smith line. Said Patrick Breen died in December, 1868, and said James Dunne died in 1874. The plaintiff, Edward J. Breen, as heir and purchaser from other heirs, is the successor in interest of said Patrick Breen, deceased; and the defendants, as heirs and personal representatives, are the successors in interest of said James Dunne, deceased. The parties to this action have occupied said land in like manner as it had been occupied by said Patrick Breen and James Dunne in their lifetime.

As a matter of fact, the said line run by said Smith was not correct. It left in the north-east part deeded to said Dunne 1,110.64 acres more land than was in the south-east part deeded to said Breen. This mistake was not discovered until about June, 1880. Its discovery came about in this way: The state constitution adopted in 1879, and statutes passed under it, required large tracts of land to be sectionized where the same had not been done by the United States government, for purposes of assessment and taxation; and plaintiff, for the purpose of complying with this requirement, employed a surveyor to sectionize his land, who, for the first time, discovered and made known the said mistake made by said Smith. Upon the discovery of the mistake, plaintiff requested defendants to rectify it, and they refused to do so.

This case has been argued by counsel for appellants upon the theory that there should be applied to it the rule that where coterminous owners of land establish a boundary line between them, and acquiesce in its correctness during the period of statutory limitation, such line cannot afterwards, be disturbed. Such is certainly the general rule in actions of ejectment, to quiet title, etc., although it is, perhaps, not definitely settled to be the rule, even in those cases when there has been a mutual mistake. See *Sheils* v. *Haley*, 61 Cal. 157, and *Smith* v. *Robarts*, 9 Pac. Rep. 104. But this is an action to reform a deed,—to correct a mistake in a written instrument, and make it

conform to the real intent of the parties. That a court of equity has power to correct such a mistake in a proper case is of course beyond doubt, and that the facts here make a proper case is equally clear. It is established beyond doubt that the two tenants in common intended to convey by deed to each other the half of a tract of land, and that by pure mistake the deed sought to be reformed failed to convey such half. There is no question here of innocent purchasers. Neither are there any equities by reason of defendants having put any improvements on the land not included in the deed. They have had the benefit of the use of the land for pasturage since the date of the deed, and have not expended upon it any money whatever. In good conscience, they ought to correct the mistake; and their only defense is founded upon the naked plea of the statute of limitations.

But we think that the action was commenced in time. Section 338, Code Civil Proc., enumerates the kinds of actions which must be commenced within three years; and subdivision 4 of said section is as follows: "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed *to have accrued* until the discovery by the aggrieved party of the facts constituting the fraud or mistake." In the case at bar the discovery of the mistake was not made until 1880, at which time the cause of action "is deemed to have accrued." The action was commenced in less than two years afterwards. It was therefore commenced in time, unless the circumstances were such that plaintiff ought to have known the mistake, and therefore should be held in law to have had knowledge of it before the time of its actual discovery. But we think that there were no circumstances from which he should be charged with such knowledge. After the partition line had been run by a surveyor believed to be competent and honest, and who had been specially employed for that purpose, there was nothing to excite the suspicion of either party that such line did not divide the *rancho* into two equal parts. Looking at, or walking or riding over, or using for grazing purposes, a tract of land containing over 24,000 acres, would not indicate to any one that it was 500 acres more or less than the half of another tract containing over 48,000 acres.

The court below did not err in holding that, in the absence of any showing to the contrary, the boundaries of the *rancho* established by the final survey of the United States surveyor general, made under the direction of and approved by the United States government, which was incorporated into the patent, and followed by said Smith in fixing said partition line, may be taken to be correct.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

74 Cal. 311

In re LETELLIER'S ESTATE. (No. 11,240.)

(*Supreme Court of California.* December 12, 1887.)

EXECUTORS AND ADMINISTRATORS—POWER TO PETITION FOR DISTRIBUTION OF ESTATE.

An executor is not authorized to petition for partial distribution of an estate under Code Civil Proc. Cal. §§ 1658, 1660, providing for it upon petition by "heirs, devisees, and legatees," after the lapse of four months from the issuance of letters testamentary or of execution, and that notice of such application must be served upon the executor or administrator personally.

Commissioners' decision. Department 2.

Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Alexander Letellier died in the county of Alameda on the twentieth day of April, 1884, leaving a will in the French language, which was, on the twelfth day of May, 1884, admitted to probate, and letters testamentary issued to Peter Portois, the executor named therein. The will contains eight specific pecun-

iary legacies, aggregating $1,100, and a devise of real estate and the dwelling-house thereon to Eugenie Couturier. On the thirteenth day of December, 1884, the executor filed a petition for the distribution to Madame Couturier of the real estate mentioned in the devise, which showed that the condition of the estate would make it impossible to pay any of the pecuniary legacies, but that petitioner did not know of any objection to making distribution of the real estate to the devisee. The hearing of this petition was set for December 29, 1884, on which day one Eugenie A. R. Letellier filed objections to the granting of the petition, in which she set forth that she was the widow of the deceased, and that deceased also left him surviving three children, none of whom were mentioned in the will, and all of whom, as well as the widow, resided in France.

On the matter being reached for hearing on the twenty-ninth December, 1884, the contestant appeared in court, by her attorney at law, and moved for a continuance of the hearing for such reasonable time, not exceeding two months, as would enable the heirs to present proofs of their heirship, and in support of such motion read in evidence a power of attorney from the widow to Mr. E. J. Le Breton, and another power from six persons, claiming to be children of the deceased; and also a document in the French language, known as an "Acte de Notoriete," and purporting to contain the declarations of two witnesses as to the marriage of the deceased with the contestant, and that the children were the issue thereof. The court thereupon announced its ruling upon the motion for a continuance in the following language: "This is not sufficient proof of heirship. The will leaves the property in question to Eugenie Couturier. Your remedy is by contesting the will. If there are any lawful heirs the decree setting apart and distributing the property will, in that event, be inoperative. I cannot see any objection to a distribution at this stage,"—and denied the motion for a continuance, and made the decree of distribution. Subsequently, the contestant moved for a new trial, which motion was denied. Appeals have been taken, both from the decree of distribution and the order denying the motion for a new trial.

Stanly, Story & Hayes, for appellants. *Geo. E. Lawrence* and *E. J. & J. H. Moore*, for respondents.

HAYNE, C. This is an appeal from a decree of partial distribution, made upon the petition of the executor. The provision of the Code of Civil Procedure is as follows: "Sec. 1658. At any time after the lapse of four months from the issuing of letters testamentary or of administration, *any heir, devisee, or legatee* may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security for the payment of his proportion of the debts of the estate." And the next section provides that "notice of the application must be given *to the executor or administrator personally*, and to all other persons interested," etc. These sections are the only ones authorizing partial distribution to be made. It seems to us that they do not contemplate a petition by the executor, to whom it is of no concern whether an heir, devisee, or legatee gets paid in advance or not. There being no authority in the statute for the proceedings taken in the court below, they were unauthorized, and should be set aside. We think this point arises upon the record, whether the decree of partial distribution is to be considered as a judgment or as an order. We therefore advise that the decree appealed from be reversed and the cause remanded.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the decree appealed from is reversed, and the cause remanded.

In re LETELLIER'S ESTATE. (No. 11,666.)

(*Supreme Court of California.* December 12, 1887.)

Commissioners' decision. Department 2.

Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Stanly, Story & Hayes, for appellants. *Geo. E. Lawrence* and *E. J. & J. H. Moore*, for respondents.

HAYNE, C. The decree ought to be set aside. The motion for a new trial having been reversed in *Re Letellier's Estate ante*, 847, it is unnecessary to consider the question made in this appeal.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the decree appealed from is reversed, and the cause remanded.

74 Cal. 341

WEIMMER *et al. v.* SUTHERLAND. (No. 12,039.)

(*Supreme Court of California.* December 18, 1887.)

JUDGMENTS—BY DEFAULT—WHAT CONSTITUTES—SETTING ASIDE BY JUSTICE OF THE PEACE.

Code Civil Proc. Cal. § 859, provides that justices' courts can set aside judgments by default within 10 days. Defendants were served, and filed an answer, in a suit before a justice, but were not present on the day of trial, not having received notice from the justice, and judgment was rendered against them. *Held*, that this was not a judgment by default, and an order setting it aside was error.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

James Sutherland, plaintiff, sued E. Weimmer and wife, defendants, before A. A. Smith, justice, and obtained judgment, which the justice set aside. Plaintiff took a writ of *certiorari* from the superior court, which declared the order vacating the judgment void, and defendants appealed.

W. D. Grady, for appellants. *Tupper & Tupper* and *Babcock & Mickle*, for respondent.

MCFARLAND, J. This is an appeal from a judgment of the superior court of Fresno county, rendered upon a writ of *certiorari* directed to a justice's court. James Sutherland (the respondent therein) brought an action in the justice's court of A. A. Smith (appellant) against E. Weimmer and wife, (also appellants herein.) In said action in the justice's court, the defendants therein (Weimmer and wife) appeared, and made a motion to quash the summons. The motion was denied, and they then demurred to the complaint. The demurrer was overruled; and then, on June 22, 1886, they filed an answer. On July 9th the case was set for trial for July 19, 1886, at 1 o'clock P. M. At the last-named time the defendants failed to appear, and the court, after having waited one hour, proceeded with the trial; and after hearing witnesses, and taking evidence on the issues made by the pleadings, rendered judgment for the plaintiff thereon, (Sutherland.) On July 26th defendants, upon affidavits, moved the court to "vacate and set aside" the judgment, upon the ground that defendants had no notice of the time of trial. The hearing of the motion was continued to September 10th, when the court found that defendants had not received notice of the day of trial, (when notice seems to have been deposited by the justice in the United States mail, directed to defendants,) and thereupon entered an order "that said judgment is hereby set aside and vacated." It does not appear that plaintiff had notice of this motion, or was present when it was heard. On the application of the plaintiff, Sutherland, the superior court granted a writ of *certiorari* to review the action of said justice vacating said judgment. On the seventh day of January, 1887, after a full hearing, both parties being present by counsel, the superior

court rendered judgment that the said order of said justice's court vacating the said judgment in said court was void, and of no effect, etc. From this judgment of the superior court this appeal is taken.

Justices' courts have no power to review their own judgments, unless by some method expressly provided by law. In *Winter* v. *Fitzpatrick*, 35 Cal. 269, it was held that a justice of the peace could not vacate a judgment rendered by him; and that an order attempting to do so, not being appealable, should be annulled on *certiorari*. However, at the time *Winter* v. *Fitzpatrick* was decided, the civil practice act provided that only those sections embraced in the title which prescribed the proceedings in justices' courts, and such other sections as were specially mentioned in that title, should be applicable to justices' courts. At the present time, section 925, Code Civil Proc., is as follows: "Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this Code which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts, and the proceedings therein." It is therefore argued that *Winter* v. *Fitzpatrick* has no bearing on the present case; and that by virtue of said section 925 all the broad powers granted to courts of record by section 473, Code Civil Proc., may be exercised by justices' courts. The language of section 925 is certainly of difficult construction; and cases might well arise where it would be extremely doubtful whether or not certain acts of a justice's court were justified by its provisions. It will be observed, however, that the section expressly preserves the notion of the "peculiar and limited jurisdiction" of these courts; and, moreover, that its general character is negative, rather than positive. The grant is somewhat in the shape of a parenthesis in a clause of limitation. If, therefore, that part of the Code which expressly deals with proceedings in justices' courts, prescribes the powers of those courts in relation to a general subject about which the powers of courts of record are expressly prescribed in another part, then we think that the powers of the justices' courts with respect to that subject are to be looked for in the former, and not in the latter, provision.

Now, the power in question here, *i. e.*, the power to relieve from a judgment taken through surprise, excusable neglect, etc., is expressly given to courts of record by section 473, and is expressly given to justices' courts by section 859. Both sections relate to the same general subject. But while section 473 gives this power to relieve, in general terms and in all cases, within six months in some instances, and one year in others, after judgment, section 859 confines the power in justices' courts to cases of a "judgment by default," and limits the time to "ten days after the entry of the judgment." We think, therefore, that the latter section is determinative of the question here involved, and not section 473. And, of course, in the case at bar, there was no "judgment by default." A default occurs when a defendant fails to answer or demur as described in sections 850 and 871 *et seq*. Not being a judgment by default, the defendants could have appealed to the superior court; and, if aggrieved, that was their remedy.

The judgment of the superior court is affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; SHARPSTEIN, J.; MCKINSTRY, J.

PATERSON, J., (*concurring.*) I concur, but express no opinion upon the question as to the proper remedy. Section 850, Code Civil Proc., provides that, "when all parties served with process shall have appeared, * * * the justice *must fix a day for the trial of said cause, and notify the plaintiff, and the defendants who have appeared, thereof.*" If this requirement be jurisdictional, and the time for appeal elapsed before defendant had notice that the case had been set for trial, a trial had, and judgment entered against

him, it would seem to be a harsh rule which would preclude him from showing upon *certiorari* that he had never had any notice of the trial; because it must be remembered the justice is not required to enter in his docket any minute of the service of notice of the time of trial, nor is he required to file any proof of such service, (section 911, Code Civil Proc.,) and there is nothing in the record, therefore, to show that judgment has been entered against the defendant without a hearing, or notice of hearing.

74 Cal. 323

STEELE *v.* PACIFIC COAST RY. CO. (No. 9,884.)

(*Supreme Court of California.* December 15, 1887.)

1. RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—FIRES—INSTRUCTIONS AS TO OTHER FIRES.

 In an action for damages from a fire caused by sparks from a locomotive, the court instructed the jury that, if they found from the evidence that defendant's engines had dropped fire at other times before or after the time alleged in the complaint, such facts should be considered in determining the negligence of the defendant. The defendant objected to the instruction, on the ground that it did not set a limit as to time. *Held* that, as the jury could only know whether the defendant's engines had dropped fire at other times by the evidence, the range of time that was allowable to be considered by the jury should be determined when the testimony was introduced.

2. SAME — DEFECTIVE APPLIANCES — ACCUMULATION OF GRASS ON RIGHT OF WAY — INSTRUCTIONS.

 In an action for damages from a fire caused by sparks from a locomotive, the complaint contained two counts of negligent acts,—negligence in running the engine, and negligence in allowing dry grass and hay to accumulate on defendant's right of way. The defendant asked the court to instruct the jury that, if they found that defendant's engine had all the best appliances for preventing the escape of fire, then defendant was not guilty of negligence in the escape of the fire, nor liable therefor, unless it escaped through the negligence of defendant in managing the machinery. *Held* that, as the instruction ignored entirely the question of negligence in allowing dry grass and weeds to accumulate on the right of way, it was properly modified so as to distinguish the two questions.[1]

3. SAME—TRIAL—OBJECTIONS TO EVIDENCE.

 In an action against a railroad company for damages from a fire caused by sparks from a locomotive, a witness for plaintiff testified that another fire had occurred at a certain time prior to the one complained of. He was then asked if he knew of any fire that had occurred between the two. Defendant objected, as irrelevant and immaterial and too remote. *Held*, that the objection was too general, and was properly overruled.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

The facts are stated in the opinion.

V. A. Gregg, for plaintiff. *R. B. Treat* and *J. M. Wilcoxon*, for defendant.

SEARLS, C. J. Action to recover of defendant the value of a lot of hay and grain destroyed by fire on August 7, 1884, claimed to have been set on fire by the negligence of the defendant in using its railroad locomotive, and in allowing dry grass and inflammable materials to accumulate along its right of way. Judgment passed for plaintiff; from which, and from an order denying it a new trial, defendant appeals.

At the trial, there was evidence tending to prove that defendant was a corporation, authorized to run and operate a railroad, and lawfully engaged in that occupation, and was such at all times mentioned in the complaint; that David Howell, on or about the seventh day of August, 1884, was the owner and possessed of a stack of unthrashed wheat in said county, adjoining the

[1] As to the imputation of negligence, in actions against railroad companies to recover damages for loss by fire, from the fact that the company allowed combustible material to accumulate on its land, see Railroad Co. v. Benson, (Tex.) 5 S. W. Rep. 822, and note.

right of way of the railroad of defendant in the field; that the stubble from which said grain was cut was continuous upon the soil of said field from the stack of wheat to the right of way of defendant's railroad, as were grasses and weeds, also, that were then dry, and capable of communicating fire; that defendant had before August 7, 1884, permitted wild oats, weeds, squirrel grass, and other grasses to become dry and inflammable on its right of way, continuous between its track and the field of Howell adjoining, and had cut the same, and had placed it in small bundles or cocks on its right of way, and near the fence inclosing the field upon which said stack of wheat then was, and had allowed it to remain there three or four weeks prior to the fire; that defendant caused a swath of said wild oats, etc., to be cut and left lying close up to its track, and adjacent to the ends of the ties upon which its rails were laid, and that it had become dry and inflammable; that the stubble from which said wild oats, etc., on said right of way had been cut was left standing, and had, at the date last set forth, and for some time prior thereto, become dry and inflammable; that said stack of wheat had been cut and placed in the field about three weeks prior to August 7, 1884; that defendant had on at least two different times prior to August 7, 1884, and in that year, attempted to burn the grass, weeds, etc., cut and lying upon its right of way, but was unable to do so because of the dampness of the same; that where the right of way of the defendant adjoins the field of said Howell as aforesaid, during all the year from about April 1st to about December 1st of each year, the prevailing winds are from the south-west and west, the track of defendant running nearly east and west at that point; that by reason of the lay of the country in that vicinity the winds generally blow very hard each day, between the dates aforesaid, between the hours of about 10 A. M. and sundown, but the weather was calm at this point for about a week prior to August 7, 1884; that in the mornings of nearly each day prior to the fifth of August, 1884, fogs were prevailing in that vicinity; that in the mornings between the dates when said grass, etc., was cut on the defendant's right of way, as set forth, and August 5, 1884, the said grasses, etc., were too wet to burn, and later in the day the winds prevailed to such an extent as to render it hazardous to burn the same, without danger of the fire escaping and getting beyond the control of the persons having charge of the same, and into the fields adjoining the right of way; that during the summer season of the year 1884 defendant caused a great portion of its right of way in other localities, but not in this, to be burned over, and most of the inflammable vegetation removed therefrom, employing servants for that purpose especially, expending thereabout money to the amount of $3,000 or thereabout; that defendant's track, where it adjoined said Howell's field, is on an up grade, going south-easterly, of about 90 to 100 feet to the mile; that locomotives emit more sparks and drop more fire going up grades than on levels or down grades; that a fire originated on August 7, 1884, on defendant's right of way, between the track and the fence inclosing Howell's said field; that said fire spread to and was communicated by vegetation in a dry state to the field of said Howell, and thence across the same to his said stack of wheat, and the same was destroyed by fire, said stack being about 200 feet from defendant's right of way; that from thence the fire was communicated to a field belonging to plaintiff, upon which was stubble and weeds in a dry state, and destroyed a lot of hay lying in said field; that said hay had been cut by plaintiff, and allowed to remain in his field, adjoining the field of said Howell, in cocks, since the month of May, 1884; that some rain fell in June and July of the year 1884 at this point; that within five minutes prior to the said fire the passenger train of defendant passed on its right of way, using fire on the locomotive thereof, and ascending the grade, hauling seven loaded cars, the locomotive pulling said train being No. 2, and graded at that amount of cars for its load; that said engine No. 2 had on several occasions emitted fire, prior to August 7, 1884, and was the worst engine belonging to defendant,

and used on its road, to emit sparks and fire; that on said August 7, 1884, said engine was run by a competent and careful engineer in charge thereof, and was provided with the most approved appliances to arrest and prevent the escape of fire in both its stack and ash-pan; that all the appliances upon said engine were at that time in good condition; that an examination of the condition of the engine aforesaid was made on the same day said fire occurred, and within an hour thereafter, and its machinery and appliances for the prevention of the escape of fire from it were found to be in good condition; that said engine was on said August 7, 1884, provided with the best appliances made use of on other roads, in this state for the prevention of the escape of fire therefrom; that, in going up said grade by the engines of defendant, fire had been seen to escape from them prior to August 7, 1884; that the hay in plaintiff's field had been allowed to become dry and inflammable; that said Howell knew of the condition of the right of way of defendant, and the lay of the land adjoining his said field, and the prevailing course of the winds during the year 1884, and prior to August 7, 1884; that no fire had ever been communicated to the fields along the line of defendant's right of way in the vicinity of the one above set forth during the year 1884; that no fire had ever been communicated or originated along the defendant's right of way from any of its locomotives for a period of about two years, except once during that period, to-wit, about two years since, when it burned a field adjoining the field of Howell; that on said August 7, 1884, said engine No. 2 was being carefully and skillfully managed by the engineer thereof; that neither Howell nor plaintiff, in the year 1884, prior to August 7, 1884, and after they had harvested their said crop, ever dug up the soil, or removed the vegetation therefrom, on their lands, or took any other precaution or measures on their land to prevent the communication of fire to their fields from the right of way of defendant, except to notify an employe of defendant of the danger, which they did some three or four weeks before the seventh day of August; that the engines of defendant run on its road in the month of August, 1884, were all supplied with the same appliances to prevent the escape or dropping of fire as said engine No. 2; that said Howell assigned his claim against the defendant, prior to the commencement of this action, to the plaintiff.

Defendants assign the giving of the fourth instruction by the court as error. It is as follows: "If you find from the evidence that defendant's engines emitted or dropped fire at other times, before or after the occurrence of this fire alleged in the complaint, these will be circumstances or facts to be considered and weighed by you in determining the question of whether the fire was dropped or emitted by the engine by the negligence or carelessness of defendant." The objection urged against the instruction is that it is not limited as to time, place, or the particular engine by which the fire in question may be supposed to have been communicated. The limitations which appellant claims should have been included in the instruction, it seems to us, are those which are to be applied to the introduction of testimony on the subject, and were not necessary to an instruction. The jury could only know that defendant's engines had "emitted or dropped fire at other times, before or after the occurrence of this fire," from the evidence, and whatever range was proper on that subject in admitting evidence was a question to be determined when the testimony was offered. It has been held in this state, in like cases, that testimony of like character is admissible. This being so, the instruction is proper. As to the proximity of time and place to which the proofs must be confined, questions must arise which can only be determined in view of the circumstances as the testimony is offered.

The court gave the fourth instruction asked by defendant, but added to it a modification, to which defendant excepted. The instruction as given is as follows, the portion in brackets being the modification as added by the court: "If you believe from the evidence that the damages claimed by the

plaintiff, if any has been sustained, were caused by fire escaping from defendant's engine, and find, further, that the engine was in good order, properly constructed, and supplied with the best appliances in use to prevent the escape of fire, then the defendant was not guilty of negligence in such escape of the fire, and is not liable for the escape of the fire, unless it escaped through the negligence of the agents or servants of the defendant in managing or running the engine machinery. [But this instruction applies only to negligence by the escape of fire from the engine, and not to negligence—if such there was—in maintaining, suffering, or permitting dry grass or hay or other inflammable substance to remain on its track or right of way, if it did so.]" A reference to the complaint will show that plaintiff counted upon two separate acts of negligence on the part of defendant, viz.: (1) Its negligence in conducting and running its engine whereby the fire escaped therefrom, and caused the injury complained of; and (2) negligence of defendant in cutting and leaving upon the ground upon its right of way, near and against its railroad track, the dry and inflammable grass, weeds, wild oats, etc., which had grown on said right of way, whereby the fire from its engine was communicated to such dry materials, and thence to plaintiff's property, etc. From this it will be seen that defendant may have exercised due care and caution in the construction and management of its engine, so that no liability would attach to it on account of fire escaping therefrom, and yet have been guilty of such negligence in leaving its right of way so incumbered with inflammable material as to render it liable. It was in view of this dual question of negligence that the court added, and as we think properly, the portion of the instruction in brackets.

The fifth instruction asked by defendant was properly refused for a like reason. It limited defendant's liability to negligence in the construction or management of its engine, and wholly ignored the question of negligence in leaving material adjoining its road.

There was no sufficient evidence of contributory negligence on the part of plaintiff to call for the instruction asked on that point by defendant. Plaintiff and his grantor had a right to cut, harvest, stack, and retain their hay and wheat upon their own land in the usual and customary manner, during the summer season, without being amenable to the charge of negligence for so doing; nor were they bound to plow, remove, or segregate the stubble left upon their land after gathering their crops, to avoid a like implication.

The instructions given by the court on behalf of plaintiff and defendant stated the law of the case clearly and properly.

The only other question necessary to be considered relates to the admission of testimony. A witness for plaintiff was asked as follows: *Question.* "Do you know of any fire occurring upon the right of way of this defendant subsequent to the fire you have spoken of, and prior to the one that occurred that destroyed that stack?" To which the defendant objected, on the grounds that it was irrelevant and immaterial, and being too remote. The court overruled the objection, and permitted the witness to answer the question; to which ruling of the court the defendant then and there duly excepted, and the witness answered as follows: *Answer.* "About two years before this fire of mine, there was a fire broke out on the place adjoining me, a little west,—before the fire of the seventh of August,—burned quite a large country." The testimony given at the trial is not set out in the transcript. It is apparent, however, from the tenor of the above question, that the witness had already spoken of a fire upon defendant's right of way prior to the one in question in this action. To this question, or the answer thereto, no objection is apparent. He is then asked as to his knowledge of other fires subsequent to the one spoken of, and prior to the one under consideration. If the question was open to objection, it was because the time was not limited to some recent period. Had the answer shown a knowledge of other fires within a

day or two of the one in question, manifestly, under our decisions, and upon the weight of authority, it would have been proper. *Henry* v. *Railroad Co.*, 50 Cal. 176; *Butcher* v. *Railroad Co.*, 67 Cal. 518, 8 Pac. Rep. 174; *Field* v. *Railroad Co.*, 32 N. Y. 339; *Sheldon* v. *Railroad Co.*, 14 N. Y. 218; Shear. & R. Neg. 333; *Gandy* v. *Railroad Co.*, 30 Iowa, 422. The objection that the question was "irrelevant and immaterial" was too general. It did not call the attention of the court to the point that the question, although proper within a limited range, was too broad in its scope, and might call for an answer covering too remote a period. An objection to testimony should specify the grounds of the objection. *Winans* v. *Hassey*, 48 Cal. 634; *Satterlee* v. *Bliss*, 36 Cal. 489. Had a motion been made to strike out the answer, perhaps it should have been granted as being too remote, but none was made.

The judgment and order appealed from are affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; TEMPLE, J.; MCKINSTRY, J.; PATERSON, J.; THORNTON, J.

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